

Marital Property Law in Wisconsin

Fourth Edition

Volume II

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I. Scope of Chapter [§ 6.1]

The creation of the debtor-creditor relationship is discussed in chapter 5, *supra*. Among the considerations involved are how various types of obligations may be incurred and which assets are available for satisfaction. *See supra* ch. 5.¹

This chapter discusses the process of enforcement of obligations by creditors, including creditors' rights based on the category of obligation; certain acts by creditors and debtors that may enlarge or reduce the creditor's right or ability to recover; collection procedures; debtors' rights; and bankruptcy.

II. Categories of Obligations and Recovery Available [§ 6.2]

A. In General [§ 6.3]

Sections 6.4–.31, *infra*, set forth how the purpose and circumstances surrounding a transaction or event determine the category of the obligation incurred by a spouse. The category of obligation then determines which classifications of property of the spouses may be involuntarily recovered by a creditor to satisfy the obligation.

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. 111-156 (excluding Pub. L. Nos. 111-148 and 111-152) (Apr. 7, 2010); all references to the Wisconsin Administrative Code are current through Wisconsin Administrative Register, No. 652 (Apr. 14, 2010) (eff. Apr. 15, 2010); and all references to the Treasury regulations are current through 75 Fed. Reg. 18,375 (Apr. 9, 2010). Textual references to the Wisconsin Statutes are hereinafter indicated as “chapter xxx” or “section xxx.xx,” without the designation “of the Wisconsin Statutes.”

B. Obligation for Support; Doctrine of Necessaries

[§ 6.4]

1. Support [§ 6.5]

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 Act or the Wisconsin Marital Property Act], a married person's obligation for the support of his or her spouse or minor children may be satisfied from all marital property and all other property of the obligated spouse, including his or her individual and predetermination date property. Wis. Stat. § 766.55(2)(a). Section 765.001(2) states that the obligation is equal between the spouses but defines this equality in terms of each spouse's relative ability to provide goods and services. *See supra* §§ 5.30 (regarding whether personal liability is imposed in Wisconsin for support obligations), 5.31; *see also infra* ch. 11.

Under *St. Mary's Hospital Medical Center v. Brody*, 186 Wis. 2d 100, 519 N.W.2d 706 (Ct. App. 1994), a creditor who provides necessary goods and services to one spouse may have a direct cause of action against the other spouse under the doctrine of necessities. The imposition of this doctrine results in personal liability of the nonincurring spouse and categorization of the obligation as a support obligation under section 766.55(2)(a).

Brody concerned responsibility for medical expenses the husband had incurred before the spouses' marriage was dissolved. The dissolution decree assigned the obligation to pay these expenses to the husband. *Id.* at 103; *see* Wis. Stat. § 766.55(2m). When the expenses remained unpaid, the hospital sued both former spouses. The circuit court held that the former wife was personally liable for the full amount of the expenses under the common law doctrine of necessities; this portion of the judgment was not appealed. Since the former wife was not assigned the obligation by the dissolution decree, however, the circuit court held that under section 766.55(2m) her assets were available only to the extent of the value of marital property assets she received pursuant to the decree. The circuit court's application of section 766.55(2m) also resulted in her income not being subject to recovery.

The court of appeals reversed the portion of the judgment that restricted recovery of the former wife's assets to the marital property assets she had received at dissolution to the extent of their value at dissolution. The appeals court held that the common law doctrine of necessities continues to be viable after the enactment of Wisconsin's marital property laws and that its application results in personal liability of each spouse for the full amount of the obligation. *Brody*, 186 Wis. 2d at 109. However, section 765.001(2) removes the primary obligation of the husband and secondary obligation of the wife, making the spouses equally liable.

The former wife's liability for medical services furnished to her former husband arose under the common law, not under marital property laws. The finding that the former wife had personal liability might therefore have ended the controversy because all of a person's nonexempt assets are available to satisfy his or her obligations. The creditor had brought the action against both spouses after they were no longer married, and the satisfaction of obligations under section 766.55(2)(a) or (b) applies only to married persons. However, because the obligation to the hospital was incurred by the former husband during marriage, the dissolution decree assigned that obligation to the husband, and the circuit court had applied section 766.55(2m), the court chose to address the category of obligation under section 766.55(2) and the effect of section 766.55(2m) on the assignment.

Although necessary obligations would always be in the interest of the marriage or the family, the court characterized these obligations as for the support of a spouse under section 766.55(2)(a), not as family-purpose obligations under section 766.55(2)(b). The court stated that the presumption of family purpose under section 766.55(1) applies to obligations "incurred" by a spouse, and the wife in this case did not incur the obligation, even though she was personally liable for it. Therefore, the presumption of family purpose was not applied as to her. Furthermore, section 766.55(2)(b) refers to obligations "incurred" by a spouse, whereas section 766.55(2)(a) refers to the "obligated" spouse. Here the wife was "obligated" under the doctrine of necessities but was not the "incurring" spouse. Thus, section 766.55(2m), which limits recovery to marital property assets that were received by a nonincurring former spouse who was not assigned the obligation in the dissolution decree, to the extent of the assets' value at dissolution, and which applies only to family-purpose obligations under section 766.55(2)(b), would not apply to support obligations under section 766.55(2)(a). The court

reasoned that categorizing obligations for necessities under section 766.55(2)(b), as the circuit court had done, would “read the support category out of the statute through disuse.” *Id.* at 111. The court also observed that providing the widest possible recovery by creditors through section 766.55(2)(a) enhances the availability of necessities and provides a support function for the spouse receiving the necessary goods and services. *Id.* at 112.

While the relative ability of a spouse to provide support for the other spouse and for their minor children under section 765.001(2) may be relevant to obligations owed to each other, and to rights of contribution between spouses, it does not apply to the spouses’ obligations to creditors. The doctrine of necessities results in personal liability for the entire amount.

The dissent in *Brody* pointed out that each spouse is only obligated for support obligations to the extent of his or her ability to provide support, and that the majority made no finding as to the relative abilities of the defendant former spouses to provide support for each other. Therefore, the dissent would have limited recovery to assets available under section 766.55(2m). *See also supra* § 5.110.

Cases decided after *Brody* have reaffirmed the principle that both spouses are personally liable for medical services provided either spouse and that section 766.55(2)(a) describes the classification of property available for recovery. *See Sinai Samaritan Med. Ctr., Inc. v. McCabe*, 197 Wis. 2d 709, 541 N.W.2d 190 (Ct. App. 1995); *Froedtert Mem’l Lutheran Hosp., Inc. v. Mueller*, No. 95-1449, 1996 WL 250835 (Wis. Ct. App. May 14, 1996) (unpublished opinion not citable per section 809.23(3)); *see also Dean Med. Ctr., S.C. v. Connors*, 2000 WI App 202, 238 Wis. 2d 636, 618 N.W.2d 194 (holding that creditor could sue both parents for entire amount due under doctrine of necessity, notwithstanding paternity judgment that established each parent responsible for one-half of child’s medical expenses).

In addition to the right of one spouse (or that spouse’s creditor) to recover from the other spouse for specific obligations, each spouse is entitled to support in general from the other spouse. The amount of the general support obligation is set under section 767.501. *See infra* § 11.31. In determining the spouses’ respective obligations, the court applies considerations listed in sections 767.511 and 767.56 (concerning child support and maintenance, respectively). A decree under section

767.501 puts spouses who are still married (but probably separated) in the same economic position as former spouses to whom an order for support under sections 767.511 and 767.56 applies. *But see infra* § 9.5 (income tax consequences for spouses living apart).

2. Necessaries [§ 6.6]

The common law doctrine of necessities is a creditor's remedy. In Wisconsin before January 1, 1986, the effect of the doctrine was to impose primary liability on the husband to creditors who provided necessary goods and services to the wife and children regardless of which spouse entered into a contract with the creditor. If the husband was unable to satisfy the obligation, secondary liability was imposed on the wife. *See 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); *Stromsted v. St. Michael Hosp. of Franciscan Sisters (In re Estate of Stromsted)*, 99 Wis. 2d 136, 299 N.W.2d 226 (1980); *see also United States v. Conn*, 645 F. Supp. 44 (E.D. Wis. 1986) (holding that attorney fees for criminal defense are necessities); *supra* § 5.109.

The necessities doctrine was harmonized with the Marital Property Act in *St. Mary's Hospital Medical Center*, 186 Wis. 2d 100, in which the court held that medical services fall within the common law doctrine of necessities for which both spouses are personally liable and that the obligation is categorized as a support obligation under section 766.55(2)(a). *See supra* §§ 5.37, 6.5; *see also Sinai Samaritan Med. Ctr.*, 197 Wis. 2d 709 (holding that obligation under doctrine of necessities arises under section 765.001, not chapter 766); *Froedtert Mem'l Lutheran Hosp.*, No. 95-1449, 1996 WL 250835 (Wis. Ct. App. May 14, 1996) ("In summary, the doctrine of necessities, as modified by section 765.001(2), Stats., imposes liability upon Mrs. Mueller; section 766.55(2)(a), Stats., describes what property may be reached; and section 803.045, Stats., clarifies the procedure when a creditor may commence an action to satisfy a judgment"); *Medical Bus. Assocs. v. Steiner*, 588 N.Y.S.2d 890 (App. Div. 1992) (discussing evolution of common law doctrine of necessities; under New York law, incurring spouse is held primarily liable, and other spouse's liability requires finding as to each spouse's ability to pay and whether provider relied on nonincurring spouse's creditworthiness); Sallie L. Rubenzer, *Necessaries and Family Purpose Debts*, Wis. Law., Oct. 1996, at 14; Jay M. Zitter, Annotation,

Modern Status of Rule That Husband Is Primarily or Solely Liable for Necessaries Furnished Wife, 20 A.L.R.4th 196 (1992). See also Henry J. Sommer & Margaret Dee McGarity, *Collier Family Law and the Bankruptcy Code* ¶ 3.03[2][b] (1991, Supp. Ann.).

C. Obligations Incurred in Interest of Marriage or Family [§ 6.7]

1. In General [§ 6.8]

Although it would appear that any obligation for necessaries would fall within the category of obligations in the interest of the marriage or the family, the court in *St. Mary's Hospital Medical Center*, 186 Wis. 2d 100, found otherwise. The court held that medical services fall within the common law doctrine of necessaries for which both spouses are personally liable and that the obligation is categorized as a support obligation under section 766.55(2)(a). *Id.* at 111–12; see *supra* §§ 5.37, 6.5; see also *Dean Med. Ctr., S.C. v. Conners*, 2000 WI App 202, 238 Wis. 2d 636, 618 N.W.2d 194 (holding that creditor could sue both parents for entire amount due under doctrine of necessaries, notwithstanding paternity judgment that established each parent responsible for one-half of child's medical expenses).

Most other nontort obligations of either spouse incurred during marriage—whether incurred by contract, penalty, fine, or any other manner—are incurred in the interest of the marriage or the family, and creditors to whom these obligations are due may recover pursuant to section 766.55(2)(b). That section provides that obligations incurred in the interest of the marriage or the family may be satisfied from all marital property held by either or both of the spouses and from the individual and predetermination date property of the incurring spouse. Wis. Stat. § 766.55(2)(b). On the basis of the incurring spouse's personal liability, any creditor may recover from that spouse's nonmarital property.

➤ **Comment.** Section 766.55(2)(b) enlarges the pool of assets available to satisfy family-purpose obligations by making available marital property held by the incurring spouse, the nonincurring spouse, or both. Other community property states having a similar

rule allowing recovery of community property for most obligations of spouses sometimes refer to this as the *family-purpose doctrine*.

To be a family-purpose obligation, an obligation must have been incurred *during marriage*, Wis. Stat. § 766.55(1), defined as the period in which both spouses are domiciled in Wisconsin between the determination date and the termination of the marriage at dissolution or death, Wis. Stat. § 766.01(8). *See supra* § 2.8 (discussion of concept during marriage).

Whether a family purpose exists in connection with incurring an obligation is a question of fact. There is a presumption that all obligations are incurred in the interest of the marriage or the family. Wis. Stat. § 766.55(1); *Schmidt v. Waukesha State Bank*, 204 Wis. 2d 426, 442–43, 555 N.W.2d 655 (Ct. App. 1996); *see supra* §§ 5.31, .32. A person attempting to rebut the presumption of family purpose has the burden of proving that the nonexistence of the family purpose is more probable than its existence. Wis. Stat. § 903.01; *Schmidt*, 204 Wis. 2d at 443. If either spouse is able to rebut the presumption of family purpose, only the incurring spouse's individual and predetermination date property and that spouse's interest in marital property, in that order, may be reached. Wis. Stat. § 766.55(2)(d); *see also infra* §§ 6.29, .51–.58. This rule protects the nonincurring spouse's individual and predetermination date property and his or her interest in the marital property from recovery by the incurring spouse's nonfamily-purpose creditors.

Notwithstanding the actual purpose of an obligation, if the incurring spouse has, before the obligation is incurred, signed a separate statement that the obligation is or will be in the interest of the marriage or the family, that statement is conclusive evidence that the obligation is a family-purpose obligation. Wis. Stat. § 766.55(1); *Bank One, Appleton, NA v. Reynolds*, 176 Wis. 2d 218, 500 N.W.2d 337 (Ct. App. 1993).

➤ **Note.** A family-purpose statement is conclusive as to the classification of assets the creditor may recover, but it does not prevent the nonincurring spouse from recovering from the other spouse under section 766.70 if the obligation was not actually a family-purpose obligation. Wis. Stat. § 766.55(1); *see infra* § 8.36.

A spouse's right to manage and control a specific asset classified as marital property does not determine whether a creditor may recover that

asset to satisfy a family-purpose obligation incurred by the spouse. Section 766.51(1m) grants each spouse management and control of all marital property when applying for an extension of credit, with certain exceptions relating to marital property used in a business in which the other spouse is active. These exceptions are described in section 766.70(3)(a)–(d) and include partnerships and joint ventures in which the nonincurring spouse is a general partner or participant, limited liability company interests held by the other spouse as a member, professional corporations, sole proprietorships, and corporations that are not publicly traded. *See supra* §§ 4.6, 5.39. Even though management rights in these marital property business assets are restricted, the excepted marital property assets are nevertheless available to the creditor of a family-purpose obligation. Wis. Stat. § 766.55(2)(b); *see also* Wis. Stat. § 706.02(1)(f) (joinder required for conveyance of homestead property except for purchase money mortgage).

The issue of whether an obligation is or is not a family-purpose obligation can arise in an initial proceeding to enforce a debt. *See infra* §§ 6.51–58. If the issue is not determined in the initial proceeding, it may arise in postjudgment proceedings involving the attempted recovery of marital property assets to satisfy the judgment. *See infra* §§ 6.59–62.

➤ **Note on Terminology.** Actions affecting one spouse’s interest in a marital property asset when that spouse’s personal liability has not been established have sometimes been called actions in rem or actions quasi in rem. This is a misnomer. Actions in rem involve adjudication of the rights of all the world in a particular asset. The asset itself is the defendant, and the determination of its status or disposition is the outcome of the action. *See* 1 Am. Jur. 2d *Actions* § 40, at 573 (1962); *Pennoyer v. Neff*, 95 U.S. 714 (1877). Proceedings quasi in rem determine the rights of particular persons in a particular asset. An action to reach and dispose of a particular asset to satisfy a debt is quasi in rem. 1 Am. Jur. 2d *Actions* § 41, at 574 (1962); *see* Wis. Stat. § 801.07. In contrast, a family-purpose obligation for which only one spouse is personally liable subjects assets of a particular *classification* to recovery but does not necessarily subject a particular *asset* to recovery.

2. Analogy to Other Community Property States [§ 6.9]

Case law in states that have developed the family-purpose doctrine—Washington, Arizona, and New Mexico—may sometimes be helpful in analyzing policies and issues relevant to a family-purpose determination. See Unif. Marital Property Act § 8 cmt. The Uniform Marital Property Act (UMPA) is reprinted in appendix A, *infra*. Care must be taken, however, to compare the underlying rule governing property available for recovery at the time the case was decided. If the rule was that only separate property, and no community property, was available to satisfy a nonfamily-purpose (separate) obligation, then the court may have strained to find a family purpose to reach an equitable result. Such a finding would allow recovery in a case in which the defendant owned no separate property. For example, in *LaFramboise v. Schmidt*, 254 P.2d 485 (Wash. 1953), the defendant husband had taken “indecent liberties” with the six-year-old plaintiff. The court found a community obligation because the defendant and his wife were at the time acting as paid babysitters—that is, performing a commercial endeavor intended to benefit the community. If the court had found that the injury was a separate obligation, the child would probably have received nothing, although this is not stated in the case.

In addition to the fact that cases may be affected by issues extraneous to a family-purpose determination, it appears that most reported cases interpreting the family-purpose doctrine in community property states arise in a tort context. This may not be analogous to situations in which the issue arises in a commercial context in Wisconsin. The Wisconsin Act has a specific rule for torts incurred during marriage that does not require a family-purpose analysis. Wis. Stat. § 766.55(2)(cm); see *infra* §§ 6.26–28. Cases in these other jurisdictions may be helpful, however, in analyzing general policies and principles related to the family-purpose doctrine.

It appears from case law in other community property states employing the family-purpose doctrine that it is not necessary for the obligation to benefit the spouse or family to support a finding of family purpose. See Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. L. Rev. 13 (1986); Keith D. Ross, *Sharing Debts: Creditors and Debtors Under the Uniform Marital Property Act*, 69 Minn. L. Rev. 111 (1984). See also *Washington*

Community Property Deskbook 6-40 to 6-45 (George T. Shields et al. eds., Wash. State Bar Ass'n 2d ed. 1989) [hereinafter *Washington Deskbook*]. The facts and circumstances of each case determine whether a family purpose existed when the obligation arose, regardless of whether a benefit resulted. Moreover, the activity may be characterized as having a family purpose regardless of whether the nonincurring spouse opposed the action.

Again by analogy to other community property states having the family-purpose doctrine, if the nonincurring spouse ratifies the obligation, it may be possible, under the doctrine of estoppel, for one spouse to obligate marital property even though no family purpose exists. In Washington, for example, an agreement for support by the putative father of children born of an extramarital relationship was found to have been ratified by his wife. *See Peterson v. Eritslund*, 419 P.2d 332 (Wash. 1966). The wife was fully aware of the situation, did not repudiate the agreement, wrote several checks to carry out the agreement, and signed several joint income tax returns claiming the children as dependents. Under these circumstances, the court refused to allow the wife to claim a nonfamily purpose to shield one-half of the community assets. *Id.*

In contrast to Wisconsin, five community property states (California, Nevada, Idaho, Texas, and Louisiana) allow recovery from community property only to the extent that a spouse has management and control of that property. This is known as the managerial system. *See, e.g., In re Nahat*, 278 B.R. 108 (Bankr. N.D. Tex. 2002) (holding that earned income is “special” community property under Texas law because only the earning spouse has management and control, and earnings are not subject to claims against the other spouse). Case law in these states would therefore be of little or no assistance in interpreting liability based on the family-purpose doctrine under the Wisconsin Act. *See also supra* ch. 5 (extension of credit).

3. Commercial and Other Contractual Obligations [§ 6.10]

a. Commercial Transactions [§ 6.11]

The family-purpose doctrine applies to nontort obligations incurred during marriage in both commercial and noncommercial settings. *See* Wis. Stat. § 766.01(8). Section 766.55(2)(b) provides that an obligation incurred in the interest of the marriage or the family may be satisfied only from all marital property assets and from all nonmarital property assets of the incurring spouse. A creditor may bring an action to recover under this section against the obligated spouse, the incurring spouse, or both spouses. Wis. Stat. § 803.045(1). If the creditor cannot obtain jurisdiction over the obligated or incurring spouse, the creditor may proceed against the nonobligated or nonincurring spouse. Wis. Stat. § 803.045(2); *see infra* §§ 6.52–.54; *see also* Wis. Stat. § 766.01(2r) (instances in which definition of creditor refers only to persons or entities that regularly extend credit). After a creditor obtains judgment, it may proceed against either spouse to recover marital property. Wis. Stat. § 803.045(3); *see infra* §§ 6.59–.62.

➤ **Comment.** Creditors that operate in a commercial setting and deal with the general public, such as banks and merchants, are less likely than creditors that do not ordinarily extend credit to be personally acquainted with the borrower. They are, therefore, less likely to be able to accurately discern the purpose for which the obligation is incurred. A commercial creditor deals with a larger volume of credit than a person who is not in the business of extending credit, and this reduces the likelihood that the commercial creditor will know how funds acquired in a credit transaction will be put to use. Since a spouse may manage all marital property (with certain exceptions) to obtain an extension of credit for what is ostensibly a family-purpose obligation, it would not be fair if the creditor could recover from only half of the marital property if the obligation were later found not to be in the interest of the marriage or the family. *See* Wis. Stat. § 766.55(2)(d); *see also infra* § 6.29. The Act prevents this result.

Even though a creditor in the business of extending credit may have no practical way of determining the borrower's purpose, the system of

satisfying obligations under the Act provides a number of protections for such creditors:

1. The presumption of family purpose, which shifts the burden to the borrower or his or her spouse to prove otherwise, provides an advantage to the creditor seeking to recover marital property assets to satisfy the debt. Wis. Stat. §§ 766.55(1), 903.01.
2. Any creditor, not just a creditor in the business of granting credit, may request a separate family-purpose statement signed by the incurring spouse at or before the time the obligation is incurred. Wis. Stat. § 766.55(1). This statement recites that the obligation is or will be incurred in the interest of the marriage or the family. Such a statement is conclusive evidence as to the creditor that a family-purpose obligation exists. *Id.*; see *Bank One, Appleton, NA*, 176 Wis. 2d at 220–21; *Park Bank-West v. Mueller*, 151 Wis. 2d 476, 484, 444 N.W.2d 754 (Ct. App. 1989); see also *supra* § 5.71.

➤ **Comment.** A signed statement prevents family purpose from becoming an issue in the collection proceedings, but it does not affect any interspousal remedy relating to the improper signing of the statement. See *supra* § 5.71, *infra* §§ 8.18, .36. It appears that most commercial lenders include such a statement with loan applications or have a separate statement signed if they do not use written applications. See Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 Wis. L. Rev. 769. The effect of the separate family-purpose statement is not clear if a creditor has actual knowledge of a nonfamily purpose. The statement appears to be conclusive in all circumstances, but estoppel based on fraud or collusion may be appropriate if such knowledge can be proved.

3. If the creditor meets the requirements of a bona fide purchaser under section 766.57, the creditor is unaffected by any claims the spouses may have against each other. See *supra* § 5.28. Actual knowledge of a nonfamily purpose may deny bona fide purchaser protection to a creditor. Wis. Stat. § 766.57(1)(a). (See section 5.28, *supra*, for a discussion of section 766.57 as it relates to secured and unsecured creditors.)

The Act makes no distinction between initial extensions of credit and renewals of existing credit. A renewal is usually regarded as an additional extension of credit. This might be important if a credit relationship was in place before the spouses' determination date and it is renewed thereafter. Since the Act was not intended to alter a spouse's existing relationships with creditors, it would be anomalous to allow a spouse to convert a predetermination date obligation into a family-purpose obligation, with creditors' expanded rights of recovery, by simply renewing the obligation. *See* Wis. Stat. § 766.55(3). However, the granting of additional credit or other modification of terms, thus creating an entirely new transaction, may under some circumstances convert a predetermination date obligation to one incurred after the determination date.

Guarantees entered into before the determination date and enforced thereafter are treated as predetermination date obligations. Wis. Stat. § 766.55(3); *see infra* § 6.22.

In *Mitchell Bank v. Schanke*, 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849, the Wisconsin Supreme Court, reversing the court of appeals, held that a dragnet clause in a mortgage signed by both spouses was both enforceable and sufficient to secure debts incurred only by the husband. There was no evidence that the husband's debts were other than family-purpose debts. Thus, marital property of both spouses was recoverable for these debts, and this satisfied the requirement in the dragnet clause that the mortgage secured future joint debts.

b. Incidental Credit Transactions [§ 6.12]

The debt satisfaction system under the Act, based on the classification of property available to satisfy the various categories of obligations, applies to all creditors. *See* Wis. Stat. § 766.55(2). The definition of the term creditor under section 766.01(2r) limits applicability of certain parts of the Act to those who regularly extend credit, but section 766.55(2) is not so limited. *See* Wis. Stat. § 766.01(2r); *see also supra* § 5.46.

The incidental creditor who is not in the business of extending credit is not required to consider property available to satisfy the obligation in determining creditworthiness. Presumably, such a creditor will in many cases use criteria that are not collection-oriented, such as family relationships, in determining whether to extend credit to a particular

debtor. The incidental creditor may also be in a better position to evaluate whether the obligation is incurred in the interest of the marriage or the family.

In addition, incidental creditors are entitled to the expanded pool of assets available to family-purpose creditors in that such obligations are presumed to be incurred in the interest of the marriage or the family. Wis. Stat. § 766.55(1). A separately signed statement of family purpose is conclusive evidence of such a purpose. *Id.*

4. Tax Liability [§ 6.13]

a. Tax on Spouses' Income [§ 6.14]

(1) Reporting Requirements [§ 6.15]

Income from marital and nonmarital property assets held or owned by either spouse is classified as marital property unless a marital property agreement under section 766.58, a unilateral statement under section 766.59, a court order under section 766.70, or another means of reclassifying assets alters this classification. Wis. Stat. § 766.31(4), (7p), (10). Income earned by either spouse is likewise classified as marital property unless a marital property agreement under section 766.58, another similar agreement, or a court order under section 766.70 provides otherwise. Wis. Stat. § 766.31(4), (7p), (10). Consequently, each spouse owns as marital property an undivided one-half interest in such income and is subject to Wisconsin and federal tax reporting requirements on that one-half interest in income. Distributions to a spouse from a trust created by a third party and income from assets received as a gift from the donee's spouse, unless the donor provides otherwise, are the donee spouse's individual property. Wis. Stat. § 766.31(7)(a), (10).

If spouses file a joint return, the spouses' marital property income and the individual property income of each spouse are reported on the return. A spouse filing a separate return reports one-half the income classified as marital property and all of that spouse's income classified as individual property. The filing of separate returns by separated spouses creates special problems for the spouse who owns a one-half interest in the income classified as marital property received by the other spouse but who is unable, because of lack of information, to report such income or

is unable to obtain access to the funds necessary to pay tax on that portion.

Section 71.10(6)(b) incorporates and expands the innocent-spouse provisions of I.R.C. § 66(c) for spouses filing separate returns. Similarly, section 71.10(6)(a) incorporates the innocent-spouse protections of I.R.C. § 6015(a) to (d) and (f) for failure to report or for underreporting of either marital property income or individual property income of one spouse on a joint return. Section 71.10(6m) applies these protections to former spouses. These problems and available protections are discussed in chapter 9, *infra*; see also chapter 12, *infra*, for discussion of the collection of Wisconsin income taxes after the death of a spouse.

A taxpayer's spouse or former spouse who might be liable or whose property might be recoverable for tax due or assessed on the taxpayer's return is entitled to information on the return. Wis. Stat. § 71.78(4)(k); see also chapter 9, *infra*.

(2) Recovery of Federal Taxes [§ 6.16]

If spouses file state and federal joint income tax returns, both spouses are personally liable for the entire amount of tax due, even though some of the income reported may be classified as individual property. Therefore, all classifications of property of both spouses may be recovered to satisfy the joint income tax obligation.

If spouses file separate returns, only the spouse signing the return is personally liable for the tax. The extent of the community property that may be recovered to satisfy a federal tax obligation for which only one spouse is personally liable is indicated by cases involving:

1. The recovery of community property or marital property generated by the nonliable spouse, for premarriage and pre-effective date federal tax obligations of the other spouse; and
2. The recovery of certain types of assets from nonliable spouses (e.g., life insurance beneficiaries).

Cases addressing premarriage and pre-effective date federal tax obligations indicate that collection of the federal tax owed depends on federal rules that take advantage of the concept of community property

ownership and on the rights of creditors under state law. *Medaris v. United States*, 884 F.2d 832 (5th Cir. 1989), involved a federal tax obligation incurred by a spouse before marriage. In that case, only the husband was liable for federal taxes incurred before the marriage. Under the Texas statute relating to the satisfaction of liabilities, a creditor could reach the husband's entire income for his premarriage debts. His wife's income was not subject to recovery for the debts under state law, even though her income was community property. The IRS gave notice of levy to the husband, but not to the wife, and proceeded to levy on all his income and one-half her income. The district court found that one-half of the wife's income and only one-half of the husband's income could be recovered to satisfy the husband's tax liability and also found that the wife was not entitled to notice of levy because she was not "liable" for the taxes. The Fifth Circuit Court of Appeals upheld the IRS's levy, agreeing that the wife was not entitled to notice of levy and that one-half her wages were subject to recovery. State law is used to determine a taxpayer's property interest, and once that interest is determined, federal law provides the extent to which that interest may be recovered. Under state law, the wife's income was community property, and under federal law, the IRS could recover the taxpayer's one-half interest in that property. State law protections, such as the Texas statute prohibiting one spouse's premarriage creditor from recovering from the other spouse's income, do not apply to the IRS. Although state-law protections do not apply to the IRS, the Fifth Circuit Court of Appeals concluded that creditors' rights under state law do. The court of appeals reasoned that the IRS should have no lesser rights than other creditors. Texas law provided that all the community property income of the liable spouse was subject to recovery for premarriage debts. Accordingly, the court of appeals held that the IRS could recover from *all* the husband's earnings, even though the wife owned one-half of those earnings as community property.

Section 766.55(2)(c)1. provides that after marriage, a spouse's premarriage creditor may recover only from that spouse's nonmarital property assets and from marital property assets that would have been the property of that spouse but for the marriage. Consequently, on facts similar to *Medaris* in Wisconsin concerning one spouse's premarriage tax debt, the IRS may recover from *all* earnings of the liable spouse. In addition, the taxpayer's one-half marital property interest in the nonliable spouse's earnings is also subject to recovery, notwithstanding the restrictions of section 766.55(2)(c)1., because the nonliable spouse's income is a marital (i.e., community) property asset under Wisconsin

law. State law rules for categories of obligation under section 766.55(2) are superseded by federal law and do not apply unless incorporated by federal law. *See infra* §§ 6.19, ch. 9; *see also Hollingshead v. United States*, 85-2 U.S. Tax Cas. (CCH) ¶ 9772 (N.D. Tex. 1985) (upholding seizure of taxpayer's community property interest in his wife's earnings for tax obligation for which she was not liable); Rev. Rul. 85-70, 1985-1 C.B. 361; *Calmes v. United States*, 926 F. Supp. 582 (N.D. Tex. 1996) (holding that IRS could not recover wife's earnings for husband's premarriage tax obligation because earnings were her separate property by premarital agreement); *infra* § 9.33 (effect of marital property agreements on reporting of income and property from which tax may be recovered).

The taxes due in *Vorhies v. Z. Management, Inc.*, 87-1 U.S. Tax Cas. (CCH) ¶ 9200 (W.D. Wis. 1987), arose before January 1, 1986, and were the husband's sole liability. The court permitted recovery from the husband's one-half interest in his wife's wages. The court stated that under I.R.C. § 6331, the government has authority to levy on the taxpayer's property interests and that those interests are to be determined according to state law (in this case, subsections 766.31(3) and (4)). Because the husband's tax liability was unpaid as of January 1, 1986, and because he had an interest in his wife's wages after that date, the levy was proper. Because federal law supersedes state law, section 766.55(2)(c)2. (which would have made the wife's wages unavailable for any of the husband's other pre-effective date debts) did not apply with respect to his federal taxes. Similarly, in *In re Porter*, No. C-92-4089 FMS, 1993 WL 106884 (N.D. Cal. Apr. 5, 1993), the court permitted the IRS to attach a tax lien to the husband's share of proceeds of community property real estate held by his bankruptcy trustee, even though the parties had separated (terminating the community under California law) and the state court later awarded the husband's share to the wife. At the time the real estate was sold, it was still community property, and the IRS was not bound by the award to the wife. *See also United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970).

In another similar case, the U.S. District Court for the District of Arizona in *Hyde v. United States*, 93-2 U.S. Tax Cas. (CCH) ¶ 50,432 (1993), upheld the IRS's levy on the wife's community property defined-benefit plan for a postmarriage tax penalty for which only the husband was liable. This defined-benefit plan was not included in any of the exemption categories of I.R.C. § 6334(a). Initially the court upheld the levy on the husband's one-half interest in the plan based only on his state

law property interest and did not make a determination whether this debt was a separate debt or a community debt. In denying reconsideration, the court held, citing *Johnson v. Johnson*, 638 P.2d 705 (Ariz. 1981), that based on the parties' stipulation that the husband's unreported income—funds that should have been paid for taxes—had been used for community purposes, the debt was a community debt under Arizona law. Since the tax penalty was a community debt, the court stated that the wife continued to be liable, even after the death of the husband, and that her entire deferred-benefit plan was subject to levy. *Cf.* Wis. Stat. § 859.18(2), (3); *see infra* ch. 12. Although the court did not differentiate between the wife's personal liability and the availability of community property for recovery, Arizona law provides that one spouse may bind the community only for community debts, not the separate property of the other spouse, as would be the case if the other spouse were personally liable. Ariz. Rev. Stat. Ann. § 25-214(B), (C) (West, WESTLAW current through legislation effective February 9, 2010 of the Sixth Special Session, and legislation effective February 11, 2010 of the Second Regular Session of the Forty-Ninth Legislature (2010)). The distinction was immaterial to the outcome of the case because the asset against which the levy was sought was admittedly community property. *See also McIntyre v. United States*, 2 Cal. Bankr. Ct. Rep. 63 (N.D. Cal. 1998) (holding that taxpayer husband had community interest under California law in wife's share of his pension benefits, which allowed IRS to collect from her share).

In contrast to the cases involving premarriage and pre-effective date federal tax obligations, cases involving recovery from a nonliable life insurance beneficiary indicate that not all courts have allowed expansive rights of recovery by the federal taxing authorities. In *Commissioner v. Stern*, 357 U.S. 39 (1958), a state law protecting a life insurance beneficiary (the surviving spouse) from creditors' claims was held to be binding on the IRS. Under Kentucky law, absent fraud or insolvency, the beneficiary is not liable for the insured's debts. *Cf.* Wis. Stat. § 859.18(4)(a)4. (comparable Wisconsin statute). The Court found that the Internal Revenue Code (I.R.C.) section allowing the government to recover from a transferee of a taxpayer's property was only procedural and gave the government no substantive rights that would exceed any other creditor's rights under state law. *Stern*, 357 U.S. at 47; *see also O'Kane v. United States*, Civ. No. 88-1226, 1989 WL 252397 (D. Idaho Dec. 11, 1989) (holding that state law protections prevented IRS recovery from nontaxpayer spouse).

The IRS was able to recover from a life insurance beneficiary in *United States v. Bess*, 357 U.S. 51 (1958). However, unlike in *Stern*, a tax lien had been filed with respect to the taxpayer's property. See *infra* § 6.20. Since the *Bess* taxpayer before his death had had a right in the policy's cash-surrender value but not the proceeds, the government could recover from the beneficiary only to the extent of the cash-surrender value, not the proceeds. See also *LaSalle Nat'l Bank v. United States*, 636 F. Supp. 874 (N.D. Ill. 1986) (holding that state law protecting spendthrift trust is inoperative to prevent federal tax lien). The spouses' protections preventing recovery of certain property are also determined by federal law. See I.R.C. § 6334 (exemptions).

Since the IRS may exercise the rights of a creditor under state law as well as federal law, when married persons file separate returns, a question arises whether the obligation to pay income tax imposed on individual property income reported by one spouse is a family-purpose obligation under section 766.55(2)(b). It appears in most instances that federal income tax due on both marital property income and individual property income is a family-purpose obligation. But see *O'Kane v. United States*, Civ. No. 88-1226, 1989 WL 252397 (D. Idaho Dec. 11, 1989) (holding that husband's liability for failure to pay corporate tax was not community debt). A review of cases in community property states using the family-purpose doctrine indicates that an obligation incurred for the benefit of one spouse usually constitutes a family-purpose obligation. See *supra* §§ 5.9, 6.9. As such, all marital property of both spouses is available for recovery. Wis. Stat. § 766.55(2)(b); see *Hyde v. United States*, 93-2 U.S. Tax Cas. (CCH) ¶ 50,432 (holding that tax due on husband's unreported income was used for benefit of community and was community debt), *reconsideration denied*, 93-2 U.S. Tax Cas. (CCH) ¶ 50,605 (D. Ariz. 1993), *aff'd*, No. 93-16685, 1994 WL 228182 (9th Cir. 1994); see also *supra* § 6.9.

➤ **Note.** While the category of tax liability under Wisconsin law does not appear to impede the IRS's recovery of taxes, one spouse may have a remedy against the other under section 766.70(5) if the IRS recovers marital property not available to a creditor under state law because the tax debt is not a family-purpose debt. See *infra* ch. 8. Equitable factors such as whether the spouses are separated may be considered in determining whether the spouse has a right of reimbursement. Other subsections of section 766.70, such as subsection 766.70(1) relating to breaches of the duty of good faith,

may apply in certain circumstances involving the incurring and recovery of taxes. *See infra* ch. 8.

(3) Recovery of Wisconsin Taxes [§ 6.17]

Unless the innocent-spouse protections apply, an income tax liability to the state of Wisconsin is treated as a family-purpose obligation under section 766.55(2)(b), and all marital property is available for recovery under section 71.91(3). No distinction is made under section 71.91(3) between tax obligations attributable to income classified as marital property and tax obligations attributable to income classified as nonmarital property reported by a spouse on a separate return. Therefore, whether an income tax liability to the state of Wisconsin on account of a spouse's individual property income reported on a separate return is family purpose or nonfamily purpose is not relevant to the taxing authorities who will be collecting the tax, but it may be of great importance to the other spouse in relation to interspousal remedies.

If the innocent-spouse rules under subsections 71.10(6)(a), (b), and (6m) apply, the tax due on a separate return may only be collected from the same property that is available for satisfying a nonfamily-purpose obligation under section 766.55(2)(d). Wis. Stat. § 71.91(3). If recovery is limited to section 766.55(2)(d), there are also limits on the rights of the Wisconsin Department of Revenue (DOR) to set off overpayments, refunds, and credits. *Id.*; *see infra* § 6.18; *see also* Wis. Stat. § 700.24 (tax liens on joint-tenancy assets). If the spouses are divorced and the divorce judgment allocates their tax liability, the judgment rather than the rules of chapter 766 apply. Wis. Stat. § 71.10(6m)(b).

b. Offset of Refund, Overpayment, or Credit for Support, Taxes Due, or Debts Owed to State [§ 6.18]

If the spouses file a joint federal income tax return for which a refund is due, and if one of them is liable for taxes due other than on the joint return, the IRS may apply the liable spouse's share of the joint refund to the amount owed. Rev. Rul. 85-70, 1985-1 C.B. 361. In the usual case in which all income is classified as marital property, the liable spouse's share will be one-half the refund because each spouse is considered to be

the recipient of one-half of all community property income and is credited with one-half of all withholding and other taxes paid. *See infra* ch. 9. Either spouse has the right to prove that some or all of the income is from noncommunity property sources of the nonliable spouse. Rev. Rul. 85-70, 1985-1 C.B. 361. On the other hand, the IRS might be able to show that state law provides that certain additional property is available for recovery; if so, the IRS may offset this amount as well. *Id.* For example, if a refund is due in a year in which all marital property income reported was earned by the spouse who is liable for taxes due for a year before marriage, all of the refund could be applied to the premarriage liability. *See* Wis. Stat. § 766.55(2)(c)1.

If a spouse who is obligated to support a former spouse or dependent children is in arrears for support, and the obligor's spouse is not liable for such support, the spouses may have their joint federal income tax refund withheld for back support under I.R.C. §§ 6305 and 6402. *See* Treas. Reg. § 301.6305-1. After notice of the intercept, the nonobligated spouse may then file a form 1040X listing the nonobligated spouse's income and claiming the portion of the refund allocable to his or her income. *See* Treas. Reg. § 301.6402-1; Rev. Rul. 80-7, 1980-1 C.B. 296. The nonobligated spouse's income would be one-half the income of both spouses that is classified as marital property, plus any income of the nonobligated spouse that is classified as individual property.

The DOR may credit an overpayment, refundable credit, or tax refund due one spouse on a separate return against amounts owed on that spouse's separate return or other amounts owed by the spouse to other state agencies and certified to the department under section 71.93. A credit or refund of one spouse may not be used to offset the liability on the other spouse's separate return. The department is required to presume that the amount of the refund or credit is classified as the nonmarital property of the filing spouse. Wis. Stat. § 71.80(3). However, if the nonfiling spouse can show by clear and convincing evidence that the state tax overpayment, refundable credit, or refund is classified as the nonmarital property of the nonfiling, nonobligated spouse, no offset will occur, and the refund or credit will be paid in full to the spouse entitled to it. *Id.*

Overpayments, refundable credits, or a tax refund due on a joint Wisconsin return may be intercepted for taxes due on joint returns or amounts certified by state agencies as due for support arrearages for dependents of one of the spouses. Wis. Stat. §§ 71.80(3m), .93. This

offset may be subject to the nonobligated spouse's claim that the overpayment, credit, or refund is classified as the nonmarital property of the nonobligated spouse. Wis. Stat. § 71.80(3m). The amount of the refund, credit, or overpayment that may be used to offset the obligated spouse's liability is limited to the proportion that the Wisconsin adjusted gross income that would have been the property of the obligated spouse but for the marriage has to the adjusted gross income of both spouses. Wis. Stat. § 71.80(3m)(b).

c. Other Tax Liability [§ 6.19]

A spouse may be liable for certain other taxes unrelated to the spouses' income, such as the Wisconsin sales tax, Wis. Stat. § 77.60(2), and taxes required to be withheld from employees' income, *see* I.R.C. § 6672; Wis. Stat. § 71.83(1)(b)2.

The IRS's rights to recover taxes of any kind are discussed in section 6.16, *supra*. Wisconsin sales and use taxes may be recovered in the same manner as income taxes. Wis. Stat. § 77.62(1) (incorporating section 71.91(3), which provides that all tax obligations are incurred in interest of marriage or family); *see supra* § 6.17.

Section 71.91(3) applies to tax liability to the state only. Rules for recovery of taxes to other governmental units, such as taxes due a municipality, are determined by section 766.55(2).

d. Tax Liens [§ 6.20]

If a person liable for federal tax fails to pay after demand, I.R.C. § 6321 imposes a lien "upon all property and rights to property, whether real or personal, belonging to such person." If the taxpayer's interest in his or her spouse's wages can be levied on for the taxpayer's sole tax liability, as in *McIntyre*, *Medaris*, *Vorhies*, and *Hollingshead*, *see supra* § 6.16, then it follows that a lien can attach to the taxpayer's marital property interest in an asset held by the other spouse. The statute imposes a lien on assets *belonging to* the taxpayer; it is not limited to assets *held by* the taxpayer. *See* I.R.C. § 6321; *see also United States v. Librizzi*, 108 F.3d 136 (7th Cir. 1997) (federal tax lien on one half of Wisconsin joint tenancy real estate when only one spouse is liable); *Hegg v. United States (In re Hegg)*, 239 B.R. 833 (Bankr. D. Id. 1999)

(holding that federal tax lien remained on former community property even though debtor was relieved of personal tax liability as innocent spouse).

➤ **Practice Tip.** The interests of purchasers, secured creditors, and certain other lienholders are protected from the effect of a tax lien, and those persons' rights supersede those of the government until the tax lien is properly perfected. I.R.C. § 6323(a). When a lien is perfected, however, it is not clear how these liens attach to real estate held by the nontaxpayer spouse in which the taxpayer has a marital property interest. The lien would be "hidden" because a lien search in the name of the nontaxpayer spouse would not reveal a tax lien on the taxpayer spouse's interest in the real estate held by the nontaxpayer. Under Wisconsin law, a bona fide purchaser from one spouse is protected against the assertion of the other spouse's interest, Wis. Stat. § 766.57(3), but this protection may not apply to federal taxes. Until this point is clarified, a buyer may wish to check for tax liens filed against a seller's spouse and to treat them the same as tax liens filed against the seller.

5. Fines, Forfeitures, and Restitution [§ 6.21]

Under traditional community property law, one spouse is not responsible for the other spouse's criminal fines, forfeitures, or orders for restitution, and only one-half of the community property may be recovered to satisfy such obligations. William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* 432 (2d ed. 1971). The Act makes no specific provision for such obligations, but presumably they are provided for within the categories of obligations under section 766.55(2) in the same manner as other obligations. *See, e.g., Sokaogon Gaming Enter. Corp. v. Curda-Derickson (In re Marriage of Curda-Derickson v. Derickson)*, 2003 WI App 167, 266 Wis.2d 453, 668 N.W.2d 736 (holding that restitution ordered for tort of conversion could be satisfied as tort under section 766.55(2)(cm)).

6. Guarantees [§ 6.22]

One type of contract obligation that can be subject to special scrutiny under the family-purpose doctrine is the guarantee or surety agreement. Such an agreement can make marital property assets subject to recovery,

even if the spouses did not receive consideration for the guarantee. An example might be the guarantee of a loan for a friend. Section 766.51, relating to management and control of marital property, does not provide specific rules for entering into guarantee agreements. Thus, a spouse having management and control of marital property may enter into a guarantee or surety agreement to the same extent that the spouse could incur any other type of credit. *Bank One, Appleton, NA v. Reynolds*, 176 Wis. 2d 218, 500 N.W.2d 337 (Ct. App. 1993); *see* Wis. Stat. § 766.51(1m). However, the issues of whether the guarantee is gratuitous and whether marital property assets are used for a purpose that is other than in the interest of the marriage or the family may arise between the spouses, in which case the nonincurring spouse may be able to bring an action to recover those assets. Wis. Stat. § 766.70(6)(a).

Since the execution of a guarantee or recovery under a guarantee signed by one spouse might result in a gift of marital property in excess of the spouse's right to make such a gift under section 766.53, Wisconsin Bankers Association forms provide for the nonincurring spouse's consent to the guarantee. This means that "both spouses act together" to make the gift of any payment or recovery under the guarantee. Wis. Stat. § 766.53. Alternatively, a signed family-purpose statement (which states that the obligation is incurred in the interest of the marriage or the family, *see supra* § 6.11) is conclusive evidence as to the creditor's right to recover marital property. *Bank One, Appleton, NA*, 176 Wis. 2d at 221. However, the statement does not affect the nonincurring spouse's right to an interspousal remedy under section 766.70. *See infra* ch. 8. Either a consent or a family-purpose statement will insulate the creditor from being treated as a gift recipient and having to disgorge the recovery. Wis. Stat. § 766.70(6)(a).

Other community property states employing the family-purpose doctrine may restrict gratuitous guarantees. For example, Arizona has a specific statute that requires joinder by both spouses on a guarantee. Ariz. Rev. Stat. Ann. § 25-214(c)(2) (West, WESTLAW current through legislation effective February 9, 2010 of the Sixth Special Session, and legislation effective February 11, 2010 of the Second Regular Session of the Forty-Ninth Legislature (2010)); *see also* Wash. Rev. Code 26.16.030(2) (West, WESTLAW current with amendments received through January 15, 2010); *Bank of Washington v. Hilltop Shakemill*, 614 P.2d 1319 (Wash. Ct. App. 1980); *Potlatch No. 1 Fed. Credit Union v. Kennedy*, 459 P.2d 32 (Wash. 1969).

The guarantee of an obligation of a member of the guarantor's immediate family probably has a family purpose under most circumstances. Similarly, there usually would be sufficient family purpose to constitute a family-purpose obligation under section 766.55(2)(b) if one spouse guarantees an obligation of a business entity in which a spouse works or owns an interest. *See, e.g., Virginia Lee Homes, Inc. v. Schneider & Felix Constr. Co.*, 395 P.2d 99 (Wash. 1964). Lenders to small businesses often require such a guarantee. A family purpose is likely to be present if the business ownership interest is classified as marital property. It may also be present if the business is classified as the guarantor spouse's individual property but generates marital property income.

If a spouse executes a guarantee agreement that results in what is arguably not a family-purpose obligation, a question arises as to when a cause of action arises under section 766.70(1) (breach of good-faith duty), section 766.70(5) (use of marital property to satisfy an obligation for other than support or family purpose), or section 766.70(6)(a) (unauthorized gift of marital property). Executing a nonfamily-purpose guarantee probably does not constitute a gift that would provide the basis for an interspousal remedy under section 766.70 and therefore does not start the various subsections' limitation periods running. There is no damage to the spouses, and no gift, until payment is made from marital property funds on account of the guarantee. Once the obligated spouse pays the nonfamily-purpose guarantee with marital property funds, a gift results and the damage to marital property is measurable, thereby giving rise to the action for the interspousal remedy.

Section 766.55(3) specifically provides that guarantee, indemnity, and surety relationships entered into before the parties' determination date for which an obligation arises after the determination date are treated as obligations in existence on the determination date. *See also* Wis. Stat. Ann. § 766.53 Legis. Council Notes—1985 Act 37, §§ 90 to 98 (West 2009). The property available for recovery by the creditor is determined under subsection 766.55(2)(c) or (d) or without reference to the Act, as the case may be, depending on whether the guarantee was executed (1) before marriage; (2) before January 1, 1986, while the parties were married; or (3) after January 1, 1986, while the parties were married but before they moved to Wisconsin. *See infra* §§ 6.23–.25, *supra* § 5.35.

D. Predetermination Date Obligations [§ 6.23]

1. Obligations Incurred Before Marriage [§ 6.24]

Section 766.55(2)(c)1. states that an obligation incurred by a spouse before marriage “may be satisfied only from property of that spouse that is not marital property and from that part of marital property which would have been the property of that spouse but for the marriage.” An obligation incurred before or during the marriage that is “attributable to an obligation arising before marriage or to an act or omission occurring before marriage” may be satisfied from the same classifications of property. Wis. Stat. § 766.55(2)(c)1. Such obligations include support of dependents from a previous marriage or liability for an act, omission, or tort that occurred before marriage, if the liability is not determined until after marriage or if collection attempts are not made until after marriage. This chapter refers to these obligations as *premarriage obligations*.

Although torts are given special treatment under section 766.55(2)(cm), that section refers only to torts committed by a spouse “during marriage,” *see* Wis. Stat. § 766.01(8). Both contractual and tort obligations are included under section 766.55(2)(c)1. The following is an example of a tort obligation included under section 766.55(2)(c)1.

➤ *Example.* Assume that a single person is in an automobile accident giving rise to liability on the part of that person. He or she marries before an action is commenced, before a judgment is entered, or before full satisfaction of the judgment has been obtained. This premarriage obligation may be satisfied only from the tortfeasor’s individual property assets, predetermination date property assets, or marital property assets that would have belonged solely to the tortfeasor spouse if there had been no marriage. In the usual case, these assets include the wages of the obligated spouse but not those of the nonobligated spouse, even though each spouse has a marital property ownership interest in the other’s wages. No order of recovery is specified; therefore, the creditor need not pursue individual or predetermination date property of the obligated spouse before proceeding against the marital property. The creditor may collect from all available marital property assets, subject to allowable exemptions. Thus, the nonobligated spouse’s interest in marital

property assets generated by the obligated spouse is also subject to the obligated spouse's premarriage obligations.

Similarly, if child support or maintenance for dependents of a previous marriage comes due during a subsequent marriage, or if an obligation under a property division from a previous marriage is not satisfied before remarriage, the obligation has arisen before the subsequent marriage and will be treated as a premarriage obligation. *See* UMPA § 8 cmt.

If one spouse has a premarriage obligation that results in marital property funds being used or recovered to satisfy the obligation, the nonobligated spouse does not automatically have a right to an interspousal remedy under section 766.70(5) (recovery for marital property used to satisfy an obligation other than in the interest of the marriage or the family), nor does the obligated spouse lose his or her interest in the spouses' remaining marital property assets or any other marital property assets subsequently acquired.

➤ **Example.** If the obligated spouse's wages are garnished to satisfy his or her premarriage support obligations, the obligated spouse nevertheless continues to have a marital property interest in the nonobligated spouse's wages. This interest continues notwithstanding the fact that the nonobligated spouse lost his or her marital property interest in the obligated spouse's wages. The parties may agree to reclassify their property to reimburse the nonobligated spouse, or the nonobligated spouse may bring an action under section 766.70(5) to recover as individual property the amount of marital property so used. However, an action for reimbursement under this section is subject to equitable considerations, such as the rights of creditors who relied on the existence of the recovered property as marital property. *See also infra* ch. 8; *In re Lam*, 364 BR 379 (Bankr. N.D. Cal. 2007) (husband paid child support from prior marriage with community property when he had separate property available).

➤ **Comment.** The effect of section 766.63, relating to mixed property, on premarriage obligations of one spouse is not clear. For example, if the spouses have mixed marital property funds that would have belonged to each of them but for the marriage to such an extent that tracing these two types of marital property funds is not possible, may the premarriage creditor of one spouse recover from all such

marital property funds as if they all would have been the marital property of the incurring spouse? Since the burden of tracing is generally on the spouse wishing to preserve his or her interest in property, the burden would probably be on the nonincurring spouse to prove what marital property funds should not be available to the creditor. *See supra* § 3.20, *infra* § 6.48.

With respect to premarriage taxes incurred by a spouse, the IRS has special powers to recover marital property assets generated by both spouses. *See supra* § 6.16.

See also Wis. Stat. § 49.854 (liens for child support); *infra* § 6.89.

➤ **Comment.** Presumably a lien against property for delinquent support payments under section 49.854 could attach to the marital property interest of a nonliable spouse in an asset in which the liable spouse has a “recorded ownership interest.” *See* Wis. Admin. Code § DCF 152.03(7) (defining *child support lien*). The child support lien statute, however, provides a procedure for a joint owner of a levied asset to assert an interest in the property proportionate to that person’s net contribution to the property. Wis. Stat. § 49.854(7m).

2. Obligations Incurred While Married or Attributable to Obligation Arising While Married but Before January 1, 1986 [§ 6.25]

The Act was not intended to change creditor-debtor relationships that arose before January 1, 1986, or to affect the pool of assets available for recovery in those relationships, even if the debtor was married when the obligation was incurred. *See* Wis. Stat. § 766.55(3); Wis. Stat. Ann. § 766.55(3) Legis. Council Notes—1985 Act 37, §§ 90 to 98 (West 2009). If a creditor-debtor relationship existed for a married person in Wisconsin when the Act became effective, January 1, 1986, but enforcement is sought after January 1, 1986, under section 766.55(2)(c)2. the creditor may recover from assets of the obligated spouse that are not marital property and from marital property assets that would have been the property of the obligated spouse but for the enactment of the Act.

➤ **Comment.** Section 766.55(2)(c)2. does not specifically apply to obligations arising while a spouse is married and literally could apply

to pre-January 1, 1986, obligations arising before marriage. However, recovery for all premarriage obligations is provided for by section 766.55(2)(c)1., leaving to section 766.55(2)(c)2. only pre-January 1, 1986, obligations incurred by a married person. The issue of which statute applies is of no consequence to the recovery because the classification of assets available for recovery is the same under either subsection of section 766.55(2)(c)—that is, the obligated spouse's nonmarital property assets and all marital property assets that would have been the property of the obligated spouse but for the marriage or but for the enactment of the Act.

Section 766.55(2)(c)2. applies to obligations enforced in Wisconsin after January 1, 1986, but incurred before that date. Because the specific date is used without reference to the spouses' determination date, the applicable obligation may have been incurred while the spouses were domiciled in another jurisdiction, as well as while they were domiciled in Wisconsin. *See also infra* § 6.30 (obligations incurred after January 1, 1986, while spouses were married and domiciled in another jurisdiction).

Torts committed by a spouse while the spouses are married but before January 1, 1986, are also subject to recovery under section 766.55(2)(c)2. Recovery for torts committed “during marriage” is provided for by section 766.55(2)(cm). *See infra* §§ 6.26–.28. The term during marriage, however, is defined by section 766.01(8) as the period during which both spouses are domiciled in Wisconsin that begins on the determination date and ends at the dissolution of the marriage or death of a spouse. Torts committed by a spouse before January 1, 1986, would have been committed before the determination date, and therefore section 766.55(2)(cm) does not apply to those torts, even though the tortfeasor was married when the tort was committed.

Section 766.70(5) provides for reimbursement to a nonobligated spouse if marital property assets are used to satisfy an obligation other than a family-purpose obligation under section 766.55(2)(b). Any obligation to which section 766.55(2)(c)2. applies, however, occurred at a time when the family-purpose doctrine was not in effect (i.e., before January 1, 1986). Whether the obligation would have been a family-purpose obligation if the Act had been in effect might be an equitable consideration in determining if the nonobligated spouse should be reimbursed under section 766.70(5).

➤ **Comment.** The result of mixing marital property available for recovery under section 766.55(2)(c)2. with marital property not available for such obligations is not clear. Since the party wishing to exclude assets from recovery usually has the burden of tracing the excludable assets, the spouse, rather than the creditor, is likely to bear that burden. *See also supra* § 6.24.

E. Tort Obligations [§ 6.26]

1. In General [§ 6.27]

Section 766.55(2)(cm) governs recovery for torts committed during marriage. That section states that “[a]n obligation incurred by a spouse during marriage, resulting from a tort committed by the spouse during marriage, may be satisfied from the property of that spouse that is not marital property and from that spouse’s interest in marital property.” The creditor need not recover from nonmarital property assets before pursuing marital property assets. Section 766.55(2)(cm) was intended to protect at least part of the marital property assets from recovery for a tort obligation incurred by one of the spouses, particularly because a marital property agreement is ineffective for that purpose (except in the rare circumstance in which the creditor had notice of the agreement before the tort occurred). Wis. Stat. Ann. § 766.55(2)(cm) Legis. Council Notes—1985 Act 37, §§ 90 to 98 (West 2009); *see* Wis. Stat. § 766.55(4m). Thus, section 766.55(2)(cm) attempts to balance the property rights of an innocent spouse and the recovery rights of an injured plaintiff.

➤ **Historical Note.** The original Act contained no separate category for tort obligations. Rather, torts were originally included in the general satisfaction scheme of section 766.55(2), which required an analysis of whether the tort fell within the family-purpose doctrine. Other community property states employing the family-purpose doctrine developed the doctrine primarily in the area of tort law. Historically, the rule for recovery in those community property states that use the family-purpose doctrine was that community (family-purpose) obligations could be satisfied only from community property and separate (nonfamily-purpose) obligations could be satisfied only from separate property. *See generally* W.S. McClanahan, *Community Property Law in the United States* 488–98 (1982); *Washington*

Deskbook, supra § 6.9, at 6-35 to -52. Because of the presumption that spouses' assets are classified as community property (similar to the presumption that assets are classified as marital property under section 766.31(2)), a plaintiff in a community property state often had no property from which to recover for a separate tort. Therefore, cases interpreting the doctrine were not logically harmonious in their analyses but appeared to attempt to use the doctrine to achieve an equitable result under the circumstances.

➤ **Comment.** Section 766.55(2)(cm), added by 1985 Wisconsin Act 37 (hereinafter the 1985 Trailer Bill), generally removes the necessity of a family-purpose analysis for torts committed during the marriage. The family-purpose doctrine with respect to torts may still apply in Wisconsin, however, in the limited circumstance of determining a nonobligated spouse's right to reimbursement for marital property funds used to satisfy a nonfamily-purpose obligation. A spouse may be entitled to reimbursement if marital property funds are used or levied upon to satisfy an obligation not incurred for support or a family purpose under section 766.55(2)(a) or (b). Wis. Stat. § 766.70(5). This right of reimbursement is subject to "equitable considerations." *Id.* One of these considerations may be whether the tort would have been within the family-purpose doctrine, such as an automobile accident on the way to the grocery store, in which case reimbursement may not be equitable.

A tort creditor is limited in collection to the tortfeasor spouse's nonmarital property assets and that spouse's one-half interest in marital property assets. Wis. Stat. § 766.55(2)(cm); *see, e.g., Sokaogon Gaming Enter. Corp.*, 2003 WI App 167, 266 Wis.2d 453 (holding that restitution debt of husband for embezzlement was a tort debt). The creditor may collect the full amount of the obligation from either or both of those sources, provided that if the recovery comes solely from marital property assets, the value of the assets or the amount of the marital property funds must be large enough that one-half the value of the assets equals or exceeds the amount of the obligation. If the creditor recovers from either spouse's wages by garnishment, recovery will take longer because only one-half the wages of both spouses is owned by the tortfeasor spouse. *See infra* § 6.68 (effect of debtor's exemptions on which classification of property is available to creditors); *see also infra* § 6.37 (how marital property agreement or unilateral statement may enlarge tort creditor's rights).

The protection of the nontortfeasor spouse's interest in marital property was illustrated in *Bothe v. American Family Insurance Co.*, 159 Wis. 2d 378, 464 N.W.2d 109 (Ct. App. 1990). The defendants, husband and wife, had different automobile liability policies issued by the same carrier. Only the husband was involved in the accident that injured the plaintiff, who recovered under the husband's liability policy and then attempted to recover under the wife's policy as well. The court stated that section 766.55(2)(cm) provided that only the husband's one-half interest in marital property assets could be reached to satisfy his tort obligations—it did not subject the tortfeasor's spouse to liability for the tortfeasor's obligations. The wife's policy did not cover torts for which she was not "legally liable," and therefore the plaintiff could not recover under her policy. Similarly, the court in *K.A.G. v. Stanford*, 148 Wis. 2d 158, 434 N.W.2d 790 (Ct. App. 1988), observed that since the plaintiff in that case had not attempted to recover from the tortfeasor's spouse, the tortfeasor's spouse's insurer had no duty to defend the action on her behalf. See also *Safeco Ins. Co. v. Butler*, 823 P.2d 499, 510 (Wash. 1992) (holding that intentional act by one spouse precluded "accident" coverage of other); *Federated Am. Ins. Co. v. Strong*, 689 P.2d 68, 74 (Wash. 1984) (holding that intentional act by one spouse did not preclude collision coverage for other spouse; recovery was separate property).

The nontortfeasor spouse's interest in marital property may lose its protection under the circumstances governed by section 345.06 (owner's liability for act of operator). Section 345.06 provides:

The owners of every vehicle operating upon any highway for the conveyance of passengers for hire are jointly and severally liable to the party injured for all injuries and damage done by any person in the employment of such owners as an operator, while operating such vehicle, whether the act occasioning such injuries or damage was intentional, negligent or otherwise, in the same manner as such operator would be liable.

If such a vehicle is a marital property asset and one spouse is such an employer, it appears that this statute may make both spouses personally liable because both are "owners" of the marital property vehicle. This result would subject all of their marital and nonmarital property assets to recovery. See also Francine R. Adkins Tone, *Vehicle Owner Imputed Liability: An Exception for Community Property Owners*, 18 Lincoln L. Rev. 49 (1988) (discussing owner-liability statute in California).

2. Torts Committed Other Than During Marriage [§ 6.28]

Section 766.55(2)(cm) applies to torts committed “during marriage.” The Act defines the term during marriage to mean the period during which the spouses live in Wisconsin after the determination date. Wis. Stat. § 766.01(8). A tort committed by one spouse after the determination date while the spouses are married but after one of them moves from Wisconsin is not incurred during marriage. Nor is the tort obligation an “other obligation” enforceable under section 766.55(2)(d) because, like section 766.55(2)(cm), section 766.55(2)(d) applies to obligations incurred during marriage. Therefore, the Act does not apply to such an obligation, and recovery may be undertaken without reference to the Act.

Predetermination date tort obligations are treated like any other predetermination date obligations. *See supra* §§ 6.23–25. A tort committed by a spouse before marriage and for which recovery occurs after marriage is treated like any other premarriage obligation. *See supra* § 6.24. A tort committed by one spouse while the spouses are married but before January 1, 1986, is a pre-effective date obligation recoverable under section 766.55(2)(c)2. *See supra* § 6.25. Recovery for a tort committed while spouses are married and after January 1, 1986, but before both spouses reside in Wisconsin is available without reference to the Act. *See infra* § 6.30.

F. Other Obligations [§ 6.29]

Section 766.55(2)(d) provides that “[a]ny other obligation”—that is, an obligation not covered by other categories under section 766.55(2)—that was incurred by a spouse “during marriage” may be satisfied only from the incurring spouse’s nonmarital property assets and from that spouse’s interest in marital property assets, in that order. Section 766.01(8) defines the term during marriage as the period in which both spouses are domiciled in Wisconsin that begins on the determination date and ends at the dissolution of the marriage or the death of a spouse.

Bringing an obligation within section 766.55(2)(d) generally requires overcoming the presumption in section 766.55(1) that the obligation was incurred in the interest of the marriage or the family. This may occur in

the initial proceeding or in supplementary proceedings when recovery from marital property assets is attempted. *See infra* §§ 6.51–.58. The family-purpose doctrine and the proof needed to rebut the presumption are discussed in sections 6.7–.22, *supra*. *See also* ch. 5.

The marital property assets remaining after a creditor has reached one-half of those assets continue to be classified as marital property unless and until the nonincurring spouse recovers a like amount as his or her individual property under section 766.70(5). *See infra* ch. 8; *see also* William A. Reppy, Jr., *Debt Collections from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143, 174 (1981).

As noted above, obligations incurred by a spouse during marriage but not in the interest of the marriage or family must be satisfied first from the incurring spouse's nonmarital property assets and second from the obligated spouse's one-half interest in marital property assets, in that order. Wis. Stat. § 766.55(2)(d). No distinction is made between individual property assets and predetermination date property assets. Consequently, the creditor may elect to pursue either or both of these types of nonmarital property assets.

➤ *Comment.* Although the creditor will generally not be concerned about whether an asset is classified as the incurring spouse's individual property or predetermination property, the nonincurring spouse may prefer that the incurring spouse's individual property assets be pursued first. If the nonincurring spouse survives the incurring spouse, the nonincurring spouse may have elective rights in the deferred marital property portion of the deceased spouse's predetermination date property. The surviving spouse generally has no rights in the other spouse's individual property. A similar advantage to the nonincurring spouse may occur at divorce if nondivisible assets (such as inherited assets) rather than divisible assets (such as assets brought to the marriage by the incurring spouse) are used to satisfy the non-family-purpose obligation. However, unless payment is made voluntarily, selection of property from which recovery is made is the choice of the creditor, not the spouses.

G. Obligations Not Provided for Under Act [§ 6.30]

The Act was not intended to change relationships between spouses and their creditors with respect to any property or obligation in existence on the spouses' determination date. Wis. Stat. § 766.55(3). Section 766.55(2)(c) leaves such relationships unaffected by providing for premarriage obligations and for pre-January 1, 1986, obligations of a spouse. Premarriage obligations may be satisfied from nonmarital property assets of the incurring spouse and from marital property assets that would have been the property of the incurring spouse but for the marriage. Wis. Stat. § 766.55(2)(c)1. Pre-January 1, 1986, obligations of a spouse (i.e., pre-effective date obligations) may be satisfied from nonmarital property assets of the incurring spouse and from marital property assets that would have been the property of the incurring spouse but for the enactment of the Act. Wis. Stat. § 766.55(2)(c)2. However, an obligation that arises while the spouses are married and after January 1, 1986, but before the spouses' determination date (i.e., while the spouses were domiciled in another jurisdiction) is not included under section 766.55(2)(c)1. or 2. Such obligations do not fit in any other category under section 766.55(2)(a)–(cm). These obligations are not satisfiable as “other obligations” under section 766.55(2)(d) because such obligations must be incurred “during marriage.” The term during marriage means the period during which both spouses reside in Wisconsin after the determination date. Wis. Stat. § 766.01(8). A post-January 1, 1986, period before spouses reside in Wisconsin would not be included. *See id.* Therefore, a creditor's recovery for such an obligation is available without reference to categories of obligations under the Act.

In addition to contract obligations, torts committed after January 1, 1986, while the spouses are married but before their determination date (i.e., while the spouses were domiciled in another jurisdiction) likewise are recoverable without reference to the Act. The general section concerning recovery for tort obligations, section 766.55(2)(cm), applies only to torts committed during marriage and thus applies only to torts committed while both spouses reside in Wisconsin after the determination date. *See* Wis. Stat. § 766.01(8); *see also supra* § 6.25 (contract and tort obligations incurred before January 1, 1986, while spouses are married).

➤ **Comment.** The Act's definition of during marriage (i.e., as the period after the spouses' determination date) appears to require the

above result with respect to torts, but it is unclear whether this result was intended.

H. Obligations When Spouses Are Separated [§ 6.31]

Absent a marital property agreement effective as to creditors, the categories of spouses' obligations and the availability of their property to creditors are the same regardless of whether the spouses are living together or apart. A creditor may reach marital property assets held by a spouse to satisfy family-purpose obligations incurred by the other spouse, even if the nonincurring spouse received no financial benefit from or has no control over the other spouse's credit transactions. A separated spouse can protect property that he or she is earning or acquiring only by obtaining a divorce, legal separation, or future classification of property and obligations under section 766.70(4)(a)4. and 5. Creditors' rights arising after the spouses are living apart but before judgment of dissolution are not diminished by reason of their living apart. Section 766.55(2m), providing that the income of one spouse is not available to pay obligations incurred by the other, does not apply until after a decree of dissolution.

The Act has a framework of definitions that does not allow a loose interpretation of *marriage*. See also UMPA § 1 cmt. Section 766.31(4) states that income earned "during marriage" is marital property. Section 766.01(8) defines the term during marriage as the period during which both spouses are domiciled in Wisconsin that begins at the determination date and ends either at marital dissolution or at the death of a spouse. *Dissolution* in turn is defined in section 766.01(7) as termination of the marriage by entry of a decree of divorce, legal separation, annulment, or declaration of invalidity. Also, the definition of *individual property* in subsections 766.31(6) and (7) does not specifically include property acquired while living apart, and such property continues to fall automatically into the classification of marital property. See Wis. Stat. § 766.31(1). Thus, marital property assets held by either spouse while living apart remain available to creditors, as do any other marital property assets, notwithstanding the separation. This rule may produce a harsh result in some cases.

Two community property states—Washington and California—have addressed the problem of debt satisfaction and separated spouses. In Washington, for example, although section 26.16.030 of the Washington

Revised Code (West, WESTLAW current with amendments received through Jan. 15, 2010) defines *community property* as property acquired by one or both of the spouses during the marriage, case law holds that spouses may by their actions dissolve the community even though the marriage has not legally ended by a judgment of divorce. If the marriage is “defunct,” obligations and property are reclassified when the parties separate and hold themselves out as unmarried and without intention to return to the marriage. *Togliatti v. Robertson*, 190 P.2d 575 (Wash. 1948), held that the law recognizes when the marriage has in fact ended, although the facts in that particular case were so egregious that the result probably would have been found in another jurisdiction under the principle of estoppel. (The ex-wife tried to claim property in her deceased ex-husband’s estate 16 years after the divorce.) The uncertainty that may result from changes in the classifications of property and obligations without the happening of a clear event has been criticized in 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).

Whether the marriage is defunct under Washington law is a question of intent. For example, a long separation resulting from one spouse’s hospitalization has been held in one case not to be evidence of abandonment of the marriage. *Rustad v. Rustad*, 377 P.2d 414 (Wash. 1963). In another case, a separated spouse who authorized her estranged husband to operate a community property business was estopped from avoiding recovery of community property assets for business debts, even though the husband was living with another woman. *Dizard & Getty v. Damson*, 387 P.2d 964 (Wash. 1964).

In assigning liability for debts in a divorce judgment, California has attempted to add certainty to the treatment of debts after separation by statutorily allocating debts for necessities to the spouses equally (this is in accord with the equal division of community property) and by allocating debts for nonnecessaries to the party who incurred the debt. If community debts exceed community property, the excess debts are allocated equitably, taking into account such factors as the parties’ relative ability to pay. *See* Cal. Fam. Code Ann. §§ 2551, 2620–2628 (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. 12 of the 2010 Reg. Sess.; and all propositions on the 6/8/2010 ballot).

III. Acts That Enlarge or Reduce Recovery from Marital Property [§ 6.32]

A. In General [§ 6.33]

Sections 6.2–.31, *supra*, set forth how the various sorts of obligations incurred by a spouse are categorized and how the categories determine the property available for recovery by a creditor. Sections 6.34–.48, *infra*, deal with ways debtors and creditors may either enlarge or reduce the property otherwise available for recovery under section 766.55(2). These include security agreements, marital property agreements, consents, notices, court decrees, gifts, changes in marital status (including a change of domicile, the dissolution of the marriage, and the death of a spouse), and mixing. Certain acts may also affect the recovery by creditors of obligations in existence before the effective date of the Act, notwithstanding that section 766.55(3) provides that such relationships are not altered by the Act.

B. Extension of Credit [§ 6.34]

1. Unsecured Credit [§ 6.35]

Section 766.51(1m)(a) provides that each spouse may manage and control all assets classified as marital property (with the exception discussed below of certain marital property assets used in certain businesses) for the purpose of obtaining an extension of credit for a family-purpose obligation under section 766.55(2)(b). Section 766.56 requires a creditor to consider all marital property assets in evaluating the creditworthiness of a spouse who applies for credit that will result in a family-purpose obligation. The objective of sections 766.51(1m) and 766.56 is to promote equal access to credit by the spouse who earns less or who has fewer assets titled in his or her name.

The right to manage and control marital property for the purpose of obtaining an extension of credit is not unlimited. Unless a spouse may otherwise manage and control a marital property asset used in certain businesses described in section 766.70(3)(a)–(d), such assets may not be used by a spouse to obtain an extension of credit—that is, the creditor need not consider these assets.

2. Secured Credit [§ 6.36]

Management and control of an asset includes the right to create a security interest in the asset. Wis. Stat. § 766.01(11). However, a spouse may not assign, create a security interest in, mortgage, or otherwise encumber a marital property asset unless the asset is otherwise under that spouse's management and control. Wis. Stat. § 766.51(1m)(b). Under these provisions, a spouse may only encumber marital property assets that (1) are held in that spouse's name, (2) are untitled and in that spouse's possession, or (3) are held by the spouses in the alternative. A spouse may not create a security interest in marital property subject to the other spouse's exclusive management and control. *Id.* Either spouse may create a purchase money security interest in a marital property asset, however, because the spouse making the purchase has the right to hold the previously untitled property. *See also* Wis. Stat. § 766.51(1)(am), (b).

For secured transactions governed by the Uniform Commercial Code, a spouse acting alone who may manage and control marital property may sign a security agreement. Wis. Stat. § 409.203(2). (See also the detailed discussion concerning creation of security interest in marital property in chapter 5.) The managing spouse's signature is sufficient to constitute a signature of the "debtor." *See* Wis. Stat. § 409.203(4)(b). It is not necessary that both "owners" or "debtors" sign. If either section 766.55(4m) or section 766.56(2)(c) applies (relating to the creditor's actual knowledge of—or providing the creditor with a copy of—a marital property agreement or court decree under section 766.70), then the provisions of the agreement or decree apply to the creation of the security interest.

The ability to manage and control property to create a security interest is not limited to creating the interest to secure obligations within the family-purpose doctrine. The creditor having an interest in collateral is protected by section 766.55(6), which states, among other things, that the category of obligation under section 766.55(2) does not affect the right of the secured creditor to satisfaction of the obligation from the collateral. However, the use of marital property assets to secure an obligation that is not in the interest of the marriage or the family may subject the spouse who granted the security interest to an interspousal remedy under section 766.70(1) or (5).

A spouse having management and control of a marital property asset may create a security interest in the asset for an antecedent obligation as well as for an obligation incurred contemporaneously with the creation of the interest. For example, the creditor to whom a spouse owes a premarriage obligation may require that the spouse execute a security interest in marital property under the management and control of the obligated spouse, a security interest in property that would not otherwise have been available for recovery by the creditor. *See supra* § 6.24. This requirement may be in exchange for an agreement to forbear attempts at collection. The creditor's rights in the secured marital property asset are protected by section 766.55(6), but the other spouse may have a remedy against the spouse who created the interest. *See Wis. Stat. § 766.70(1), (5).*

➤ **Comment.** Many security agreements in use before the enactment of the Act, including those granting an interest in after-acquired property, refer to property “owned” by the borrower. As payments are made with marital property funds, the other spouse acquires a marital property interest in the assets pledged as collateral. *See Wis. Stat. § 766.63(1).* It is not clear whether section 766.55(6) protects the creditor's interest in collateral owned by the nonincurring spouse on account of such payments. It is similarly unclear whether section 766.55(3), which maintains creditor-debtor relationships in effect before the application of the Act, protects the creditor's interest in such collateral. While the language of the agreement is crucial, it is consistent with the policy of the Act under section 766.55(3) to interpret a provision relating to after-acquired property “owned” by the debtor to continue the security interest in after-acquired marital property assets, particularly because the managing spouse could create a new security interest in the same marital property asset. *See Wis. Stat. § 766.51(1)(am).*

A spouse's marital property interest in a life insurance policy does not affect a creditor's interest in the policy or proceeds assigned to the creditor either as security for a debt or payable to the creditor. *Wis. Stat. § 766.61(4).*

See also Wis. Stat. § 706.02(1)(f) (describing requisites for creation of security interest in homestead); *Liebzeit v. Universal Mortgage Corp. (In re Larson)*, 346 B.R. 486, 489 (Bankr. E.D. Wis. 2006) (concluding that mortgage not signed by both spouses violated section 706.02(1)(f))

and was not valid); *Stanfield v. First Midwest Bank (In re Stanfield)*, 408 B.R. 229 (Bankr. E.D. Wis. 2009) (same); *infra* § 6.88.

C. Marital Property Agreement; Unilateral Statement [§ 6.37]

Another method of restricting or expanding the pool of property that creditors may reach to satisfy obligations is for the spouses to enter into a marital property agreement under the Act. Marriage agreements not governed by the Act that are preserved under section 766.58(12)(a) may also affect the rights of creditors. *See infra* § 6.82 (marriage agreements in bankruptcy context). A unilateral statement under section 766.59, which makes the income on nonmarital property the individual property of the owner, is treated as a marital property agreement as it relates to the rights of third parties. Wis. Stat. § 766.59(5).

Section 766.56(2)(c) states that a creditor is not bound by a property classification, characterization of an obligation, or limitation of management and control rights in a marital property agreement or unilateral statement (or a court decree under section 766.70, *see infra* § 6.42) that affects the creditor's rights unless the agreement or statement is disclosed and the creditor is provided with a copy before credit is granted or before an open-end plan (defined in section 766.555(1)(a)) is entered into. Section 766.56(2)(c) applies to all creditors and is not limited to those who regularly extend credit. *See* Wis. Stat. § 766.01(2r)(a), (c); *Schultz v. Sykes*, 2001 WI App 260, 248 Wis. 2d 791, 638 N.W.2d 76. Knowledge or disclosure of the agreement or decree that is obtained or takes place after credit is extended does not bind the creditor with respect to the obligation or to any renewal, extension, or use of the open-end plan. Wis. Stat. § 766.56(2)(c); *see also Bank One, Appleton, NA v. Reynolds*, 176 Wis. 2d 218, 221–22, 500 N.W.2d 337 (Ct. App. 1993).

➤ **Comment.** It is not clear if it is necessary under section 766.56(2)(c) to provide a creditor with a copy of the entire marital property agreement, or if a memorandum of the agreement quoting only parts relevant to creditors' rights suffices. However, spouses may enter into more than one marital property agreement, and providing a copy of only the relevant agreement or provision is probably sufficient. If another provision of the agreement might be

relevant but is not disclosed and the creditor is not given a copy, the creditor would not be bound by the undisclosed provision.

A creditor who before the obligation is incurred has actual knowledge of a provision in a marital property agreement or unilateral statement that adversely affects the creditor's right to recover is bound by its terms, notwithstanding the fact that the creditor was not provided a copy. Wis. Stat. § 766.55(4m). Apparently the creditor's actual knowledge can be derived from either an oral or a written source, although an oral source may present problems of proof for the spouse wishing to enforce the agreement to protect property recoverable by the creditor in the absence of the agreement. The provision concerning actual knowledge applies to all creditors and not only to those who regularly extend credit. *See* Wis. Stat. § 766.01(2r)(c) (excludes section 766.55(4m) from the general definition of *creditor* in section 766.01(2r)(a) as "a person that regularly extends credit").

➤ **Note.** A marital property agreement can in some cases enlarge a creditor's recovery rights. The effect of sections 766.55(4m) and 766.56(2)(c) is to provide that a creditor without knowledge or without a copy of the agreement cannot be *adversely* affected by a marital property agreement. The benefit of the agreement is not prohibited, and creditors may take advantage of their enhanced right of recovery. For example, an "opt-in" agreement that classifies all property of the parties as marital property subjects the former nonmarital property assets of one spouse to family-purpose obligations incurred by the other spouse. *See infra* ch. 7. Also, an agreement that former marital property assets are the individual property of one spouse increases the assets recoverable by a tort creditor of the spouse owning the individual property. *See supra* §§ 6.26–.28.

Any creditor governed by the Wisconsin Consumer Act, Wis. Stat. chs. 421–427, must give notice on each loan application that the creditor is not bound by the terms of a marital property agreement or unilateral statement under section 766.59 (or a court decree under section 766.70, *see infra* § 6.42) unless the creditor is furnished a copy or has actual knowledge of the adverse provision. Wis. Stat. § 766.56(2)(b). Failure to provide the notice, unless otherwise excused, may result in liability of \$25 per applicant. Wis. Stat. § 766.56(4)(b); *Park Bank-West v. Mueller*, 151 Wis. 2d 476, 484, 444 N.W.2d 754 (Ct. App. 1989); *see infra* §§ 6.39–41.

If a marital property agreement is entered into after an obligation is incurred, the existing creditor will not have had a copy or actual knowledge of the agreement when the obligation arose and will therefore be unaffected by the agreement. *See* Wis. Stat. §§ 766.56(2)(c), .55(4m). Any reclassification of property or limitation of management and control under the agreement will not diminish creditors' rights that arose before the agreement was executed.

➤ **Note.** If the creditor has no knowledge of a marital property agreement that *enhances* the right of the creditor to recover property, such as an agreement that reclassifies individual property as marital property, the creditor may nevertheless recover the assets that would not have been available absent the agreement.

➤ **Practice Tip.** Because marital property agreements may be ineffective with respect to creditors in those instances outlined above, parties to such agreements may wish to retain separate records relating to assets classified as individual property notwithstanding the agreement (e.g., an inheritance), as well as records relating to assets classified as individual property because of the agreement (e.g., wages). For example, assume that a spouse places funds owned at the time of the marriage in the same brokerage account into which deposits from his or her wages are also made, and that a marital property agreement classifies the wages as individual property. If the funds owned at the time of the marriage cannot be traced, they may be reached by the other spouse's family-purpose creditors who had no knowledge or copy of the agreement.

Although marital property agreements may be recorded with registers of deeds, recording does not constitute notice to third parties. *See* Wis. Stat. § 766.56(2)(a). The recording statute, section 59.43(1)(r), does not provide any restriction, requirement, or guidance as to the county in which agreements should be recorded. On the other hand, recording may be useful as evidence of the date on which the agreement was entered into and the status of particular items of property. Also, a marital property agreement containing the legal description of real estate and recorded in the county where the real estate is located does provide notice to subsequent purchasers since it appears in the chain of title under chapter 706.

A tort creditor will rarely have notice of an agreement, because of the unplanned and unintentional nature of most torts. Therefore, the property available to satisfy a tort obligation is not adversely affected by the terms of a marital property agreement. An agreement cannot be used to reduce property available for recovery for a tort unless the injured party had knowledge of the agreement before the tort occurred. *See Schultz v. Sykes*, 2001 WI App 260, 248 Wis. 2d 791, 638 N.W.2d 76.

D. Creditor's Written Consent [§ 6.38]

Another method by which collection rights can be reduced is for a creditor to consent to limited rights. Wis. Stat. § 766.55(4). The consent must be signed by the creditor and must be in writing. *Id.*

➤ **Practice Tip.** This device may be useful to a spouse who does not have a marital property agreement but who nevertheless wishes to protect a particular asset or his or her spouse's property, such as a business or the other spouse's wages. Oral agreements not to pursue certain property for collection appear to be unenforceable (because of the requirement that the consent be in writing) except to the extent that estoppel may apply under particular circumstances. The creditor's written-consent device appears not to be used widely in commercial transactions.

E. Creditor's Notice to Nonapplicant Spouse [§ 6.39]

1. Wisconsin Consumer Act Transactions [§ 6.40]

Section 766.56(3)(b) requires a creditor in a Wisconsin Consumer Act transaction to notify a nonapplicant spouse before payment is due if the other spouse has been extended credit that may result in a family-purpose obligation. The notice must describe the nature of the credit and must state that an obligation in the interest of the marriage or the family has been or may be incurred.

The statutory notice requirement is mandatory, but the Act does not specify the consequences if a creditor fails to give notice, if the applicant gives an incorrect address, or if the notice is not received. In *Park Bank-West v. Mueller*, 151 Wis. 2d 476, 444 N.W.2d 754 (Ct. App. 1989), the court of appeals found that the bank's failure to give the proper notice

under section 766.56(3)(b) to the spouse of a customer who had received a \$25,000 loan did not bar recovery of marital property assets from the nonapplicant spouse to satisfy the obligation. When the obligation was incurred, the section 766.56(3)(b) notice was addressed only to the husband, not to the nonapplicant wife or to both spouses, as is required by statute. The wife learned of the loan only after her husband's death, when the bank demanded payment. The loan balance was approximately \$15,000. *Id.* at 478.

The wife argued that the bank should not be allowed to recover from her because the section 766.56(3)(b) notice had not been given. However, the court held that the only penalty for failure to give notice is a \$25 liability, *see* Wis. Stat. § 766.56(4)(b), a penalty that the court said is so lenient as to indicate that the legislative purpose in the notice requirement was to provide information only, not to limit recovery. *Park Bank-West*, 151 Wis. 2d at 484. The court presumed this to be an unsecured consumer-credit transaction requiring section 766.56(3)(b) notice because the possibility that it was not such a transaction was not raised until appeal. *Id.* at 481–82; *see also infra* ch. 12.

2. Open-end Credit Plans [§ 6.41]

The Act contains special rules governing open-end credit plans that were entered into by one spouse before the spouses' determination date, but for which charges or advances under the plan were made after the spouses' determination date. *See* Wis. Stat. § 766.555. These rules apply to all such plans and are not limited to plans governed by the Wisconsin Consumer Act.

The first category of affected plans involves spouses whose determination date is January 1, 1986—that is, persons who were married and living in Wisconsin when the Act became effective. *See* Wis. Stat. § 766.555(2). The person who entered the plan could have been married or unmarried at the time of entering the plan. Creditors could give notice to the spouses of these plan participants, stating that a family-purpose obligation may be incurred under the plan and that such an obligation may be satisfied from all marital property assets, including income, as well as from the nonmarital property assets of the incurring spouse. *See* Wis. Stat. § 766.555(2)(c). The notice is considered given when mailed. It may be in an envelope addressed to the incurring spouse as long as there is notice on the outside of the envelope that it contains

important information for both spouses. *Id.* If the notice was given, then charges incurred for a family purpose under the plan after the date of the notice may be satisfied from the incurring spouse's nonmarital property assets and from all marital property. *Id.* If the notice was not given, the creditor may recover only from nonmarital property assets of the incurring spouse and from marital property assets that would have been available but for the enactment of the Act. Wis. Stat. § 766.555(2)(b).

The second category of plans affected involves spouses whose determination date is after January 1, 1986. *See* Wis. Stat. § 766.555(3). The person who entered the plan could have been unmarried or married but without an established marital domicile in Wisconsin at the time of entering the plan. In this category, obligations incurred in the interest of the marriage or the family may be satisfied from nonmarital property assets of the incurring spouse and from all marital property assets, even though no notice of the extension of credit was given to the nonincurring spouse. Wis. Stat. § 766.555(3)(c). This provision relieves the creditor of supplying notice to the nonincurring spouse, because there is no practical way for a creditor to find out that the plan participant has been married. *See* Wis. Stat. Ann. § 766.555 Legis. Council Notes—1985 Act 37, § 99 (West 2009). The provision also relieves the creditor of sending a notice when a plan participant moves to Wisconsin.

If a spouse enters into an open-end credit plan, credit advanced under the plan will usually result in a family-purpose obligation for which the creditor may recover from all marital property assets (with notice, when required, to the nonparticipating spouse that the application has been made, Wis. Stat. § 766.555(2)(c)). To avoid subjecting all marital property assets to such recovery, however, the nonparticipating spouse may, by giving notice under section 422.4155, terminate a plan governed by the Wisconsin Consumer Act. Wis. Stat. § 766.565(5). Since any plan—whether entered into before or after the spouses' determination date—may result in an obligation under section 766.55(2)(b), any right to terminate the plan would apply to all such plans at any time.

If the spouses have entered into a marital property agreement and one spouse has entered into an open-end plan, disclosure of the agreement after the plan has been entered into will not bind the creditor to collection rights set forth in the agreement upon future use of the plan. *See* Wis. Stat. § 766.55(4m). A spouse wishing to avoid recovery of marital property upon future use of a plan governed by the Wisconsin Consumer Act must terminate the plan under section 422.4155 and provide the

creditor with a copy of the marital agreement. The creditor will be bound by the agreement (or by a court decree or unilateral statement) for any new plan entered into in the future by either spouse. *See* Wis. Stat. §§ 766.55(4m), .565(5); *supra* § 6.37.

F. Court Orders Under Section 766.70 [§ 6.42]

A court decree under section 766.70 may enlarge or reduce the extent of a spouse's obligations, change the classification of property, or limit creditors' collection rights in certain property. *See infra* ch. 8. Without actual knowledge of such a decree or without having received a copy of the decree before credit is extended, creditors are not bound by terms adversely affecting their rights. Wis. Stat. §§ 766.55(4m), .56(2)(c). This protection corresponds to the protection of the rights of creditors without notice of a marital property agreement. *See* Wis. Stat. §§ 766.55(4m), .56(2)(c); *see also supra* § 6.37. Creditors' rights in effect before the entry of the decree are likewise unaffected. Wis. Stat. §§ 766.55(4m), .56(2)(c).

The effect of a decree is likely to come into question when a creditor attempts to recover assets previously classified as marital property and held by the incurring spouse but reclassified in an action under section 766.70, resulting in the assets becoming the individual property of the nonincurring spouse. Without notice of the decree, the creditor may recover the reclassified assets notwithstanding the nonincurring spouse's individual property ownership of the asset.

A court order under section 766.70 may enlarge a creditor's rights, and the resulting property classification will be recognized, even if the creditor had no notice of the decree. For example, the tort creditor of a spouse who receives former marital property assets reclassified by decree as individual property may recover from all such individual property assets. The creditor is not limited to recovery from only the tortfeasor spouse's one-half interest in the assets, as it would be if the assets had remained classified as marital property. Wis. Stat. § 766.55(2)(cm).

➤ **Note.** Sections 766.55(4m) and 766.56(2)(c) refer only to court decrees under section 766.70 and not to court orders under other statutes or rules of law. Therefore, if an asset is classified by a court decree not under section 766.70 in a way that in any manner affects

the rights of a creditor without notice of the decree, the creditor is bound by the classification in the decree.

G. Reclassification by Gift; Gifts to Third Parties

[§ 6.43]

Gifts between spouses can reclassify property to enlarge or to reduce the pool of property available to creditors. Wis. Stat. § 766.31(10). Unless the gift is a fraudulent conveyance, *see* Wis. Stat. ch. 242 (Uniform Fraudulent Transfer Act), the creditor may not disregard the reclassification of the asset by a gift of the asset from one spouse to the other. Thus, with regard to creditors, the effect of reclassification by gift differs from that of reclassification by a marital property agreement, unilateral statement, or court decree under section 766.70, *see* Wis. Stat. §§ 766.55(4m), .56(2)(c); *see also supra* §§ 6.37, .42.

A gift of an individual property asset, or a gift of the donor spouse's marital property interest in an asset, from one spouse to the other that the donor spouse intends to be the donee's individual property reclassifies not just the asset but also the income as the donee's individual property (unless the donor provides otherwise). Wis. Stat. § 766.31(10). Such income and accumulations are therefore not available to family-purpose creditors of the donor spouse unless there has been a fraudulent conveyance.

A creditor may ask if an applicant is married, unmarried, or separated under a decree of legal separation. Wis. Stat. § 766.56(2)(d). A creditor to which the Wisconsin Consumer Act applies is also required to provide a notice that an agreement or unilateral statement under section 766.59 does not adversely affect the creditor's rights of recovery unless the creditor is provided a copy or given actual notice. Wis. Stat. §§ 766.56(2)(b), .59(5). However, asking a credit applicant about previous transfers by gift or the effect of such transfers is not specifically allowed.

A spouse having management and control of marital property may make gratuitous transfers of both spouses' interests in marital property. Wis. Stat. § 766.51(4). A gift by one spouse of marital property to a third party in excess of the limits under section 766.53 is subject to the remedies of the nonparticipating spouse; however, the right to recover such property may be exercised only by a spouse. Wis. Stat.

§ 766.70(6)(a). A creditor may not exercise a spouse's right to recover a gift of a marital property asset in excess of allowable limits. *See id.*

A gift may also occur if a spouse mixes his or her nonmarital property with marital property. Mixing reclassifies the nonmarital property as marital property unless the nonmarital property can be traced. Wis. Stat. § 766.63(1); *see supra* ch. 3; *see also infra* § 6.48 (effect on creditors' recovery).

H. Changes in Spouse's Status [§ 6.44]

1. Change in Domicile [§ 6.45]

Marital property assets that are removed to another state maintain their classification and continue to be subject to recovery by creditors according to the category of obligation under section 766.55(2). *See* Wis. Stat. § 766.55(7). The assets maintain their classification even if either or both of the spouses are no longer domiciled in Wisconsin. *See* Wis. Stat. § 766.55(7); *see also* Wis. Stat. § 766.03(3). However, the classification of property acquired by spouses after either or both of them are no longer domiciled in Wisconsin is determined by the law of the new domicile.

The Act's definition of during marriage makes it clear that the term does not include any period after the effective date of the Act in which one of the spouses is not domiciled in Wisconsin. Wis. Stat. § 766.01(8). Therefore, if one of the spouses establishes a domicile outside Wisconsin, the Act no longer applies to the marriage.

➤ **Comment.** Although the cessation of the Act's applicability does not, by itself, modify rights acquired while the Act was in effect, it may have a practical effect on creditors' recovery rights that arose while the spouses were domiciled in Wisconsin. A creditor who relied on the earned income of the nonincurring spouse may have substantially diminished rights if both spouses or the spouse generating the income moves to a common law property state. *See* A.M. Swarthout, Annotation, *Change of Domicile as Affecting Character of Property Previously Acquired as Separate or Community Property*, 14 A.L.R.3d 404 (1967).

2. Dissolution of Marriage [§ 6.46]

The dissolution of a marriage will generally reduce the assets available to a creditor. The income of the former spouses is no longer marital property. Consequently, section 766.55(2m) provides that, unless the dissolution decree makes the nonincurring spouse responsible for the obligation, a creditor may not recover earnings of the nonincurring former spouse to satisfy a family-purpose obligation previously incurred by the other spouse.

➤ **Note.** The above provision diminishes a creditor's rights. However, the creditor's rights will not be diminished by the dissolution of the marriage if the obligation falls within the doctrine of necessities, for which both spouses are personally liable without the limitation of section 766.55(2m). *St. Mary's Hosp. Med. Ctr. v. Brody*, 186 Wis. 2d 100, 519 N.W.2d 706 (Ct. App. 1994); *see also supra* § 6.6.

If a nonincurring spouse is assigned former marital property assets under a judgment of dissolution, that property is subject to recovery by creditors of family-purpose obligations under section 766.55(2)(b) just as it was before the judgment, but only "to the extent of the value of the [former] marital property at the date of the decree." Wis. Stat. § 766.55(2m). Any postjudgment appreciation belongs to the spouse who receives the assets. *Id.*; *see also Watters v. Doud*, 631 P.2d 369 (Wash. 1981); Annotation, *Spouse's Liability, After Divorce, for Community Debt Contracted by Other Spouse During Marriage*, 20 A.L.R.4th 211 (1983).

➤ **Comment.** Whether the creditor may recover only the asset itself or may trace the proceeds of the asset to other assets is not clear. It appears that a dollar figure would be determined to set the upper limit of the nonobligated former spouse's liability, and this amount could be recovered from the former marital property assets received in the dissolution or from any other assets traceable to the assets received. If an asset has decreased in value, it appears that the creditor may recover only the depreciated value (which is all that would have been recoverable had the marriage continued).

➤ **Note.** Section 766.55(2m) does not provide for the recovery, after dissolution, of former marital property from the nonobligated spouse

by creditors other than family-purpose creditors, and such other creditors would presumably be restricted to recovery from the spouse who is personally liable. *See, e.g., Sokaogon Gaming Enter. Corp. v. Curda-Derickson (In re Marriage of Curda-Derickson v. Derickson)*, 2003 WI App 167, 266 Wis.2d 453, 668 N.W.2d 736 (creditor intervened in dissolution action and attempted to have restitution debt of husband for embezzlement found to be a family-purpose debt; court held obligation was tort debt of husband that was not recoverable from former marital property wife received in property division).

The judgment of dissolution may provide that the nonincurring spouse is responsible for particular obligations. Such a provision would allow recovery from the nonincurring spouse's postjudgment income and from any other property as if both spouses had incurred the obligation. Wis. Stat. § 766.55(2m).

➤ **Practice Tip.** A creditor who has relied on the income of the nonincurring spouse in extending credit may wish to intervene in the dissolution action to urge that the nonincurring spouse be made responsible for the obligation after the dissolution. *See* Wis. Stat. § 803.09.

The nonincurring spouse may also be responsible for an obligation, notwithstanding whether the judgment of dissolution provides responsibility for payment, if the obligation came within the doctrine of necessities and the nonincurring spouse is found personally liable. *See supra* § 6.6. The circuit court in *St. Mary's Hospital Medical Center*, 186 Wis. 2d 100, had held that an obligation that was incurred during the marriage for medical services for the former husband, and was assigned to the husband in the dissolution decree, could be satisfied from the marital property the former wife received in the decree only to the extent of the property's value at the date of the decree. *Id.* at 110; Wis. Stat. § 766.55(2m). The court of appeals reversed the limitation and held that the obligation could be satisfied from *all* of the former wife's assets, which would include her future income. *Brody*, 186 Wis. 2d at 113. The former wife was found to be personally liable for the full amount, even though she had not incurred the debt. Since the obligation was for necessary goods and services for a spouse, it was categorized as a support obligation under section 766.55(2)(a), not a family-purpose obligation under section 766.55(2)(b) to which section 766.55(2m) applied. The court of appeals reached the same result in *Froedtert*

Memorial Lutheran Hospital, Inc. v. Mueller, No. 95-1449, 1996 WL 250835 (Wis. Ct. App. May 14, 1996) (unpublished opinion not citable per section 809.23(3)). *See also supra* § 6.5.

➤ **Comment.** The effect of an annulment decree on creditors' rights that arose before the decree was issued is unclear. Although the decree may declare a marriage void from its inception, the parties are considered legally married until the decree is issued. *See* Wis. Stat. § 767.313(2). A property division occurs in an annulment, just as in other dissolution actions, and thus postannulment creditors' rights could be the same as they would be after any other decree of dissolution. *See* Wis. Stat. § 767.61(1); *see also Sinai Samaritan Med. Ctr., Inc. v. McCabe*, 197 Wis. 2d 709, 541 N.W.2d 190 (Ct. App. 1995) (holding that marriage may not be annulled after spouse's death and that surviving spouse was liable for deceased spouse's medical expenses under doctrine of necessities, even though marriage appeared to be void). On the other hand, it is arguable that the nullification of the marriage results in classification of the parties' assets under common law principles, as if there had never been a marriage, and therefore no marital property assets or former marital property assets would exist.

3. Death of Spouse [§ 6.47]

The death of a spouse terminates the marriage, and the surviving spouse and the estate become tenants in common with respect to the former marital property. Wis. Stat. § 861.01(1). The 1985 Trailer Bill created a framework for satisfaction of spousal obligations after the death of a spouse; the framework generally follows the provisions for satisfaction of obligations during marriage. *See infra* ch. 12.

The estate may contain assets that become subject to creditors' claims, even though those assets were not available when held by the surviving spouse. For example, in *Mundell v. Mundell (In re Estate of Mundell)*, 857 P.2d 631 (Idaho 1993), the decedent's community interest in an individual retirement account (IRA) held by his surviving spouse became property of his probate estate. These funds were subject to the claims of his heirs, but they would also be subject to creditors' claims. Under Wisconsin law, an IRA would be exempt under section 815.18(3)(j) when held by a spouse, but there is no exemption from recovery by creditors for such an asset under section 859.18(4) or (5).

In addition to assets owned at the death of a spouse, the subsequent income of the surviving spouse is subject to recovery for family-purpose obligations incurred by the deceased spouse under an extension of credit (i.e., by a creditor who regularly extends credit) or for a state tax obligation. Wis. Stat. § 859.18(3). To the extent that a creditor relied for repayment on income generated by the deceased spouse, the creditor's ability to recover may be diminished (as it would have been under pre-effective date law), but the creditor's rights may be substantially protected by having available the income of the surviving spouse, even though that income is no longer marital property. This right of creditors for recovery of obligations after the death of the incurring spouse is in contrast to creditors' rights after a dissolution under section 766.55(2m). Section 766.55(2m) prohibits a creditor from recovering from the future income of the nonincurring spouse after a dissolution unless the decree provides otherwise. *See supra* § 6.46.

If the decedent spouse is the only incurring spouse for family-purpose obligations, the surviving spouse's right to receive nonprobate transfers such as life insurance, deferred employment benefits, joint tenancy property, and survivorship marital property is not subject to the claims of such creditors. Wis. Stat. § 859.18(4); *Wonka v. Cari*, 2001 WI App 274, 249 Wis. 2d 23, 637 N.W.2d 92. To the extent that such property was available to family-purpose creditors before the decedent's death, the rights of those creditors are diminished. Nevertheless, these nonprobate transfers may be subject to recovery if the obligation came within the doctrine of necessities and the surviving spouse is personally liable. *See supra* § 6.6. Assets received pursuant to a marital property agreement that provides for transfer of property at the death of a spouse are subject to recovery by creditors unless the assets were not available while both spouses were alive and the agreement is binding on the creditor. Wis. Stat. § 859.18(6).

If the surviving spouse is the only obligated or incurring spouse under section 766.55(2), those creditors may not recover certain nonprobate transfers from recipients other than the surviving spouse. Wis. Stat. § 859.18(4)(b). However, because the surviving spouse is personally liable to those creditors, other assets coming into the hands of the surviving spouse on account of nonprobate transfers upon the death of the other spouse, or on account of the surviving spouse's marital property interest in assets held by the decedent, may be available for recovery, unless the assets are otherwise exempt. *See* Wis. Stat. § 815.18(3). Assets recovered through elections may also be available. *See infra* ch.

12. Furthermore, under limited circumstances, a surviving spouse may be obliged to make elections for the benefit of certain creditors. In *Tannler v. Wisconsin Department of Health & Social Services*, 211 Wis. 2d 179, 564 N.W.2d 735 (1997), the guardian ad litem for an institutionalized surviving spouse failed to make any marital property elections after the death of the noninstitutionalized spouse. This failure to maximize resources to provide for the care of the institutionalized surviving spouse constituted divestment for Medical Assistance purposes, and the surviving spouse was denied benefits. *Id.* at 191.

I. Mixing [§ 6.48]

Mixing nonmarital property funds with marital property funds reclassifies nonmarital property funds as marital property unless the nonmarital property funds can be traced. Wis. Stat. § 766.63(1); *see supra* ch. 3. Under this rule, a family-purpose creditor may be able to recover from funds that would not have been available had the funds not been reclassified as marital property.

➤ *Example.* A spouse with funds accumulated before marriage (individual property funds) continues to deposit earned income after marriage in the same bank account. Numerous deposits and withdrawals are made during the marriage, making it impossible to trace the individual property funds. The other spouse incurs a family-purpose obligation, and the creditor attempts to recover by garnishment of the nonincurring spouse's bank account, which now includes mixed individual property funds and marital property funds. The creditor thus is able to recover from the nonincurring spouse's individual property funds that by mixing have been reclassified as marital property.

An asset classified as nonmarital property can become classified as mixed property by a spouse's application of substantial labor resulting in substantial appreciation of the asset. Wis. Stat. § 766.63(2). Reduction of indebtedness on a nonmarital property asset using marital property funds can also result in the asset's classification as mixed property. If the nonmarital property component of the asset cannot be traced, the asset is classified as marital property. Wis. Stat. § 766.63(1). The entire asset is then subject to recovery for family-purpose obligations incurred by either spouse. *See* Wis. Stat. § 766.55(2)(b).

➤ **Comment.** The Act does not address the effects of mixing more than one type of marital property assets or funds. The effects of such mixing might be important if either spouse has premarriage or pre-effective date creditors. Obligations incurred before the marriage may be satisfied from marital property that would have been the property of the incurring spouse but for the marriage, and obligations incurred before January 1, 1986, may be satisfied from marital property that would have been the property of the incurring spouse but for the Act. Wis. Stat. § 766.55(2)(c)1., 2. Conversely, marital property generated by the nonincurring spouse is not available for recovery by the incurring spouse's premarriage or pre-effective date creditors. However, if the nonincurring spouse permits such marital property funds to be mixed with marital property funds generated by the incurring spouse (e.g., in a joint bank account), it appears, by analogy to rules relating to mixing marital and nonmarital property assets or funds, that the creditor could recover from all such funds.

IV. Creditors' Remedies [§ 6.49]

A. In General [§ 6.50]

The Act does not change substantive and procedural rules for establishing and enforcing the personal liability of a debtor to a creditor. In certain cases, however, the Act expands the property available to a creditor to satisfy an obligation of a debtor found personally liable. Personal liability to a creditor subjects the debtor's nonexempt nonmarital property assets to recovery by the creditor. Certain of the debtor's marital property assets are also subject to recovery, depending on the category of obligation under section 766.55(2). Thus, a nonincurring spouse's interest in marital property assets may be involuntarily recovered to satisfy family-purpose obligations incurred by the other spouse without a finding of personal liability on the part of the nonincurring spouse. This result is necessary to support the expanded availability of credit to spouses, which is discussed in chapter 5, *supra*. Whether property may be recovered depends on the classification of the spouses' property under the Act and the categories of obligations described in section 766.55(2). The property available to satisfy each category is discussed in sections 6.2–.31, *supra*, and chapter 5, *supra*. Additional factors that expand or reduce the property available to a creditor are discussed in sections 6.32–.48, *supra*.

Sections 6.51–.65, *infra*, deal with procedures available to enforce a creditor’s right to reach assets determined available to satisfy the applicable category of obligation. The issue of personal liability is resolved in the initial action, and if the judgment is not satisfied, assets are recoverable by execution, garnishment, appointment of a receiver, and other creditors’ remedies.

B. Procedures for Obtaining Judgment [§ 6.51]

1. Parties [§ 6.52]

a. Actions Against Spouses [§ 6.53]

The general rule is that for an obligation described in section 766.55(2) (which includes almost all obligations for which a spouse may be liable), a creditor may proceed against the obligated or incurring spouse alone or against both spouses. Wis. Stat. § 803.045(1); *Schultz v. Sykes*, 2001 WI App 260, 248 Wis. 2d 791, 638 N.W.2d 76. The nonobligated or nonincurring spouse is neither a necessary nor an indispensable party. If the creditor having an obligation to which section 766.55(2)(a) or (b) applies cannot obtain jurisdiction over the obligated spouse, the creditor may proceed against the nonobligated spouse alone. Wis. Stat. § 803.045(2).

Other community property states also provide for recovery from community property (or in some cases, impose joint and several liability) when only one spouse is a party. *See, e.g., Gagan v. Monroe*, 269 F.3d 871 (7th Cir. 2001) (holding that debt against husband in federal court in Indiana was enforceable against Arizona community property, and failure to join wife did not violate her due process rights); *French Mkt. Homestead, FSA v. Huddleston*, 579 So. 2d 1079 (La. Ct. App. 1991) (holding that wife was not entitled to service of foreclosure complaint concerning community property asset on which she had executed mortgage). In Washington, each spouse is treated as an agent for the community. The rule in Washington assumes that the spouse who has been served in the action will guard the interests of the nonparty spouse in the spouses’ community property assets by giving that spouse appropriate notification or defending the action. *Komm v. Department of Soc. & Health Servs.*, 597 P.2d 1372 (Wash. Ct. App. 1979). The good-faith duty in Wisconsin under section 766.15 also supports that rationale.

The Wisconsin Rules of Civil Procedure provide that when the incurring spouse is a defendant, the nonincurring spouse may join or be joined as a permissive party. The nonincurring spouse is not a real party in interest in the action, but the nonincurring spouse has an interest in marital property assets that might be recovered or subject to recovery. Wis. Stat. § 803.04(3). The nonincurring spouse would not be a proper party only when that spouse has no interest in property that might be reached by the creditor, such as when the spouses have a marital property agreement classifying all their property as individual property and the creditor had a copy of the agreement before the obligation was incurred. Otherwise, marital property assets are available to satisfy all categories of obligations under section 766.55(2), although the availability of particular assets depends on which spouse generated the assets and when the obligation was incurred. For example, the nonincurring spouse's interest in marital property assets, regardless of which spouse holds the assets, is not available to satisfy a plaintiff's tort claim against the incurring spouse; only the incurring spouse's one-half interest in marital property assets held by either spouse is subject to recovery. Wis. Stat. § 766.55(2)(cm). Marital property assets remaining after the tort obligation to the plaintiff has been satisfied continue to be classified as marital property. Therefore, the incurring spouse continues to have a one-half interest in the remaining marital property assets, with the practical result of diminishing the nonincurring spouse's interest in marital property assets. *See* Wis. Stat. § 766.70(5).

In most instances of obligations other than those incurred before the spouses' determination date, it is beneficial to the creditor to join both spouses as defendants in the initial action. Doing so allows adjudication of the category of obligation at the same time that liability is determined. The judgment can (although it need not) determine the category of obligation if both spouses are joined. *See* Wis. Stat. § 806.15(4). Without a determination of category, the obligation is presumed to be within the family-purpose doctrine. *See* Wis. Stat. § 766.55(1). Joining both spouses avoids the inefficiency and expense of having that family-purpose presumption attacked by the nonjoined spouse in postjudgment proceedings in aid of execution. *See infra* §§ 6.56, .59–.62. If both spouses are joined, a determination by the court of the category of obligation is not subject to later attack. Joining both spouses also establishes and protects a judgment creditor's lien on real estate held by the nonobligated spouse. *See infra* § 6.58. If the postjudgment action is a garnishment action affecting the property of a spouse who was not a

party to the principal action, the spouse must be a defendant in the garnishment action. Wis. Stat. § 812.02(2e).

If an action in rem, such as a real estate foreclosure, relates to a marital property asset, it appears that both spouses must be joined as defendants. Wis. Stat. § 801.12(1). Section 801.12(1) states that the interests of a defendant in an asset that is the subject of an in rem or quasi in rem action may be affected only if he or she is served with a summons as provided in that section. This provision is inconsistent with section 766.01(11), which defines management and control to include both instituting and defending a civil action. If the asset that is the subject of the action is classified as marital property and is held by one spouse alone, that spouse alone should be able to defend the action. *See* Wis. Stat. § 766.51(1)(am). Therefore, because of this inconsistency, it might be the better practice to serve both spouses in a foreclosure action involving real estate that may be classified as marital property.

A practical problem arises for a creditor who wishes to join both spouses but does not know if the obligated spouse is married or does not know the name of the spouse. One possible solution is that used in *Northern Commercial Co. v. E.J. Hermann Co.*, 593 P.2d 1332 (Wash. Ct. App. 1979). The full designation of the defendants was “E.J. Hermann Co., Inc., a Washington corporation, and E.J. Hermann, and Jane Doe Hermann, his wife.” When discovery reveals the spouse’s name, the proper designation can be made, or the reference to the defendant’s spouse can be eliminated if there is no spouse. *See* Wis. Stat. § 807.12. Of course, due diligence in giving notice to the nonobligated spouse to obtain personal jurisdiction under section 801.11 would be necessary. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

See also Mann v. GTCR Golder Rauner, L.L.C., 351 B.R. 714, 722–24 (D. Ariz. 2006) (holding that amendment of complaint to replace “Jane Doe” with defendant’s wife’s actual name related back to original complaint, making action timely as to her, when purpose of including her was to bind marital community).

If both spouses are named as defendants only because marital property may be subject to recovery, it might promote clarity to caption the action to show that only one spouse is alleged to be personally liable. For example, the caption might designate the defendants as “John Smith, individually, and John Smith and Mary Smith, husband and wife, in

relation to their marital property.” If both are alleged to be personally liable, the caption could so state. This designation was used by a trial court in *Rauen v. Kloth*, No. 87-CV-620 (Wis. Cir. Ct. Marathon County), reported in *A Pleading Suggestion*, Law. Marital Prop. F., May 1988, at 10. That case also found the nontortfeasor wife to be a proper party even though no personal liability was sought against her. The practice in some community property states is to add “as a marital community” after the names of the spouses as defendants, but Wisconsin does not recognize marital property as a separate entity, distinct from a form of ownership by the spouses.

If the spouse of a defendant is joined in the action and for any reason should not be included, the court may upon motion dismiss the spouse as a party. Wis. Stat. § 803.06(1). However, if a spouse is dismissed as a party, the spouse will not be a “named defendant in the action” and will not be “named in the judgment.” Without these designations, a judgment against the liable spouse will not result in a lien (or apparent lien) on real estate held by the defendant’s spouse. Wis. Stat. § 806.15(4); *see infra* § 6.58.

b. Actions by Spouses [§ 6.54]

If a spouse is the plaintiff in an action, it appears that the plaintiff’s spouse may request to be joined as a party, or the court may join the plaintiff’s spouse as a party upon the defendant’s request, whether or not the plaintiff’s spouse is a necessary or indispensable party. Wis. Stat. § 803.04(3). This right exists even if one spouse alone has the right to bring the action. *See* Wis. Stat. § 766.51(1)(f) (providing that spouse having claim for relief under “other law” has right to manage and control action); *see also* Wis. Stat. § 766.01(11).

If the spouse of a plaintiff is joined in the action and for any reason should not be included, the court may upon motion dismiss the spouse as a party. Wis. Stat. § 803.06(1).

2. Pleading [§ 6.55]

In a case in which an incurring spouse is a defendant, the complaint should contain allegations necessary to determine the spouse’s personal liability. The complaint also should contain any allegations that are

specific to the cause of action and are independent of the issue of classification of the spouse's assets or the category of the obligation under section 766.55(2), such as the statute giving rise to the action or a demand for a jury trial. The same allegations must be made if the nonincurring spouse is also included as a defendant under section 803.045(1). If the creditor wishes the right to reach all marital property assets determined in the initial action, the creditor must also allege facts sufficient to show the family-purpose nature of the obligation. *See* Wis. Stat. § 806.15(4) (judgment may determine category of obligation under section 766.55(2) if both spouses are joined). If the incurring spouse has executed a family-purpose statement under section 766.55(1), this should be stated. The creditor asserting the personal liability of a spouse under the necessities doctrine should state facts sufficient to establish liability and should include a request for such a finding in the prayer for relief.

If the plaintiff is aware, or becomes aware after discovery, that the nonobligated spouse holds marital property assets that could be subject to a judicial lien under section 806.15(4), then this allegation and a description of the property should be added to the pleadings to make the pleadings conform to the judgment identifying the property. *See infra* § 6.58.

The creditor in a Wisconsin Consumer Act transaction involving an extension of credit under section 766.56 may wish to allege that the applicant's spouse was given notice of the extension under section 766.56(3)(b), provided such a notice was actually given.

➤ **Note.** Under the holding in *Park Bank-West v. Mueller*, 151 Wis. 2d 476, 444 N.W.2d 754 (Ct. App. 1989), failure to provide notice under section 766.56(3)(b) would not affect the creditor's right to recover. The only sanction for failure to provide notice is a \$25 liability to the nonapplicant spouse. *Id.*; Wis. Stat. § 766.56(4)(b).

The creditor in a Wisconsin Consumer Act transaction may also wish to plead that it gave to the applicant proper notice under section 766.56(2)(b) (stating that no provision of a marital property agreement, unilateral statement under section 766.59, or court decree under section 766.70 adversely affects a creditor's rights unless a copy is provided) and that no such instrument was presented—again, provided such a notice was actually given.

➤ **Note.** The above allegation may not be necessary, since by analogy to *Park Bank-West*, it appears that the creditor's failure to give notice results only in the \$25 liability to the applicant imposed by section 766.56(4)(b). However, such allegations may be desirable to provide a complete picture.

If the defendant gave the creditor a copy of an agreement, a unilateral statement, or a court decree under section 766.70, or if the creditor consented in writing to limiting its rights of recovery, the defendant should plead these as affirmative defenses.

The existence, identity, and location of the defendant's spouse might not arise until discovery. *See* Wis. Stat. § 802.09 (amended pleadings).

3. Notice; Personal Jurisdiction [§ 6.56]

A creditor who decides to join a nonobligated spouse must serve that spouse to obtain personal jurisdiction over him or her. *See* Wis. Stat. § 801.11; *see also* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The defendant obligated spouse alone has management and control of the action that can result in subjecting marital property assets to recovery by the creditor, but without joinder and proper service on the nonobligated spouse, the category of debt may be subject to collateral attack in postjudgment proceedings to enforce recovery. *See infra* §§ 6.59–.62. For example, in *Knittle v. Knittle*, 467 P.2d 200 (Wash. Ct. App. 1970), the nonincurring wife was not joined in the initial action to set arrearages for the husband's support of a child from his prior marriage. However, on appeal the court held that the wife was entitled to join in the action brought in aid of execution to collect the arrearages and to raise any defenses she could have raised in the initial action. Sections 803.03(1)(b), 806.15(4), and 812.02(2e) embody the same principle in Wisconsin.

➤ **Practice Tip.** To avoid the possibility of postjudgment litigation, it would be good practice to attempt to discover the identity and location of the defendant's spouse after the commencement of the action so the defendant's spouse could be joined under section 803.04(3) and served.

If the plaintiff with "reasonable diligence" cannot serve the defendant in an action, substituted service on the spouse of the defendant (or any

person over age 14) is the equivalent of service on the defendant and is adequate to bind the defendant personally, provided that the spouses are living together. Wis. Stat. § 801.11(1)(b). If the spouses are living apart, substituted service on the spouse under section 801.11(1)(b) is not adequate. The plaintiff can obtain personal jurisdiction by publication if with reasonable diligence the nonapplicant spouse cannot be served by personal or substituted service. Wis. Stat. § 801.11(1)(c).

4. Discovery [§ 6.57]

Permissible avenues of discovery are expanded under the Act because of the additional issues that can arise in an initial proceeding. Discoverable facts include a party's marital status, the identity of the spouse, the purpose of the transaction, and the classification of assets owned by the spouses, if such assets are subject to recovery. This information is necessary to adjudicate the category of debt under section 766.55(2).

Ordinarily the assets from which a creditor intends to recover to satisfy a judgment are not relevant in the initial action that determines personal liability. However, under the Act a judgment can include a provision that specific real property held by the spouse or former spouse of the judgment debtor is available to satisfy the obligation. Wis. Stat. § 806.15(4); *see infra* § 6.58. Information concerning any such property would therefore be subject to discovery.

5. Judgment; Judgment Lien [§ 6.58]

The findings of fact, conclusions of law, and judgment determine personal liability on the part of the obligated spouse who is the defendant in a civil action. The judgment also may determine the category of obligation and may provide that specific real estate is available to satisfy the obligation. Wis. Stat. § 806.15(4). The properly docketed judgment creates a lien on the real estate of "every person against whom the judgment is rendered" that is located in the county where the judgment is docketed. Wis. Stat. § 806.15(1). The docket includes the name and address of the judgment debtor and of the spouse or former spouse who is named in the judgment. Wis. Stat. § 806.10(1)(a). Because the latter spouse is "named" in the judgment, that spouse is included, even if he or

she was joined in an action for which he or she was not personally liable. Wis. Stat. § 806.15(4).

➤ *Comment.* It is not clear how a clerk shows on the docket that a distinction exists between a spouse who is personally liable and a spouse who is not personally liable but whose property may be affected by the judgment. However, the order for judgment might provide whether the judgment is to be docketed in the names of one or both of the spouses.

Section 806.15(4) provides that a judgment does not become a lien on real estate held by the spouse or former spouse of the judgment debtor unless (1) the spouse is named in the judgment, (2) the obligation is determined to be an obligation described in section 766.55(2), and (3) the real estate is expressly determined to be available to satisfy the obligation under section 766.55(2) or is acquired after the judgment is docketed. There is no lien if the nonincurring spouse is not a named defendant or all the other conditions under section 806.15(4) are not met. A problem arises, however, when the nonincurring spouse is a party but no specific real estate is determined to be subject to the judgment lien.

After-acquired real estate “held” by the spouse or former spouse is subject to the judgment lien if the spouse or former spouse is a named defendant. Wis. Stat. § 806.15(4)(intro.), (b). Apparently, this lien will appear on the record of real estate that is the nonmarital property real estate of the nonincurring spouse as well as on the record of marital property real estate. It appears that the lien will also appear on the record of real property held (presumably in this context, owned) by a former spouse. This may create a cloud on the title of nonmarital property real estate acquired within 10 years of a judgment by any spouse who was a named defendant. *See* Wis. Stat. § 806.15(1). For example, if a nonincurring spouse was joined in an action as a permissive party and is subsequently divorced, it appears that a lien attaches to all real estate acquired after the divorce, even if the real estate is marital property owned with a subsequent spouse.

Notwithstanding the apparent cloud on record title, real estate that is not available to a creditor for recovery under section 766.55(2) is exempt from execution. Wis. Stat. § 815.205(1). If execution is issued, a spouse or other party having an interest in the real estate (other than the judgment debtor who is personally liable on the judgment) may notify the officer making the levy that the real estate is exempt, and the sale

will be stayed to allow the interested party to obtain a release from the creditor. Wis. Stat. § 815.205(2). The demand for release must be made within five days of notification of the officer, and if the release is not obtained, an action for declaratory relief may be commenced under section 806.04 (the Uniform Declaratory Judgments Act) within 15 days of the demand, in which case the stay continues until the court determines the interests of the parties in the real estate. Wis. Stat. § 815.205(2)(b). Section 806.15(5) provides that such an action may be commenced 10 days after demand on the judgment creditor.

If the spouses have reclassified their assets by a marital property agreement, it may not be clear from the chain of title if real estate so classified is owned in joint tenancy, is a survivorship marital property asset, is a marital property asset, or is otherwise classified differently from the record title. Consequently, the effect of a judgment lien may not be accurately reflected in the chain of title.

The effect of a judgment lien that attaches to a spouse's interest in survivorship marital property real estate is similar to the effect of a judgment lien that attaches to a spouse's interest in real estate held in joint tenancy. While both spouses are alive, a judgment lien that attaches to only one spouse's interest in the survivorship marital property asset (i.e., only one spouse is personally liable under a family-purpose obligation) subjects the entire asset to recovery. If the judgment debtor spouse dies before execution on the judgment lien on the survivorship marital property real estate, the surviving spouse takes the decedent's interest free of the lien, unless the judgment lien is on the interests of both spouses and all the spouses' property is available under section 766.55 to satisfy the obligation—that is, both spouses are personally liable. Wis. Stat. § 766.60(5)(c). A surviving spouse receives the decedent's interest in survivorship marital property real estate, subject to tax and other statutory liens, real estate mortgages, and security interests, even though the decedent was the only incurring spouse. Wis. Stat. § 766.60(5)(b). If execution has been issued before the judgment debtor spouse dies, the surviving spouse takes the decedent's interest subject to the lien. Wis. Stat. § 766.60(5)(c).

C. Proceedings in Aid of Execution [§ 6.59]

1. In General [§ 6.60]

After a creditor has obtained a judgment, whether the nonincurring spouse was joined as a defendant or was the only defendant, the creditor may proceed against either or both of the spouses to reach marital property assets subject to recovery for the judgment to the extent provided in section 766.55(2). *See* Wis. Stat. § 803.045(3). The judgment may, but need not, determine the category of obligation under section 766.55(2) and may determine that specific assets or classifications of assets are available for recovery. Wis. Stat. § 806.15(4). If the judgment is silent on those issues, the obligation is presumed to be within the family-purpose doctrine. *See* Wis. Stat. § 766.55(1). And these assets may be held by the spouse who was not the defendant in the underlying action. To enable creditors to recover marital property from both spouses for a family-purpose debt, the creditor must be able to conduct a supplementary examination of either spouse. Thus, the court of appeals in *Courtyard Condominium Ass'n v. Draper*, 2001 WI App 115, 244 Wis. 2d 153, 629 N.W.2d 38, interpreted section 816.03 to allow examination of the judgment debtor's spouse as well as the judgment debtor.

Sections 811.001 and 812.01(1) provide that attachment and garnishment actions, respectively, may affect property held by the judgment debtor or both the debtor and the debtor's spouse if an obligation under section 766.55(2) is involved. *See* Wis. Stat. Ann. § 811.001 Legis. Council Notes—1985 Act 37, § 154 (West 2007); Wis. Stat. Ann. § 812.01 Legis. Council Notes—1985 Act 37, § 156 (West 2007); *see also infra* §§ 6.62, .65. Section 816.03, relating to supplementary proceedings, was not modified by the Act. Section 816.03(1)(a) provides that the “judgment debtor” may be ordered to appear at a supplementary examination to answer questions concerning his or her property but the statute does not provide for the examination of a party who is not the “judgment debtor.” The incurring spouse may be the only defendant in the principal action, or the nonincurring spouse may be the only defendant if the creditor is unable to obtain personal jurisdiction over the obligated or incurring spouse. Wis. Stat. § 803.045(2). However, marital property assets held by either the incurring or the nonincurring spouse are available for satisfaction of family-purpose obligations.

2. Execution [§ 6.61]

Section 815.03 states that there are three types of executions in Wisconsin:

1. Executions against the property of the judgment debtor;
2. Executions against his or her person; and
3. Executions for delivery of property (or for damages for withholding property).

Execution may be against real or personal property. If necessary, a receiver may be appointed to collect and preserve income-producing assets subject to recovery. Wis. Stat. § 813.16. In postjudgment proceedings, as in prejudgment proceedings, it appears that notice need be given only to the spouse having management and control of an asset sought to be recovered. Wis. Stat. § 766.01(11).

➤ *Comment.* There is no provision for executing on assets held by a judgment debtor's spouse, although executing on any marital property assets necessarily includes executing on an asset in which the judgment debtor's spouse has an interest, regardless of which spouse holds title. Therefore, the phrase "property of the judgment debtor" in section 815.03 must be interpreted to mean assets available under section 766.55(2) to satisfy debts incurred by the judgment debtor, regardless of which spouse holds the property. *See also infra* § 6.62.

The issue of whether an asset is a proper subject of execution is likely to arise in a motion to quash the writ of execution brought by the nonincurring spouse who was not a party to the original action. The burden is on the objecting spouse to prove that the obligation is not a family-purpose obligation and that the plaintiff is limited to recovery of certain classifications of assets, or that the asset levied against is not marital property. *See* Wis. Stat. §§ 766.55(1), .31(2); *see also* Wis. Stat. § 903.01; *supra* § 2.25. If the asset is real estate that is not recoverable under section 766.55(2), the judgment debtor's spouse can avoid the execution and remove the lien. Wis. Stat. §§ 806.15(5), 815.205; *see supra* § 6.58.

3. Garnishment [§ 6.62]

Chapter 812 is divided into two subchapters, the first providing for garnishment of property other than earnings and the second providing for garnishment of earnings. A single garnishment action may recover earnings earned within pay periods beginning within 13 weeks after the date of service, and there are provisions for subsequent garnishments by other creditors for extensions beyond the 13 weeks. *See* Wis. Stat. §§ 812.35, .40. The definition of *debtor* in an earnings garnishment includes the judgment debtor's spouse whose earnings are marital property. Wis. Stat. § 812.30(4).

After obtaining a judgment against the person liable, a judgment creditor may proceed against any person who is indebted to or who has any property belonging to the creditor's debtor or property "which is subject to satisfaction of an obligation" under section 766.55(2). Wis. Stat. § 812.01(1).

A creditor holding a judgment against one spouse may proceed to recover (1) the nonmarital property of the incurring spouse and (2) marital property held by the incurring spouse, the nonincurring spouse, or both spouses, to the extent such property can be recovered for the applicable type of debt. *See* Wis. Stat. § 766.55(2); *see also* *Schultz v. Sykes*, 2001 WI App 260, 248 Wis. 2d 791, 638 N.W.2d 76. Under section 812.02(2e), a garnishment action affecting "property of a spouse" must name that spouse as a defendant. This requires naming the spouse who holds an interest in funds subject to garnishment or both spouses if both spouses have such an interest. *See* Wis. Stat. § 812.02(2e); *see also* Wis. Stat. § 705.07(1) (rights of creditors in recovering from multiple-party depository accounts). The creditor need not first obtain a judgment against the nonincurring spouse in the underlying action. Wis. Stat. §§ 812.01(1), .32. However, for the creditor to commence a garnishment action affecting the "property of a spouse" who was not a defendant in the principal action, that spouse must be made a defendant in the garnishment action. Wis. Stat. §§ 812.02(2e), .30(4); *Bank One Appleton, NA v. Reynolds*, 176 Wis. 2d 218, 222–23, 500 N.W.2d 337 (Ct. App. 1993); *see also* Wis. Stat. § 812.37(1); *Kotecki v. Marek*, No. 93-0495, 1993 WL 404321 (Wis. Ct. App. Oct. 12, 1993) (unpublished opinion not citable per section 809.23(3)).

➤ **Comment.** Interpreted literally, section 812.02(2e) requires that in all garnishments of marital property wages or other marital property assets held by either spouse, both spouses are to be named as defendants. However, such a requirement is contrary to the Act's policies regarding management and control. *See* Wis. Stat. § 766.01(11). Under the Act, management and control of marital property assets includes the right to conduct a lawsuit relating to such marital property assets held by that spouse, Wis. Stat. § 766.01(11), and it should not be necessary to name as defendant a spouse who does not hold the marital property sought to be recovered by garnishment. The Legislative Council notes on the 1985 Trailer Bill changes to section 812.01 indicate that a creditor may attempt to recover wages of a nonincurring employee spouse in a garnishment action even if judgment in the original action is against only the nonemployee spouse and the employee was not a party to the original action. Wis. Stat. Ann. § 812.01 Legis. Council Notes—1985 Act 37, § 156 (West 2007); *see also* Wis. Stat. § 812.02(2e). The notes also indicate that the nonemployee spouse need not be joined in the garnishment action because the employee spouse has management and control of his or her wages and consequently of the action.

That there may be a garnishment action to recover from the nonincurring spouse without a judgment against that spouse in the underlying action is consistent with the experience in some of the other community property states. For example, in Washington, service may be made on either spouse, and a resulting judgment based on a community obligation may be enforced against all community property even if the nonincurring spouse is not a party. *Oil Heat Co. v. Sweeney*, 613 P.2d 169 (Wash. Ct. App. 1980).

The requirement that the nonincurring spouse be joined in a garnishment action to recover from that spouse's property affords the nonincurring spouse the right to raise defenses unrelated to liability on the claim. Either the debtor or the debtor's spouse may file an answer at any time before or during the effective period of an earnings garnishment. Wis. Stat. § 812.37. When a creditor obtains a judgment against an incurring spouse without joining the nonincurring spouse, the judgment is subject to claim preclusion as to the incurring spouse's personal liability on the underlying obligation. *Schultz v. Sykes*, 2001 WI App 260, 248 Wis. 2d 791, 638 N.W.2d 76. This result is consistent with the incurring spouse's management and control of the action. *See* Wis. Stat. § 766.01(11). The defenses the nonincurring spouse might raise

include a challenge to the conclusion that the obligation was within the family-purpose doctrine or to the classification of particular assets as marital property. The nonincurring spouse thus has the right to contest the classification of particular assets that might be the individual property of the nonincurring spouse, thereby preserving due process rights.

If, however, the garnishment relates to assets under the sole management and control of the incurring spouse and the nonincurring spouse is not joined in the garnishment action, the nonincurring spouse has no opportunity to raise such issues. The incurring spouse, however, had the right to raise defenses in the underlying action and has the right in the garnishment action, a result consistent with management and control of such assets. Conduct of an action with respect to marital property is subject to the good-faith duty of the spouse having management and control. Wis. Stat. §§ 766.15(1), .70(1).

Even if both spouses are not required to be parties to a garnishment action to recover marital property funds owed to the judgment debtor, the nonincurring spouse is a permissible defendant under section 803.04(3). If the nonincurring spouse learns of the garnishment action, he or she may move to be joined. Wis. Stat. § 803.04(3). The nonincurring spouse may then raise defenses relating to the category of obligation and classification of assets available. It is doubtful that the nonincurring spouse has the right to raise other defenses relating to the litigation, as such a right would be inconsistent with the incurring spouse's management and control of the action. *See* Wis. Stat. § 766.01(11).

D. Foreclosure of Mortgages; Miscellaneous Actions Involving Property [§ 6.63]

The spouse having title to a marital property asset subject to a mortgage or security interest has management and control of that asset and thus the right to defend an action brought by the secured creditor to enforce its rights in the asset. *See* Wis. Stat. § 766.01(11); *see also supra* ch. 4. Thus, the spouse who does not hold the asset need not be joined as a party to the action to enforce the creditor's interest, even though the nontitled spouse has a marital property interest in the asset. That spouse, however, may join or be joined in the action. Wis. Stat. § 803.04(3). The creditor may wish to join the nontitled spouse if a deficiency judgment is sought, for the same reasons the creditor might wish to join the nonincurring spouse in a general civil action. *See supra* §§ 6.51–.58.

If the obligor on the note and the mortgagor are not the same (such as when one person has mortgaged real estate to secure another person's debt), each party has the right to defend the action. The purchaser of the foreclosed property takes the property free of any claim of the defendant's spouse. *See* Wis. Stat. § 766.57(3).

Actions involving homestead property have special rules and usually require joinder of the spouse on account of the resident spouse's homestead interest, even though the spouse may not have an ownership interest. *See* Wis. Stat. §§ 706.02(1)(f), 815.20.

Other actions involving both real and personal property held by one spouse alone are also subject to the management and control of only the titled spouse. *See, e.g.*, Wis. Stat. § 840.03 (actions involving interests in real property, such as partition or quiet title); Wis. Stat. ch. 810 (replevin). The creditor may sue only the spouse who has title to or possession of (if untitled) the asset regardless of its classification. *See supra* § 6.53 (parties in in rem and quasi in rem actions).

E. Enforcement of Security Interest [§ 6.64]

A spouse having management and control of a marital property asset may create a valid security interest in that asset, unless the creditor is bound by a marital property agreement having provisions to the contrary. *See* Wis. Stat. § 409.203(4)(b).

The creditor seeking to recover collateral that is classified as marital property may commence an action against only the spouse who created the security interest. That spouse has management and control of the property under section 766.51(1)(am) and may defend the action. *See* Wis. Stat. § 766.01(11). Nevertheless, the other spouse having a marital property interest in the asset sought to be recovered may join or be joined in the action. Wis. Stat. § 803.04(3). Section 766.55(6) further protects a creditor's interest in collateral notwithstanding the category of the obligation, the dissolution of the marriage, or the death of a spouse, as those events do not affect the satisfaction of the obligation from the collateral. Also, regardless of the nonincurring spouse's interest in a secured property asset, the creditor holding a security interest is entitled to protection as a bona fide purchaser, provided the creditor meets all requirements for such protection. *See* Wis. Stat. § 766.57.

On the other hand, sections 801.07 and 801.12 appear to require inclusion of the nonincurring spouse in an action affecting collateral, although sections 803.04(3) and 803.045(1) make such inclusion optional. However, including both spouses as parties to an action seeking to recover a marital property asset is the only way to affect the “interests of the defendant” in an asset. Wis. Stat. § 801.07(1); *see supra* §§ 6.52–.54. In light of this apparent conflict, the creditor may wish to join the nonincurring spouse whenever possible.

F. Attachment [§ 6.65]

When it appears that a defendant’s imminent conduct may affect the creditor’s ability to recover, a creditor may be entitled to attachment (seizure) of a defendant’s assets before there is sufficient time for the creditor to obtain a judgment. Wis. Stat. § 811.03(1). For purposes of a prejudgment attachment action, the term *defendant* is defined to include the defendant’s spouse or former spouse, provided that the action against the defendant involves an obligation for which marital property may be reached. Wis. Stat. § 811.001(1). The term *property of the defendant* is defined to include the marital property interest of a spouse or former spouse if the obligation is one for which marital property may be recovered. Wis. Stat. § 811.001(2).

Parties to the attachment motion are the same as the parties necessary for postjudgment collection proceedings. If only the incurring spouse is the defendant in the underlying action and the marital property asset sought to be attached is under the incurring spouse’s management and control, joining the nonincurring spouse is not necessary. Wis. Stat. § 766.01(11); *see also supra* § 6.62. The other spouse having a marital property interest may, nevertheless, join or be joined in the action. Wis. Stat. § 803.04(3).

➤ **Practice Tip.** The attachment chapter of the statutes, chapter 811, does not contain a counterpart to section 812.02(2e) of the garnishment chapter, which requires that if a garnishment affects property of the nonincurring spouse and he or she was not a defendant in the underlying action, the nonincurring spouse must be a party in the garnishment action. However, if the marital property asset sought to be attached is under the management and control of the nonincurring spouse, due process principles suggest that the nonincurring spouse should be served with notice. The category of

obligation and the question of whether the asset or a classification of assets is available to the creditor can then be adjudicated before judgment.

V. Debtors' Rights and Protections [§ 6.66]

A. In General [§ 6.67]

Sections 6.2–.31, *supra*, describe the categories of obligations under the Act and the classifications of assets available to satisfy each. Sections 6.32–.48, *supra*, cover typical events that might change the result under the statutory scheme. Sections 6.49–.65, *supra*, set forth the procedures by which a creditor can satisfy an obligation. Sections 6.68–.112, *infra*, deal with means by which debtors can protect assets from recovery. These include the use of exemptions, Wisconsin Consumer Act protections, and bankruptcy.

B. Exemptions [§ 6.68]

Exemptions from execution are found in sections 815.18 (property exempt from execution generally) and 815.20 (homestead exemption). These are certain items, some of which are limited in value, that a debtor may retain for personal, household, and some business and farm use, notwithstanding liability to creditors. In addition, a debtor with an obligation under the Wisconsin Consumer Act has certain other exemptions, found at section 425.106. *See also In re Brien*, 128 B.R. 220 (Bankr. E.D. Wis. 1991) (holding that worker's compensation award is exempt under section 102.27(1)). Exemptions allow a debtor to retain property regardless of the claims of general creditors; a creditor having a security interest in otherwise exempt property is not defeated by these protections.

Under section 815.18(8), each spouse is entitled to claim exemptions. If the exemption is limited to a dollar amount, the spouses may combine their exemptions in the same asset or in different assets. Wis. Stat. § 815.18(8). They may not combine exemptions in the same income under section 815.18(3)(h). *Id.*; *Bank One, Appleton, NA v. Reynolds*, 176 Wis. 2d 218, 223, 500 N.W.2d 337 (Ct. App. 1993); *see also infra* § 6.90 (debtors' exemptions in bankruptcy).

For example, section 815.18(3)(b) allows an exemption for “[e]quipment, inventory, farm products and professional books used in the business of the debtor or the business of a dependent of the debtor” up to an aggregate value of \$15,000. *Dependent* is defined as any individual, including a spouse, who requires and is receiving substantial support from the debtor. Wis. Stat. § 815.18(2)(d). The purposes of allowing exemptions are to sustain life, to avoid the debtor’s becoming a public charge, and to preserve the debtor’s means of obtaining a livelihood. Wis. Stat. § 815.18(1). As previously noted, each spouse is entitled to exemptions, and they may combine their exemptions to protect a single asset or different assets. *See* Wis. Stat. § 815.18(8). Furthermore, because spouses are equally obligated to support each other, *dependent of the debtor* should include both spouses. *See* Wis. Stat. § 765.001(2) (intent of chapters 765–768). Thus, section 815.18(3)(b) would probably allow spouses to combine their exemptions in a business in which only one is active. In contrast, a bankruptcy court interpreting New Mexico law held that the spouse of a businessperson may not exempt the businessperson’s tools of the trade even though the tools are community property. *In re Bryan*, 126 B.R. 108 (Bankr. D.N.M. 1991). In that case, the relevant statute did not refer to an exemption for a dependent of the debtor, and only the person engaged in the business was allowed the exemption.

As mentioned above, exemptions relating to obligations incurred under the Wisconsin Consumer Act are also provided to debtors. *See* Wis. Stat. § 425.106. Although section 815.18(8) prevents the spouses from combining their exemptions on the earnings of one spouse, the corresponding provision under the Wisconsin Consumer Act, section 425.106(2), does not contain the earnings limitation. However, it appears that the exemption is applied to the wages of a “customer,” meaning “a person,” and that each exemption is applied to one person’s earnings. Wis. Stat. § 425.106(1)(a); *see* Wis. Stat. § 421.301(17) (defining *customer*). Therefore, the amount recoverable by the creditor would be the same as under pre-effective date law for both a consumer and a nonconsumer action.

➤ **Comment.** It appears that a debtor may choose to exempt property of any classification. If a spouse chooses to claim an individual property asset as exempt and the exemption results in recovery of nonexempt marital property assets by a creditor, a question arises whether the other spouse would have a remedy. No rule allows recovery by a spouse for the other spouse’s use of marital

property assets to satisfy a family-purpose obligation, although there may be a right to an interspousal remedy if the obligation is for other than a family-purpose obligation or if the choice of exemption results in a breach of the good-faith duty. *See* Wis. Stat. § 766.70(1), (5).

Section 815.20 sets forth the homestead exemption of \$75,000 for “debts of the owner,” which presumably can be interpreted as obligations for which the creditor could otherwise recover the homestead if it were not protected by the homestead exemption. The exemption applies to land owned by spouses jointly, in common, or as marital property. Wis. Stat. § 815.20(1). Each co-owner spouse is entitled to a \$75,000 exemption in the equity in the homestead.

C. Wisconsin Consumer Act Protections [§ 6.69]

Although the original Marital Property Act left the Wisconsin Consumer Act largely unchanged, the 1985 Trailer Bill attempted to harmonize these two acts. *See* Wis. Stat. Ann. § 766.565 Legis. Council Notes—1985 Act 37, § 109 (West 2009). As a general rule, the Wisconsin Consumer Act restricts liability unless full disclosure is made to and consent is obtained from the person obligated. On the other hand, the Marital Property Act enlarges the situations under which property may be recovered to satisfy certain obligations incurred by a spouse with or without the other spouse’s knowledge or consent.

Section 766.56(3)(b) requires that creditors in transactions governed by the Wisconsin Consumer Act give notice to the nonincurring spouse that the other spouse has been extended credit that may result in an obligation in the interest of the marriage or the family. *See supra* §§ 6.39–41. This notice is not required if the nonapplicant spouse has actual notice or waives notice in writing. Wis. Stat. § 766.56(3)(c). Failure to give this notice does not diminish the creditor’s right to recover the debt. The only sanction is the \$25 liability imposed by section 766.56(4)(b). *Park Bank-West v. Mueller*, 151 Wis. 2d 476, 444 N.W.2d 754 (Ct. App. 1989).

A creditor is generally not required to give additional or separate Wisconsin Consumer Act notices to a nonincurring spouse, such as the notice of right to cure default under section 425.104. *See* Wis. Stat. § 766.565(2). There is an exception, however, in the case of an increase in an open-end-plan finance charge. *See* Wis. Stat. § 766.565(6); *see*

also Wis. Stat. § 422.415. If notice of an increase in the finance charge rate is not given to the nonincurring spouse, the new rate does not affect that spouse's interest in marital property assets. Wis. Stat. § 766.565(6). The notice may be sent to the last-known address of the incurring spouse and addressed to the incurring spouse as long as the outside of the envelope carries a notice that it contains important information for both spouses. *Id.* This requirement is consistent with the requirement that notice be sent to the nonincurring spouse when an open-end plan is entered into. *See* Wis. Stat. § 766.56(3)(b).

Under section 766.565(5), the spouse of a person who establishes an open-end credit plan may terminate the plan by giving notice under section 422.4155. The Federal Reserve Board has determined that the right to terminate an open-end plan does not violate the Equal Credit Opportunity Act. *See* Edward J. Heiser, Jr., & Robert J. Flemma, Jr., *Wisconsin's Marital Property Act: The Pain and Confusion of Converting to a Community Property System*, 42 Consumer Fin. L.Q. Rep. 42 (1988). Use of the plan is not affected until the plan is terminated, and property is available to satisfy charges made before the plan is terminated in accordance with section 766.55(2). If the nonapplicant spouse terminates a plan, this fact may be considered in future applications for credit with the creditor made by the applicant spouse. Wis. Stat. § 766.565(5).

For a discussion of the notices given to nonapplicant spouses and the property available to satisfy charges under so-called straddle plans (i.e., open-end credit plans established before the spouses' determination date and used after that date), *see* sections 6.39–.41, *supra*.

The Wisconsin Consumer Act provides protections to “customers,” defined under section 421.301(17), such as the right to redeem collateral under section 425.208. Section 766.565(3) makes clear that the spouse of a person who incurs an obligation under the Wisconsin Consumer Act has all rights and remedies available to the incurring spouse.

The Division of Banking is authorized to make rules relating to consumer transactions consistent with the policies of both the Marital Property Act and the Wisconsin Consumer Act. Wis. Stat. § 766.565(7); Wis. Admin. Code ch. DFI-WCA 1 (Wisconsin Consumer Act). The Legislative Council notes on the 1985 Trailer Bill changes to section 766.565 indicate that issues that develop with respect to the relationship between the Wisconsin Consumer Act and the Marital Property Act may

best be resolved by the rulemaking authority of the Division of Banking rather than by statutory amendment. *See* Wis. Stat. Ann. § 766.565 Legis. Council Notes—1985 Act 37, § 109 (West 2009).

D. Bankruptcy [§ 6.70]

1. Bankruptcy Estate [§ 6.71]

a. In General [§ 6.72]

Financial relief for individuals and certain recognized entities, with the exception of those engaged in certain specialized businesses, is provided by chapters 7, 11, 12, and 13 of title 11 of the United States Code, also known as the Bankruptcy Code.

➤ **Note on Terminology.** In the bankruptcy context, the term *debtor* means a person who or entity that files a voluntary petition in bankruptcy, or, in the case of an involuntary bankruptcy, the person against whom or the entity against which relief is ordered. *See* 11 U.S.C. § 101(13). *Nondebtor* in the bankruptcy context means the spouse of a debtor, even though the spouse may also be obligated to a creditor listed in the debtor's bankruptcy schedules.

In a Chapter 7 case, a debtor's nonexempt assets are liquidated to pay creditors. Exempt property is property that may be retained by a debtor to facilitate his or her "fresh start." *See infra* § 6.90. The nonexempt assets are collected, sold, and converted to cash by a trustee, and the net proceeds are distributed to creditors according to a system of priorities for certain categories of obligations. The debtor then receives a discharge of all dischargeable debts. *See infra* §§ 6.106–.111. The discharge operates as an injunction preventing recovery for dischargeable debts in existence on the filing date. Certain types of debts are nondischargeable. *See* 11 U.S.C. § 523.

A Chapter 11 reorganization case allows a debtor to retain possession of all property of the estate, except in unusual circumstances in which the court orders the appointment of a trustee. *See* 11 U.S.C. § 1104. The debtor, in this context known as the *debtor-in-possession*, has all the powers of a trustee. The Chapter 11 debtor, or sometimes other interested parties, may propose a plan for reorganization or orderly

liquidation of the debtor's assets and a schedule of distributions to creditors. The plan must be proposed in good faith, and creditors must receive at least as much as they would have received under a Chapter 7 liquidation. 11 U.S.C. § 1129. Creditors vote on the plan, and the court confirms the plan if all statutory requirements are met. *Id.* Upon confirmation of the plan, the debtor obtains a discharge of all dischargeable debts except to the extent they are provided for in the plan. 11 U.S.C. § 1141(d).

A Chapter 12 case may be filed only by individuals and farming or fishing operations with regular income that meet the definition of *family farmer or family fisherman* and other related definitions in 11 U.S.C. § 101. 11 U.S.C. § 109(f). The debtor remains in possession although the debtor-in-possession may be removed under certain circumstances. *See* 11 U.S.C. § 1204. Requirements for confirmation of a plan and plan administration are similar to those in a Chapter 13 case.

A Chapter 13 case enables a debtor to propose a plan of repayment of some or all debts over three (or sometimes up to five) years. 11 U.S.C. § 1322(d). To qualify for filing a Chapter 13 case, an individual (or an individual and the individual's spouse) must have a regular income and not more than \$1,081,400 in secured debts and \$360,475 in unsecured debts. 11 U.S.C. § 109(e). Payments are made to a Chapter 13 trustee who administers the plan and pays creditors. 11 U.S.C. § 1322(a)(1). Some debts provided for by the plan may be paid directly to the creditor by the debtor. The debtor retains possession of all exempt and nonexempt property. If the plan is proposed in good faith, pays creditors no less than they would have received under Chapter 7, and meets other requirements for confirmation, the court confirms the plan. 11 U.S.C. § 1325. On completion of the plan, the debtor receives a discharge of all unpaid dischargeable debts. 11 U.S.C. § 1328.

State property law determines ownership rights that a person or entity may have in various types of property, and these rights determine the property's treatment under the Bankruptcy Code. 5 *Collier on Bankruptcy* ¶ 541 (15th ed. 2003) [hereinafter *Collier*]. Since marital property has the essential characteristics of community property and is based on the same principles as community property, it is treated as community property under the Bankruptcy Code. *See* Wis. Stat. § 766.001(2) ("It is the intent of the legislature that marital property is a form of community property."). Therefore, the discussion of bankruptcy

in this chapter uses the terms *community property* and *marital property* interchangeably.

The bankruptcy schedules, which must be filed by every debtor, disclose the debtor's assets, creditors, income, expenses, and other pertinent information relating to the debtor's financial condition. *See* Official Bankruptcy Form 6, at <http://www.uscourts.gov/bkforms/index.html>. Individual debtors must disclose whether assets are owned by the husband, by the wife, jointly, or as community property. *See id.* The debtor must also disclose who is liable to each creditor—the husband, the wife, both spouses, or the “community.” *See id.* Although Wisconsin does not recognize a “community” or “marital” obligation, this designation is loosely analogous to a family-purpose obligation.

➤ **Note.** The Wisconsin Marital Property Act and the Bankruptcy Code differ in how particular classifications of property may be recovered for satisfaction of various types of obligations. Rules for satisfaction of creditors under section 766.55(2) do not apply in the bankruptcy context. *See infra* § 6.105. When a case is within the jurisdiction of the bankruptcy court and state and federal rules differ, the federal rules control.

On April 20, 2005, President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23. Most provisions became effective for cases filed on or after October 17, 2005, but some changes, such as certain homestead-exemption provisions, were effective on enactment. BAPCPA constitutes a substantial and comprehensive revision of bankruptcy law, the details of which are beyond the scope of this text. For more information, see Randall D. Crocker et al., *No Small Change: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (State Bar of Wisconsin CLE Books 2005). However, issues involving marital property often entail other consumer and business issues as well, and attorneys are encouraged to become familiar with the changes in bankruptcy law or to consult experienced bankruptcy counsel when these issues arise.

A few of the more notable changes are as follows:

1. A *means test* was established to determine eligibility for a Chapter 7 discharge for debtors whose debts are primarily consumer debts. 11 U.S.C. § 707(b). This applies primarily to higher income debtors,

but the standard for dismissal of any Chapter 7 case was changed from *substantial abuse* to *abuse*. *Id.* The standing of creditors to bring a motion to dismiss for abuse of the Bankruptcy Code was expanded.

2. The time between eligibility for Chapter 7 discharges was extended from six years to eight. 11 U.S.C. § 727(a)(8). A time limit was also established for obtaining a Chapter 13 discharge after a discharge in another chapter has been obtained. 11 U.S.C. § 1328(f).
3. Exceptions to the automatic stay, especially for collection of payments for support of dependents, were expanded. Wage orders and tax intercepts for collection of support payments are not stayed, even if collection is from property of the estate. 11 U.S.C. § 362(b)(2).
4. Nondischargeable support obligations are now defined as *domestic support obligations*, 11 U.S.C. § 101(14A), and the categories of claimants were expanded, including the addition of support debts due to a governmental unit, 11 U.S.C. § 101(14A)(A)(ii).
5. Property division debts are now excepted from discharge. Equitable defenses were eliminated, and it is no longer necessary to file an adversary proceeding to have the debt excepted from discharge. 11 U.S.C. § 523(a)(15).
6. Domestic support obligations are elevated to first-priority claims, subject only to expenses of the trustee in recovering funds to pay such claims. *Compare* 11 U.S.C. § 507(a)(1)(A) *with* 11 U.S.C. § 507(a)(1)(C). These claims must be paid in full in a plan, unless the claimant consents to other treatment. Governmental support claims need not be paid in full, but a Chapter 13 plan with this provision must extend for five years. 11 U.S.C. § 1322(a)(4). Plans for higher income debtors under a Chapter 13 means test must extend for five years as well. 11 U.S.C. § 1325(b)(4)(A)(ii).
7. Domestic support obligations that accrue after filing must be paid to have a plan confirmed, 11 U.S.C. §§ 1225(a)(7), 1325(a)(8), and Chapter 12 and 13 debtors must certify that all such obligations are paid before a discharge is issued, 11 U.S.C. §§ 1228(a), 1328(a). Failure to make such payments is grounds for dismissal of the case.

8. Length of time of domicile in a state has been increased for the purpose of claiming exemptions. 11 U.S.C. § 522(b)(3). Also, there are limitations on the homestead exemption, and expanded recovery of fraudulent transfers, for debtors found to have committed certain wrongful acts. Provisions regarding the homestead exemption were effective on the date of enactment.
9. Debtors are subject to increased disclosure requirements at the beginning of a case and during the pendency of a plan. 11 U.S.C. § 521(e)(2)(A). Creditors can obtain copies of tax returns filed while the plan is in effect. 11 U.S.C. § 521(f).
10. Debtors are required to meet credit-counseling requirements to file a case, except in special circumstances, and to obtain a discharge. 11 U.S.C. § 109(h)(1).
11. The Chapter 13 discharge no longer encompasses debts incurred by fraud, defalcation in a fiduciary capacity, or personal injury caused by willful or malicious acts. 11 U.S.C. § 1328(a)(2).
12. Creditors holding security interests in motor vehicles and other personal property are protected from “cramdown” in a Chapter 13 plan, 11 U.S.C. § 1325(a), by lien-avoidance limitations, 11 U.S.C. § 522(f), and in reaffirmation procedures, 11 U.S.C. § 524(c). Rights of creditors holding claims for cash advances and luxury goods are expanded in exceptions to discharge under all chapters. 11 U.S.C. § 523(a)(2)(C). The value of collateral for Chapter 7 and 13 debtors is generally retail value. 11 U.S.C. § 506(a)(2).
13. Withholding by employers and payments by debtors to qualified benefit plans are not counted as property of the estate. Also, certain educational trusts set up for children during a set period before filing are excepted from property of the estate. 11 U.S.C. § 541(b).
14. The automatic stay may not be in effect for particular property if serial cases have been filed and earlier ones dismissed. 11 U.S.C. § 362.
15. There are new provisions for an individual Chapter 11 case. The individual Chapter 11 debtor’s earned income is property of the estate. 11 U.S.C. § 1115.

16. There is increased liability for attorneys filing cases for debtors, requiring reasonable investigation into information submitted by the client. There is a new definition of *debt relief agency*, requiring certain disclosure and record-keeping requirements when giving bankruptcy advice to certain persons. 11 U.S.C. §§ 526–528.

➤ **Note.** In *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010), the U.S. Supreme Court held that attorneys are considered to be debt relief agencies, and that debt relief agencies, including attorneys, although prohibited from advising people to incur more debt in contemplation of filing bankruptcy, are not prohibited from advising people to incur more debt for “valid purposes” or from discussing the consequences of acquiring additional debt.

b. Who May File Voluntary Petition [§ 6.73]

Under Chapters 7, 9, 11, 12, and 13 of the Bankruptcy Code, only a person or entity recognized under 11 U.S.C. § 109 may file a voluntary bankruptcy petition. The prerequisites of 11 U.S.C. § 109 do not include obtaining consent from an individual’s spouse, and accordingly, one spouse alone may file. Although a married person may wish to file a bankruptcy petition only as to his or her interest in marital property assets and related obligations, thereby attempting to protect the nonmarital property assets of either or both of the spouses, the aggregate community property of a married couple is not considered an entity. Consequently, a spouse or spouses may not treat their community property as an entity for the purpose of declaring bankruptcy. *In re Wallace*, 22 F.2d 171 (E.D. Wash. 1927); *see* 4 *Collier, supra* § 6.72, ¶ 541.15. One spouse (or both, if they file a joint petition under 11 U.S.C. § 302) must also subject his or her separate property (in Wisconsin, individual and predetermination date property) to inclusion in the bankruptcy estate. The spouse who does not file the petition keeps his or her nonmarital property assets outside the jurisdiction of the bankruptcy court. *See also infra* § 6.91 (discussion of rules for who may be subject to involuntary petition in bankruptcy); *In re McDonald*, No. Civ. A. 93-4176, 1994 WL 160484 (E.D. La. Apr. 22, 1994) (holding that wife could not file joint petition without husband’s consent, even though community property encumbered by community claims was in her bankruptcy estate); Fed. R. Bank. P. 1004.1 (filing by power of attorney).

For federal law purposes, it appears that only a husband and wife can file a joint petition. In *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004), the debtor and her same-sex partner had been legally married in Canada, but the court held that they had no right to file a joint case under the Bankruptcy Code because the court had no obligation to give full faith and credit to the Canadian marriage. Furthermore, even if the couple had been legally married in one of the states that allows same-sex marriages, the Defense of Marriage Act, 1 U.S.C. § 7, does not prohibit such marriages; it only determines how such marriages are treated under federal law.

It is less clear whether former spouses who are subject to a Wisconsin decree of legal separation can file a joint petition. Section 766.01(7) includes legal separation in the definition of *dissolution*. After dissolution, marital property rules no longer apply to the parties' assets. See Wis. Stat. § 766.01(8) (definition of during marriage); see also Patricia K. Ballman, *Legal Separation: Is It a Termination of Marriage or a Suspension of Marriage?*, 25 Wis. J. Fam. L.1 (2005). Nevertheless, parties to a legal separation are not free to remarry others, and they can apply for a revocation "at any time after the judgment" of separation. Wis. Stat. § 767.35(4). On stipulation of the parties within a year after the judgment, or by motion of one party after a year, the court "shall" convert the judgment of legal separation to a divorce judgment. Wis. Stat. § 767.35(5); see also *Bartz v. Bartz*, 153 Wis. 2d 756, 452 N.W.2d 160 (Ct. App. 1989) (construing statute's use of "shall" as mandatory).

➤ **Comment.** *Spouse* is not a defined term under the Bankruptcy Code, and only an individual and that individual's spouse can file a joint bankruptcy petition. 11 U.S.C. § 302. No cases have decided the issue in this state, but it is probable that courts would interpret the definitions of dissolution and during marriage under the Wisconsin Marital Property Act to put legally separated spouses outside the qualification for a joint bankruptcy petition.

Section 109(e) of the Bankruptcy Code provides for who may qualify as a Chapter 13 debtor. Relief under Chapter 13 is available only to "an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400, or [with the same liability limitations] an individual with regular income and such individual's spouse." 11 U.S.C. § 109(e).

➤ **Comment.** There may be circumstances in which a person might be personally liable for unsecured debts of less than \$360,475, but because of obligations incurred by his or her spouse, there might be unsecured community claims of more than \$360,475. Since the statute designates an individual that “owes,” rather than an individual with an interest in property that could be recovered for a debt, it appears that only personal liability is used to determine a married debtor’s eligibility for relief under Chapter 13.

If only one spouse files, creditors of both spouses having community claims are entitled to notice. 11 U.S.C. § 342. Local Bankruptcy Rules for the Eastern District of Wisconsin 1005, 1007.1–.3 require disclosure of certain information concerning the debtor’s spouse to facilitate notice to interested parties. *See also In re Sweitzer*, 111 B.R. 792, 798–99 (Bankr. W.D. Wis. 1990) (discussing notice requirements in one-spouse filings in community property state).

c. Property of Estate [§ 6.74]

(1) Debtor’s Nonmarital Property and Marital Property Under Debtor’s Sole, Equal, or Joint Management and Control [§ 6.75]

The filing of a bankruptcy petition creates an estate consisting of the bankruptcy debtor’s separate (nonmarital) property assets. 11 U.S.C. § 541(a)(1). The estate includes assets that were never classified as marital property, plus any assets that were formerly classified as marital property, such as assets acquired on account of the death of the debtor’s spouse before the bankruptcy petition was filed or assets awarded to the debtor in a dissolution action before the petition was filed. The estate also includes any community (marital) property assets under the debtor’s management and control. 11 U.S.C. § 541(a)(2)(A). Section 541(a)(2)(A) of the Bankruptcy Code states:

Property of the estate.

(a) The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

...

(2) All interests of the debtor and the debtor’s spouse in community property as of the commencement of the case that is—

(A) under the sole, equal or joint management and control of the debtor;

...

The application of 11 U.S.C. § 541(a)(2)(A) to Wisconsin marital property results in the inclusion of all property under the debtor's management and control in the estate, including (1) all the debtor's nonmarital property assets, (2) all marital property assets titled in the debtor's name alone or titled in the debtor's and the debtor's spouse's names in the conjunctive or in the alternative, and (3) untitled assets in the debtor's possession. *See* Wis. Stat. § 766.31; *see also Ragan v. Commissioner*, 135 F.3d 329 (5th Cir. 1998); *Kapila v. Morgan (In re Morgan)*, 286 B.R. 678 (Bankr. E.D. Wis. 2002); *In re Lang*, 191 B.R. 268 (Bankr. D. P.R. 1995).

As a general rule, marital property assets held by one spouse are not subject to the other spouse's management and control. Wis. Stat. § 766.51(1). Nevertheless, section 766.51(1m) provides that each spouse acting alone may manage all marital property assets for the purpose of obtaining an extension of credit for a family-purpose obligation. There are exceptions for certain business-related marital property assets or business interests classified as marital property and described in section 766.70(3)(a)–(d), which are not subject for any purpose to the management and control of the spouse not holding the property. Arguably, the nonholding spouse's management and control of nonbusiness-related marital property assets for the limited purpose of obtaining an extension of credit brings those assets into the bankruptcy estate of the nonholding spouse under 11 U.S.C. § 541(a)(2)(A). However, since such control is limited and indirect, a more logical interpretation is that once the pre-bankruptcy debt is incurred, the debtor's management and control rights cease. Under this second view, the nondebtor's marital property non-business-related assets are not part of the debtor's bankruptcy estate under 11 U.S.C. § 541(a)(2)(A), although they may be included under 11 U.S.C. § 541(a)(2)(B). *See infra* § 6.76.

**(2) Marital Property Assets Liable for
Allowable Claim Against Debtor or
Against Both Debtor and Debtor's Spouse
[§ 6.76]**

In addition to marital property assets under the debtor's sole, equal, or joint management and control under 11 U.S.C. § 541(a)(2)(A), which are fully included in the estate, *see supra* § 6.75, all other assets classified as marital property held by the nondebtor spouse are included in the estate "to the extent" those assets are "liable for an allowable claim" against the debtor or against both the debtor and his or her spouse. 11 U.S.C. § 541(a)(2)(B). Because all marital property held by either spouse may be recovered for a family-purpose debt, Wis. Stat. § 766.55(2)(b), all marital property assets other than those included in the estate under 11 U.S.C. § 541(a)(2)(A), including marital property business-related assets and business interests, are subject to inclusion in the estate under 11 U.S.C. § 541(a)(2)(B). *See also* Wis. Stat. § 766.70(3)(a)–(d).

➤ **Comment.** Whether nonbusiness-related marital property assets held by the nondebtor spouse are includible under 11 U.S.C. § 541(a)(2)(A) or (B) may be important in a case in which such assets are involved. The ability to exclude these assets from the debtor's estate affords protection of those assets from the debtor spouse's creditors.

It is clear from the foregoing that categories of property included in the estate under 11 U.S.C. § 541(a)(2) do not neatly correspond to the classifications of property under the Marital Property Act. To determine whether marital property assets held by the nondebtor spouse are includible under 11 U.S.C. § 541(a)(2)(B), what constitutes a "claim" under this section must be determined. A claim is basically the right of a creditor to payment. 11 U.S.C. § 101(5). Under 11 U.S.C. § 102(2), a claim against the debtor includes a claim against property of the debtor; thus, a creditor that may recover from community property in which the debtor has an interest has a claim against the debtor, even if the debtor is not personally liable to the creditor. For the purpose of including property in the estate in the first instance, without regard at this point to how it will later be distributed to creditors, reference to state law concerning obligations and the ability of creditors to reach particular assets is necessary. This rule was intended to allow creditors access to property in the bankruptcy estate that would have been available under

state law, although there may be significant differences. See Alan Pedlar, *Community Property and the Bankruptcy Reform Act of 1978*, 11 St. Mary's L.J. 349 (1979). But see *infra* § 6.105 (rights of creditors to payment from property of estate).

All property of the spouses is potentially includible in the bankruptcy estate because of the presumption in Wisconsin that all property of the spouses is classified as marital property and the rule that all marital property assets may be recovered by creditors to satisfy a family-purpose obligation. Wis. Stat. §§ 766.31(2), .55(2)(b); see *Danning v. Burg (In re Burg)*, 103 B.R. 222 (B.A.P. 9th Cir. 1989) (holding that nondebtor wife's declaration that she had received gift but could not remember into which account it was deposited was insufficient to rebut presumption that asset was community property); cf. *Schwaber v. Reed (In re Reed)*, 89 B.R. 100 (Bankr. C.D. Cal. 1988) (holding that under California law, bankruptcy trustee could not take advantage of presumption intended only for spouses at divorce that asset held in joint tenancy is community property for purposes of property division), *aff'd*, 940 F.2d 1317 (9th Cir. 1991). The presumption that all obligations are incurred in the interest of the marriage or the family, Wis. Stat. § 766.55(1), tends to make all marital property assets "liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse," 11 U.S.C. § 541(a)(2)(B); see also Wis. Stat. § 766.55(2)(b). If any of the marital property assets held by the nondebtor are includible in the estate under 11 U.S.C. § 541(a)(2)(B) and the value of these assets exceeds the amount necessary to satisfy claims, the assets may be returned to the nondebtor after claims are filed and the amount of excess is determined. The return of these assets might be by abandonment by the trustee or by court order upon motion by the nondebtor spouse.

Although nonexempt marital property assets held by a nonincurring and nonobligated spouse may be recovered by a creditor to satisfy a family-purpose obligation under section 766.55(2)(b), certain marital property assets held by the nondebtor spouse in the bankruptcy context might not be liable to any "extent" for a claim against the debtor or a claim against both the debtor and the debtor's spouse if the assets themselves are exempt under state law. Even though a nondebtor spouse is not entitled to exemptions under bankruptcy law, state law exemptions affect the extent of recovery under state law and hence, whether those assets are includible in the debtor's estate under 11 U.S.C. § 541(a)(2)(B). See Wis. Stat. § 815.18(3). For example, an IRA held

by the nondebtor spouse could not be recovered by a creditor because of the exemption under section 815.18(3)(j)1. and thus would not be includible in the debtor's estate.

An immediate practical concern to the trustee or debtor-in-possession is when to take possession of 11 U.S.C. § 541(a)(2)(B) assets and when the assets' inclusion in the estate is determined. Section 541 of the Bankruptcy Code does not indicate at what point in the bankruptcy proceeding the "extent" of includible assets held by the nondebtor spouse is determined, although it appears to be at the time of filing. 11 U.S.C. § 541(a)(1). The initial inclusion of *all* marital property assets in the estate, subject to a motion by the debtor or the debtor's spouse that particular marital property assets are not includible under 11 U.S.C. § 541(a)(2)(B), is the most practical approach to bankruptcy administration of marital property assets. The bankruptcy estate is created as of the filing of the bankruptcy petition, although certain specifically enumerated assets may be added later (such as assets acquired by inheritance, life insurance proceeds, or property settlement with the debtor's spouse, that the debtor acquires or becomes entitled to within 180 days of filing, 11 U.S.C. § 541(a)(5)). Income on estate property, 11 U.S.C. § 541(a)(6), transfers recovered by the trustee, 11 U.S.C. § 541(a)(4), and certain assets acquired after the date of filing are also added when the estate's interest arises. 11 U.S.C. § 541(a)(7). It would be contrary to 11 U.S.C. § 541(a)(1) to determine property of the estate at a date after filing, such as when claims are filed. Furthermore, the trustee or debtor-in-possession must expeditiously administer the estate; this is not feasible if it is not known until after the claims are filed whether a business or other asset that is classified as marital property and that is held by the nonfiling spouse will be in the estate. *See* 11 U.S.C. §§ 704, 1106. There are no Bankruptcy Code provisions outlining the trustee's duties with respect to the nondebtor spouse's marital property during the period between filing and the determination of claims. Therefore, if the property is not included in the estate as of the date of filing, the trustee would have no control or effective means of protecting the estate's interest. Since marital property business-related assets held by the nondebtor may be excluded after the administration of the estate has commenced, in many instances such a business should not be liquidated or even interrupted, especially if it is profitable. If the case is under Chapter 7, the trustee may wish to obtain an order authorizing continuation of operations. *See* 11 U.S.C. § 721.

It may under certain circumstances be possible to determine at the outset that there are no 11 U.S.C. § 541(a)(2)(B) assets in the estate. If all scheduled debts are predetermination date debts of the debtor, and if marital property assets held by the nondebtor spouse are traceable to the nondebtor spouse's wages or other marital property funds not subject to such obligations under Wisconsin law, *see* Wis. Stat. § 766.55(2)(c)1., then upon the nondebtor's motion, the assets could be excluded from the estate before any administration by the trustee. In that instance, marital property assets generated by the nondebtor would not be liable for any claim, and such property would not be includible under 11 U.S.C. § 541(a)(2)(B). *But see infra* § 6.105 (expanded rights of some categories of creditors to distributions from estate).

Another approach to determining property of the estate under 11 U.S.C. § 541(a)(2)(B) is to exclude the marital property assets held by the nondebtor, but to order payment to the estate of an amount determined to be necessary to pay qualified claims up to the net value of such assets. The amount would be determined after all claims are filed. This approach has been described as the equivalent of a "charging order," under which the trustee may call on the marital property assets held by the nondebtor only if other assets includible in the estate are insufficient to pay all allowable claims. *See Pedlar, supra*, at 360. Arguably, excluded business interests classified as community (marital) property, such as a sole proprietorship, should be "charged" only to the extent the value of the assets exceeds business debts. *See id.* In other words, the amount of the net value of the proprietorship would be paid into the estate, but the assets themselves would not be under the trustee's control. Such a charging order might be equitable in some circumstances, but it does not appear to be available under the language of 11 U.S.C. § 541(a)(2)(B). The order would mean that a sole proprietorship that is classified as marital property and held by the nondebtor spouse, and in which the nondebtor spouse is employed, would no longer be treated differently from a closely held corporation, the stock of which is classified as marital property, held by the nondebtor spouse and in which the nondebtor spouse is employed. With a sole proprietorship, the estate includes the business assets, with the result that personal and business creditors are in the same class and have equal priority; with a corporation, the estate includes only the nondebtor spouse's stock, with the result that the business creditors have first rights to recover from the business assets.

The following example illustrates possible consequences of the disparity in treatment that results if a business classified as marital property in which the nondebtor spouse is active is a sole proprietorship rather than a corporation.

➤ *Example.* Assume a debtor has \$10,000 in unsecured debts and all other assets are exempt. The nondebtor nonfiling spouse holds a sole proprietorship that is classified as marital property, and assets used in the business are worth \$10,000. There are business-related unsecured debts of \$12,000. The bankruptcy estate of the spouse who is not active in the business consists of the \$10,000 in nonexempt business-related assets and total claims of \$22,000. These creditors are paid pro rata at the rate of about 45% (\$10,000 is used to pay \$22,000 in claims). On the other hand, if the business were held in corporate form by the nondebtor spouse, the stock's fair market value in the estate would presumably be zero. Since under that assumption there would be no value in the estate, the trustee would abandon the stock. If the business were later liquidated, the unsecured business creditors would receive about 83% of their claims (\$10,000 would be used to pay \$12,000 in claims), and the creditors holding obligations incurred by the debtor would receive nothing.

If the debtor's debts are secured, different consequences arise from the disparity in treatment, as illustrated in the following example:

➤ *Example.* Assume the same assets as in the previous example, except that the debtor has incurred priority debts of \$10,000 (such as taxes or other priority debts under 11 U.S.C. § 507) rather than unsecured debts lacking priority status. The priority debts are paid in full before any unsecured claims are allowed. In this example, the business creditors of a sole proprietorship classified as marital property and held by the nondebtor spouse receive nothing, and all the business assets are used to pay the priority claims incurred by the debtor spouse. Since the nondebtor spouse has not joined in the bankruptcy and remains personally liable to the business creditors, his or her nonmarital property, if any, may be reached to satisfy obligations to these business creditors. As in the previous example, if the nondebtor spouse's business were incorporated, it would be abandoned by the trustee, and business creditors would be able to recover from business assets.

See Alan Pedlar, *The Implications of the New Community Property Laws for Creditors' Remedies in Bankruptcy*, 63 Cal. L. Rev. 1610, 1631 (1975); see also *U.S. West Fin. Servs., Inc. v. Berlin (In re Berlin)*, 151 B.R. 719 (Bankr. W.D. Pa. 1993); *In re Lundell Farms*, 86 B.R. 582, 590–91 (Bankr. W.D. Wis. 1988) (holding that even though partnership interests were classified as marital property, asset owned by debtor partnership was not classified as marital property because it was owned by partnership and not by married partners; therefore, any application of marital property principles was inappropriate).

Whereas community property is included in the bankruptcy estate of either spouse, only the debtor's interest in property owned in joint tenancy is included in his or her estate. Assets titled in joint tenancy and tenancy in common after the determination date exclusively between spouses are included in the estate of one spouse since, absent a marital property agreement or contrary intent of the asset's donor, attempts to title assets using these forms of ownership result in marital property or survivorship marital property. Wis. Stat. § 766.60(4)(b). In other community property states, the form of title may give rise to a presumption as to whether property titled in the spouses' names as joint tenants is treated as community property or as a true joint tenancy. See, e.g., *Rhoads v. Jordan (In re Rhoads)*, 130 B.R. 565 (Bankr. C.D. Cal. 1991) (holding that under California law, persons who hold property titled in joint tenancy are presumed to own asset as joint tenants and asset is not considered community property); *Swink v. Sunwest Bank (In re Fingado)*, 113 B.R. 37 (Bankr. D.N.M. 1990) (holding that assets held in joint tenancy presumed to be community property under New Mexico law); see also Sommer & McGarity, *supra* § 6.6, ¶ 4.01, at 4–5. A presumption created by title can be rebutted, resulting in the inclusion or exclusion of the nondebtor's one-half interest in an asset, depending on the proof of the parties' intent as to their ownership interests.

In contrast to the rules in other community property states, section 766.60(4)(a) states that

Except as provided in par. (b) . . . 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.

This rule applies to all assets that are owned in joint tenancy by a spouse and acquired before or after the determination date. It is a rule of law, not a presumption. The paragraph (b) referred to in the quoted material states that if a document of title, instrument of transfer, or bill of sale expresses an intent to create a joint tenancy, the asset is survivorship marital property, and if the intent was to create a tenancy in common, the asset is marital property. Wis. Stat. § 766.60(4)(b). That paragraph applies to assets, other than bank accounts governed by chapter 705, that are acquired exclusively between spouses after the determination date and are titled in the spouses' names as joint tenants or as tenants in common.

If a particular asset to which section 766.60(4)(a) applies—that is, an asset held by the debtor and the debtor's spouse as joint tenants or tenants in common—was acquired before the determination date, part of the value of the asset may have become marital property as a result of the reduction of indebtedness with marital property funds or the application of substantial uncompensated labor that results in substantial appreciation. *See* Wis. Stat. § 766.63. In those circumstances, to argue that only the debtor's one-half interest in the asset is property of the estate would appear to conflict with 11 U.S.C. § 541(a)(2)(A), which makes all community property under the debtor's sole, equal, or joint management and control property of the estate. Even though, in some circumstances, rules relating to the disposition of assets held in joint tenancy exclusively between spouses will supersede rules relating to marital property classification, this does not prevent a component of the value from being classified as marital property. Therefore, it appears that if a fractional interest of an asset held in joint tenancy is classified as marital property, that interest is property of a debtor spouse's bankruptcy estate. 11 U.S.C. § 541(a)(2)(A); *see infra* § 6.78 (management and control of assets co-owned by bankruptcy trustee and another party).

An asset to which section 766.60(4)(b) applies—that is, an asset acquired after the determination date and titled exclusively in the names of both spouses as joint tenants or tenants in common—will be in the estate of either spouse since both marital property and survivorship marital property assets held by both spouses are in the bankruptcy estate of either spouse under 11 U.S.C. § 541(a)(2)(A). This is true even if the asset was acquired with property or funds of another classification. *See also supra* ch. 2.

Section 766.70 makes clear that interspousal remedies are available only to the other spouse, not to a third party such as a creditor. *See* Wis. Stat. Ann. § 766.70 Legis. Council Notes—1985 Act 37, §§ 89, 130 to 138 (West 2009). Therefore, it appears that an interspousal remedy to which one spouse is entitled does not become property of the estate of the spouse entitled to a remedy.

The fact that an asset is subject to community claims does not mean that the asset is included in property of the estate under 11 U.S.C. § 541(a)(2)(B) unless it is also community property. In *Anderson v. Conine (In re Robertson)*, 203 F.3d 855 (5th Cir. 2000), the debtor and his former wife were divorced, and their community property was partitioned pursuant to Louisiana law before the husband filed his Chapter 7 case. The Fifth Circuit Court of Appeals held that the trustee could not set aside the partition that made the debtor's former homestead the separate property of his former wife because the partition was constructive notice to a hypothetical bona fide purchaser. Furthermore, the fact that the former wife and her property might have been subject to actions to recover community debts did not mean that her property was community property, and her separate-property house was not property of the debtor's estate.

In *Brassett v. Brassett (In re Brassett)*, 332 B.R. 748 (Bankr. M.D. La. 2005), a former wife filed a bankruptcy petition after the effective date of her divorce but before the couple's community property was partitioned. Under Louisiana law, no further community property was acquired after the divorce. Under bankruptcy law, all community property becomes part of the bankruptcy estate when one spouse files a bankruptcy petition, and unpartitioned community property after divorce is treated in the same manner. *See* 11 U.S.C. § 541(a)(2). The nonfiling former husband argued that postdivorce distributions that he received from a community property joint venture were earned income, which would have been his separate property, but the court held that these were equity distributions of a community property business. Accordingly, those distributions became part of the wife's bankruptcy estate, and her right to an accounting of them and to recovery of her share in them also passed to her estate.

(3) Future Income [§ 6.77]

Under section 541(a)(6) of the Bankruptcy Code, earnings received for postpetition services performed by the debtor are not property of the estate of a Chapter 7 or Chapter 11 debtor. A debtor may voluntarily submit those earnings to fund a Chapter 11 plan. The postpetition earnings of the spouse of a Chapter 7 or Chapter 11 debtor are not included in 11 U.S.C. § 541 and therefore also are not property of the estate. *See* 11 U.S.C. § 541(a)(6).

Sections 1207(a)(2) and 1306(a)(2) of the Bankruptcy Code contain exceptions to 11 U.S.C. § 541(a)(6) in that earnings for services performed by the debtor between the filing of the petition and the completion of the Chapter 12 or 13 plan, at least to the extent needed to fund the plan, are included in the estate. The debtor's "future income" is submitted to the control and supervision of the Chapter 12 or 13 trustee. 11 U.S.C. §§ 1222(a)(1), 1322(a)(1). Earnings of the nondebtor spouse are generally not subject to provisions in a Chapter 12 or 13 plan, even though they are marital property.

In *In re Reiter*, 126 B.R. 961 (Bankr. W.D. Tex. 1991), however, the court held that the nondebtor spouse's wages were property of the estate under 11 U.S.C. § 1306(a)(1) because they were community property described in 11 U.S.C. § 541(a)(2) and because the debtor acquired an interest in those wages after commencement of the case. Before a plan was confirmed, the automatic stay applied to the nondebtor spouse's wages as property of the estate, 11 U.S.C. § 362(a)(2), to prevent the IRS from recovering the debtor's interest in those wages and to limit the IRS to a claim in the estate.

➤ **Comment.** It is arguable, based on the reasoning in *Reiter*, that the debtor's marital property interest in the earnings of the nonfiling spouse is "future income of the debtor" that is required to be submitted to the control of the Chapter 12 or 13 trustee. *See* 11 U.S.C. §§ 1222(a)(1), 1322(a)(1). *But see In re Nahat*, 278 B.R. 108 (Bankr. N.D. Tex. 2002) (holding that nondebtor spouse's community property earned income is a "special" type of community property under Texas law and is not property of estate because it is under sole management and control of the nondebtor spouse and is not subject to claims against the debtor); *In re Markowicz*, 150 B.R. 461 (Bankr. D. Nev. 1993) (holding that after confirmation of plan, nondebtor

spouse's income was not property of estate). However, it appears that there have been no cases in which a Chapter 13 trustee has attempted or been able to have part of a nondebtor spouse's wages paid into the plan without that spouse's consent. The benefit of the nondebtor spouse's earnings to the debtor may, nevertheless, affect the determination of whether the debtor's disposable income is subject to the plan and whether the plan is proposed in good faith. 11 U.S.C. §§ 1225(a)(3), (b)(2), 1325(a)(3), (b)(2); *In re Bottleberghe*, 253 B.R. 256 (Bankr. D. Minn. 2000); *In re Enret*, 238 B.R. 85, 88 (Bankr. D. N.J. 1999); *In re Soper*, 152 B.R. 985 (Bankr. D. Kan. 1993); *In re Belt*, 106 B.R. 553 (Bankr. N.D. Ind. 1989); *In re Saunders*, 60 B.R. 187 (Bankr. N.D. Ohio 1986). If the nondebtor spouse's earnings are available to meet the debtor's expenses, the plan will not be confirmed unless these wages are taken into consideration. *In re Belt*, 106 B.R. 553; *In re Saunders*, 60 B.R. 187.

d. Management and Control by Trustee or Debtor-in-possession [§ 6.78]

Upon the filing of a bankruptcy petition, the Chapter 7 trustee or the debtor-in-possession under Chapters 11, 12, or 13, as the case may be, obtains management and control of all property of the estate. 11 U.S.C. §§ 704, 1107(a), 1203, 1303; *see also* 4 *Collier, supra* § 6.72, ¶ 541.15. As it appears from the discussion in sections 6.74–77, *supra*, all marital property assets may be in the debtor's estate, including all business-related marital property (described in section 766.70(3)(a)–(d)) held by the nondebtor spouse, even though those assets are not under the debtor's management and control at the time of filing. Although a spouse who does not hold a business interest classified as marital property and described in section 766.70(3)(a)–(d) cannot achieve management and control of the asset under Wisconsin law, *see* Wis. Stat. §§ 766.51(1)(am), .70(3), (4), the Bankruptcy Code supersedes state law and appears to authorize such a transfer of management and control. 4 *Collier, supra* § 6.72, ¶ 541.15. Therefore, any marital property business interest becomes subject to the management and control of the Chapter 7 trustee or the spouse who filed under Chapter 11, 12, or 13, whether or not that spouse held the business interest before the bankruptcy petition was filed. If necessary, the debtor-in-possession or trustee may compel transfer of the estate's property. 11 U.S.C. § 542.

See also *In re Brassett*, 332 B.R. 748 (Bankr. M.D. La. 2005) (holding that debtor spouse's right to recover community property interest in postdivorce unpartitioned asset passed to her bankruptcy estate); *supra* § 6.76.

➤ **Comment.** The practical result of the above rule is that a spouse unable to achieve management and control under state law may be able to do so by invoking bankruptcy law.

If property of the estate is held by a spouse and a third party, the trustee or debtor-in-possession may under certain conditions sell both the estate's and the co-owner's interest in the property. 11 U.S.C. § 363(h). Section 363(h) of the Bankruptcy Code provides that if the asset is owned by the debtor and a nondebtor party as joint tenants or as tenants in common, the trustee may sell the entire asset, provided that (1) partition in kind is impracticable; (2) the estate's share will be greater than would be realized by the sale of a fractional interest; (3) the benefit to the estate outweighs the detriment to the co-owner, including consideration of noneconomic interests; and (4) the asset is not used in the production of certain types of energy. 11 U.S.C. § 363(h); *see, e.g., Sapir v. Sartorius*, 230 B.R. 650 (S.D.N.Y. 1999), *aff'd*, No. 99-5020, 2000 WL 234456 (2d Cir. Feb. 1, 2000) (unpublished opinion); *Gazes v. Roswick (In re Roswick)*, 231 B.R. 843 (Bankr. S.D.N.Y. 1999); *Bakst v. Griffin (In re Griffin)*, 123 B.R. 933 (Bankr. S.D. Fla. 1991); *In re Waxman*, 128 B.R. 49 (Bankr. E.D.N.Y. 1991); *Greene v. Levenhar (In re Levenhar)*, 30 B.R. 976 (Bankr. E.D.N.Y. 1983); *Morris v. Ivey (In re Ivey)*, 10 B.R. 230 (Bankr. N.D. Ga. 1981).

These restrictions on the right to sell the entire asset do not apply to an asset formerly owned by the spouses as community property. 11 U.S.C. § 363(h); *In re Lang*, 191 B.R. at 272 (holding that federal bankruptcy law preempts Puerto Rican law that requires consent of both spouses for sale of community property); *Swink v. Sunwest Bank (In re Fingado)*, 995 F.2d 175 (10th Cir. 1993); *see also Kapila v. Morgan (In re Morgan)*, 286 B.R. 678 (Bankr. E.D. Wis. 2002).

If an asset is subject to sale in its entirety by the trustee, then the co-owner (in the case of an asset owned in joint tenancy, tenancy in common, or tenancy by the entireties) or the spouse (in the case of former community property) has the right to purchase the asset from the estate at the same price that would have been received from a third-party buyer. 11 U.S.C. § 363(i).

When the bankruptcy filing is for the sole purpose of gaining management and control over the nondebtor spouse's marital property assets, or when there is clear solvency and no legitimate reason for bankruptcy administration, the bankruptcy court may abstain from exercising jurisdiction after notice and hearing. *See* 28 U.S.C. § 1334(c); 11 U.S.C. § 305; *see also* 4 *Collier, supra* § 6.72, ¶ 541.15. Procedurally, the spouse holding a marital property asset, such as a business interest that is classified as marital property and that need not be brought into the estate under 11 U.S.C. § 541(a)(2)(B), may move to have the court abstain from exercising jurisdiction over the case. 11 U.S.C. § 305. Alternatively, the spouse may move the court for an order requiring that the trustee abandon the property if it would be of inconsequential value or benefit to the estate, such as an asset that has a small marital property component and is primarily the nonmarital property of the nonfiling spouse. 11 U.S.C. § 554(b); *see also Ludwig v. Geise (In re Geise)*, 132 B.R. 908 (Bankr. E.D. Wis. 1991). Abstention, abandonment, or refusal by the court to order transfer of the asset to the trustee or debtor-in-possession effectively returns the property to the nondebtor who owns it or in whose name it is held.

**e. Classification of Property by Court Order,
Marriage Agreement, Interspousal Gift, or
Unilateral Statement [§ 6.79]**

(1) In General [§ 6.80]

Property may be classified by court order under section 766.70; future income on nonmarital property assets may be classified as individual property by execution of a unilateral statement under section 766.59; and property may be classified by a marital property agreement under section 766.58, by written consent relating to life insurance under section 766.61(3)(e), or by gift. *See* Wis. Stat. § 766.31(10). A property division in a dissolution action can also change the ownership of property. *See* Wis. Stat. § 767.61. Classification by court order or by voluntary action of one or both of the spouses may affect whether property is included in the estate under 11 U.S.C. § 541(a)(2) or is excluded because former marital property assets became the individual property assets of the nonfiling spouse.

(2) Court Order [§ 6.81]

Subject to being set aside by the bankruptcy court as a fraudulent transfer, a state court decree may alter the classification of a spouse's property or govern the determination of property includible in a bankruptcy estate, as illustrated by *Britt v. Damson*, 334 F.2d 896 (9th Cir. 1964), a case involving a separation agreement incident to a dissolution under Washington law. The plaintiff in *Britt* was the trustee in bankruptcy for the defendant's former husband. The trustee sought to have the Washington divorce decree set aside any former community property brought back into the bankruptcy estate. His action was predicated on theories that (1) the trustee succeeded to the rights of a lien creditor (under 11 U.S.C. § 110(c) (1958), the predecessor statute to 11 U.S.C. § 544(a)); (2) the property division was a fraudulent conveyance under state law (under 11 U.S.C. § 110(e)(1) (1958), predecessor to 11 U.S.C. § 544(b)); and (3) the transfer rendered the debtor insolvent or with unreasonably small capital and was for insufficient consideration (under 11 U.S.C. § 107(d)(2) (1958), predecessor to 11 U.S.C. § 548(a)). The lower court ruled in the defendant's favor on the ground that her former husband had no right to subject her separate property to a bankruptcy proceeding. The Ninth Circuit Court of Appeals also ruled in the defendant's favor and analyzed the trustee's various theories, rejecting all of them.

The appellate court noted that a distinction must be made between the rights of a hypothetical lien creditor with respect to property of the estate and the rights of creditors under state law with respect to former community property in the hands of the nondebtor spouse. Hypothetical lien rights in bankruptcy extend only to property of the estate. The debtor had no interest in the property awarded to his former wife, and he could not bring that property into the estate. Therefore, the trustee as a hypothetical lien creditor had no rights in the property the former wife received in the division of property. *Britt*, 344 F.2d at 900. In contrast to a hypothetical lien creditor's rights, state creditors' rights are not necessarily diminished by the exclusion of former community or marital property assets from the bankruptcy estate when one of the former spouses files a bankruptcy petition after the marriage is dissolved. At the time *Britt* was decided, Washington law conferred rights on creditors in existence before a divorce, as does Wisconsin under section 766.55(2m), allowing those creditors whose rights attached before the divorce to proceed against former community property received by the nonincurring

spouse. The creditors whose rights arose before the dissolution may recover those assets under state law. *See* Wis. Stat. § 766.55(2m).

The *Britt* court analyzed the definition of the term *transfer* and determined that a transfer had taken place, but to the extent that community property had been divided equally there was fair consideration. *Britt*, 334 F.2d at 903. The amount recoverable by the trustee therefore would be any portion in excess of 50% of the community property received by the nondebtor spouse without sufficient consideration. Consideration might be an equitable factor and might include maintenance and child support provisions. If the division had been unequal, then a circuit court, not the appellate court, could determine whether consideration was fair and whether the debtor was rendered insolvent or with unreasonably small capital. *Id.* at 902. This case made no distinction between a court order reached by stipulation and one reached by contested proceedings, but that may be a relevant factor in determining fair consideration.

➤ *Comment.* *Britt* has been criticized as allowing spouses to agree to remove property from the bankruptcy estate and to put property beyond creditors' reach. *See* 4 *Collier, supra* § 6.72 ¶ 541.15.

A court order under section 766.70 may also alter property classification, and such an order would determine the extent to which the spouses' property passes to the bankruptcy estate. An order under section 766.70 issued during an ongoing marriage would probably be analyzed in the same manner as outlined in *Britt* to determine whether a fraudulent conveyance occurred by reason of the order. *See supra* § 6.42 (Wisconsin creditor's rights without notice of court order under section 766.70).

(3) Marriage Agreement [§ 6.82]

It appears that the terms of a marriage agreement are effective against a bankruptcy trustee, unless the effect of such an agreement is a voidable fraudulent transfer under 11 U.S.C. § 548(a) and (b) or 11 U.S.C. § 544(b). Determining property of the estate requires reference to state law to determine the debtor's rights in property, and if the debtor has no rights in property classified by agreement as the individual property of the nondebtor spouse, then the property is not included in the bankruptcy estate. *See* 11 U.S.C. § 541(a).

For example, in *Rinehart v. Meek (In re Grady)*, 128 B.R. 462 (Bankr. E.D. Wis. 1991), the court held that an opt-out agreement between the debtor and his wife, entered into after marriage and immediately before the effective date of the Act, was binding on the bankruptcy trustee. The classifications established in the agreement were followed in determining the property division at the time of the couple's divorce, which occurred before the former husband's bankruptcy. Some of the assets the wife received in the dissolution would have been classified as marital property absent the agreement, but pursuant to the agreement, the assets were her individual property when acquired. Even though the former wife received substantially more assets in the property division than did the debtor, she had acquired most of them from her family by gift or inheritance. She received only her own property in the property division. Thus, since the property division at divorce did not effectuate a transfer, it could not be a fraudulent transfer that was avoidable by the trustee.

Similarly, the bankruptcy court in *Geise*, 132 B.R. 908, held that a statutory individual property classification agreement (SIPCA), signed by a debtor and his spouse after their marriage and after the Act was in effect, was binding on the bankruptcy trustee. The nondebtor spouse was entitled to trace her individual property assets as determined under the SIPCA, including a portion of the value of a house that had become mixed property. Assets classified as individual property by the SIPCA retained their individual property classification even after the SIPCA expired. Only the component part of the mixed property house that was classified as marital property was property of the estate and subject to transfer to the trustee; however, the marital property component of the value of the nondebtor's house was so small that payment was not required.

The court in *Pietri v. Pietri (In re Pietri)*, 59 B.R. 68 (Bankr. M.D. La. 1986), determined that a debtor's interest in the continuation of the Louisiana community property regime was not a property right or interest. Therefore, the recording of a prenuptial agreement in which each spouse gave up any right to future acquisition of community property and agreed to live under a separate property regime did not per se constitute a fraudulent transfer under 11 U.S.C. § 548. In Louisiana, a marital agreement is not effective as to third parties until it is recorded. In this case, the debtor failed to record the agreement until three years after the marriage and two weeks before the bankruptcy. The case was decided on summary judgment, and the court left open whether a

fraudulent transfer had actually occurred. It appears that the property accumulated before the agreement was recorded was community property as to the trustee, although the court refused to make a finding as to the trustee's rights in specific assets or the trustee's right to avoid transfers made by the debtor. *But see Rooz v. Kimmel (In re Kimmel)*, 367 B.R. 166 (Bankr. N.D. Cal), *aff'd*, 378 B.R. 630 (B.A.P. 9th Cir. 2007), *aff'd*, 302 Fed Appx. 518 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2394 (2009) (holding that such an agreement may be a fraudulent transfer under California law).

In an unpublished decision, the U.S. District Court in *In re Pappas*, No. 89-C-211-S (W.D. Wis. May 10, 1989), also found that a spouse does not have a present property interest in future accumulations of marital property and hence that forgoing those future accumulations does not constitute consideration. Consequently, a marital property agreement classifying those future rights did not constitute a transfer within the meaning of 11 U.S.C. § 548. It could not, then, be a fraudulent transfer, which the trustee under 11 U.S.C. § 548 could set aside, recovering the transferred assets for the estate. What this means is that a marital property agreement giving up any marital property interest in future acquisitions of property will be effective in keeping out of the debtor spouse's bankruptcy estate property acquired by the nondebtor spouse after the date of the agreement. The court contrasted the relinquishment of the future acquisition of a marital property interest with the relinquishment of a present support right. Forgoing a present right to support would constitute valuable consideration, for which there must be sufficient consideration in return. The agreement in *Pappas* had included a provision requiring the husband to transfer to the wife stock in his family business—that is, requiring the husband to forgo a present right. The husband argued that the motivation for the transfer was to promote “marital harmony.” The court found that marital harmony did not constitute “value.” Therefore, the transfer had been for no consideration, and the trustee could avoid the transfer and recover the stock for the estate. *See also Zubrod v. Kelsey (In re Kelsey)*, 270 B.R. 776, 781 (B.A.P. 10th Cir. 2001) (“Value is not measured from the subjective, emotional perspective of Mr. Kelsey, but instead from the objective, economic perspective of his creditors”).

Under section 766.55(4m), any of the debtor's creditors who are without actual knowledge or notice of the agreement may recover from the transferee spouse property that would have been available to the creditor but for the agreement. In addition, creditors are entitled to

proceed under section 766.55(4m) against former marital property assets that are classified as the nondebtor's individual property if the obligation was incurred before the execution of the agreement that reclassified such property as the nondebtor spouse's individual property. Therefore, in Wisconsin the rights of these two sorts of creditors are not adversely affected by excluding from the bankruptcy estate assets that would have been in the estate but for the agreement. The creditor may seek recovery against the nondebtor transferee spouse in state court, notwithstanding the effect of the discharge, because nonmarital property owned by the transferee is not protected by the discharge. *See infra* §§ 6.106–.110. Such creditors may be in a better position to recover than if the reclassified property were in the bankruptcy estate. If such property were in the estate, it would be subject to priority claims and other community claims against the debtor or both the debtor and the debtor's spouse, as well as to the claim of the creditor who had no notice of the agreement or court order. *See infra* §§ 6.92–.104.

The very existence of the creditor who had no notice, however, may enable the trustee to bring the reclassified property into the estate. Notwithstanding the general principle that a marriage agreement is binding on the trustee, the trustee may have avoidance powers, other than the power to set aside a fraudulent conveyance, that might bring assets into the estate that would otherwise be excluded by the agreement. These include powers as a hypothetical judicial lien creditor, a hypothetical execution creditor whose execution was returned unsatisfied, and a hypothetical bona fide purchaser, all as of the date of filing the petition. 11 U.S.C. § 544(a). Although these powers would probably not permit the trustee to set aside the marital property agreement, the trustee may invoke the power of 11 U.S.C. § 544(b) to set aside the agreement if there is an actual creditor who did not receive a copy or had no actual knowledge of the agreement before granting credit.

The trustee's powers as hypothetical creditor, executor, or purchaser allow the trustee to recover property from a transferee or third party for the benefit of the estate. 11 U.S.C. §§ 544(a), 550. The hypothetical creditor, however, arguably does not extend to include the creditor who has the right to set aside the agreement and recover property that would have been property of the estate absent the agreement. That creditor is only a creditor who had no actual knowledge of the agreement or did not receive a copy. It is not totally clear that a hypothetical creditor or purchaser would be deemed to have notice of a marital property agreement, but the better view would appear to be that the hypothetical

creditor or purchaser would be deemed to have notice. Otherwise, an agreement would not bind the trustee, regardless of how conscientious the debtor was in disclosing the agreement to creditors.

On the other hand, 11 U.S.C. § 544(b) states that the trustee can avoid a transfer that is voidable by an actual existing creditor who has an allowable claim because the creditor had no notice or knowledge of the agreement. The trustee in *Geise*, 132 B.R. at 913, had argued that because none of the creditors had been given notice of or a copy of the SIPCA before granting credit, he should be able to exercise the rights of such a creditor and not be bound by the agreement. 11 U.S.C. § 544(b). However, it appears that, except for the debt to the DOR, all the debtor's obligations were incurred before the agreement was entered into. *See* Wis. Stat. § 71.10(6)(a). The DOR is not a creditor as defined by section 766.01(2r) nor does it "extend credit." *Geise*, 132 B.R. at 913. Consequently, because there were no creditors entitled to avoid the agreement under state law, the trustee was not able to exercise the rights of such a creditor. *See* 11 U.S.C. § 544(b).

Section 766.55(4m) states that if a creditor does not receive a copy of an agreement or a court decree under section 766.70, the agreement cannot adversely affect the creditor, unless the creditor has actual knowledge of the adverse provision. The section does not say that the agreement is void. It is arguable that if the creditor's remedies were sufficient for it to recover in spite of the agreement, the creditor would be bound by terms of the agreement. It is also arguable that anything that diminishes the assets available for recovery constitutes an "adverse effect." If the creditor's ability to recover the nondebtor spouse's assets were adversely affected because of the manner in which the agreement classified property, and if this result were interpreted to make the agreement void as to that creditor, then the trustee could avoid the agreement and bring into the bankruptcy estate property that would have been marital property absent the agreement. Bringing the assets into the estate benefits all creditors, not solely the creditor without notice of the agreement.

One effect of bankruptcy is that an executory contract, described generally as one in which obligations remain to be performed on both sides, may be rejected or, under certain circumstances, assumed and assigned. *See* 11 U.S.C. § 365. The individual Chapter 11 debtor in *In re Draper*, 790 F.2d 52 (8th Cir. 1986), attempted to reject his marital settlement agreement as an executory contract under 11 U.S.C. § 365.

The bankruptcy court denied the debtor's motion, finding that his obligation to provide for his children's college education was actually in the nature of a support obligation rather than an executory contract. The district court and the court of appeals affirmed this view as not being clearly erroneous. The court of appeals noted that even if the agreement had been rejected, the damages for the breach would have been nondischargeable support, providing the same result as denying rejection of the agreement.

(4) Gift [§ 6.83]

Property may be reclassified by a gift between spouses, which also reclassifies the income from that property as the individual property of the donee spouse (unless the donor spouse provides otherwise). Wis. Stat. § 766.31(10). Section 766.55(4m)—which provides that a creditor without actual knowledge or without a copy of a marital property agreement or a decree under section 766.70 cannot be adversely affected by a provision of the agreement or decree—does not apply to gifts. Therefore, a gift that reclassifies marital or nonmarital property of the obligated donor as the individual property of the nonobligated donee is generally binding on the creditor. Creditors cannot avoid the transaction in the same manner that they can if the reclassification was by decree or agreement. *See* Wis. Stat. § 766.55(4m); *see also supra* § 6.37. However, if a transfer could have been avoided by a creditor as a fraudulent transfer, it can also be avoided by the bankruptcy trustee and brought into the estate. *See* 11 U.S.C. §§ 544(b), 548.

(5) Unilateral Statement [§ 6.84]

Under section 766.59, a spouse may execute a statement that classifies the income on that spouse's nonmarital property assets as individual property. Without the statement, such income is classified as marital property. Wis. Stat. § 766.31(4). It is not clear whether a unilateral statement by a nondebtor spouse will be effective to exclude accumulations of such income from the bankruptcy estate of the debtor spouse.

One possible view is that for some purposes under state law, Wis. Stat. § 766.59(5), a unilateral statement is treated like a contract and the authority of state contract law to determine the rights of individuals is

well recognized under federal law. However, a unilateral statement is not a contract. The adverse interests of contracting parties and litigants are more likely than a unilateral act to protect the spouses' rights in property, including property that is included in the bankruptcy estate, and this will also protect the rights of the spouses' creditors. In addition, the unilateral withdrawal by one spouse of income from the pool of marital property is sufficiently dissimilar from agreements and court orders that arguably it need not be recognized by federal law. The income from the nonfiling spouse's nonmarital property would then be in the estate of the debtor spouse, notwithstanding the nonfiling spouse's unilateral statement.

A better view is to classify such income as the individual property of the nondebtor spouse and to exclude it from the debtor's estate. Income subject to the unilateral statement is not marital property under state law, Wis. Stat. § 766.31(7p), and so is not includible in the estate as marital property under 11 U.S.C. § 541(a)(2). Furthermore, creditors of the debtor spouse are protected under state law if they had no notice of the unilateral statement, because they may recover property held by the nonincurring spouse that would have been marital property absent the statement. *See* Wis. Stat. §§ 766.55(4m), .59(5). Creditors of the debtor spouse who had notice of the nondebtor spouse's election are bound by its terms, which is fair in light of the notice before the granting of credit. However, if the trustee may set aside a marital property agreement using one of the trustee's avoidance powers, a unilateral statement should also be subject to avoidance. *See supra* § 6.82.

f. Voidable Transfers [§ 6.85]

(1) In General [§ 6.86]

Property of a bankruptcy estate includes property recovered by a bankruptcy trustee under the trustee's powers to avoid (nullify) certain transfers made before the filing of the bankruptcy petition. 11 U.S.C. § 541(a)(3). These voidable transfers include:

1. Transfers to a "custodian" under 11 U.S.C. § 542 (such as a receiver, sheriff after levy, or other party holding a nonbeneficial interest);

2. Fraudulent transfers or gifts that could have been avoided by a creditor under state law, 11 U.S.C. § 544(b), or under 11 U.S.C. § 548;
3. Set-offs, 11 U.S.C. § 553;
4. Property acquired on account of a bankruptcy trustee's other special lien avoidance powers, 11 U.S.C. §§ 544, 545, 724(a);
5. Excessive payments to an attorney, 11 U.S.C. § 329(b);
6. Recovery from general partners of a debtor partnership, 11 U.S.C. § 723; and
7. Preferences, 11 U.S.C. § 547.

See generally 11 U.S.C. §§ 541(a)(3), (4), 550. The trustee may also avoid certain postpetition transfers and collusive sales. 11 U.S.C. §§ 549, 363(n). The most common types of avoidable transfers are preferences under 11 U.S.C. § 547, fraudulent conveyances under 11 U.S.C. §§ 548 and 544(b), and transfers subject to the trustee's avoidance powers as a hypothetical creditor or bona fide purchaser under 11 U.S.C. § 544(a). *See supra* § 6.82 (trustee's avoidance powers under 11 U.S.C. §§ 544 and 548 with respect to marriage agreements).

If the trustee avoids a transfer, thereby bringing an asset into the estate, the debtor may claim the asset exempt, provided that the asset qualifies for an exemption, the transfer was not voluntary, and the debtor did not conceal the property. 11 U.S.C. § 522(g). If the trustee chooses not to avoid a transfer, usually because the debtor is entitled to claim it exempt under 11 U.S.C. § 522(g), the debtor may use the trustee's avoidance powers to recover the asset. 11 U.S.C. § 522(h). The debtor may also be entitled to avoid nonpossessory, non-purchase money liens on certain exempt assets and to avoid judicial liens unrelated to support of dependents to the extent those liens impair an exemption. 11 U.S.C. § 522(f).

(2) Preferences [§ 6.87]

A preference under 11 U.S.C. § 547 is a transfer of a debtor's property (which includes the debtor's interest in marital property assets)

to or for the benefit of a creditor in payment of a debt in existence at the time of payment. To be avoidable, the transfer must have been made while the debtor was insolvent and must have resulted in the creditor's receiving more than the creditor would have received under Chapter 7 if the transfer had not been made. 11 U.S.C. § 547(b). Transfers may be avoided as preferences if they are made (1) on or within 90 days before the filing of the bankruptcy petition, if the transfer was to an ordinary creditor, or (2) within one year before the filing if the transfer was to an "insider" (defined in 11 U.S.C. § 101(31)). 11 U.S.C. § 547(b)(4). A debtor is presumed to be insolvent within the 90 days before filing. 11 U.S.C. § 547(f). Certain defenses are available to transferees; for example, avoidance is not permitted in the case of transfers that occur for new or contemporaneous consideration or in the ordinary course of business. 11 U.S.C. § 547(c).

A transfer of marital property assets by a nondebtor spouse in connection with a debt incurred by either spouse may also be a preference. *See Pedlar, supra*, § 6.76, at 372.

➤ **Example.** Assume that a farmer who is a sole proprietor uses marital property funds to pay a seed company for an antecedent debt incurred in operating the farm. The farmer's spouse files a petition in bankruptcy within 90 days after the payment. The spouse's trustee may recover the payment from the seed company as a preference. *See also infra* § 6.105 (administration of assets recovered by avoided transfers in bankruptcy estate).

A preference is a transfer that, among other things, was made to a creditor for an antecedent debt—that is, a payment that is not a contemporaneous exchange for consideration. The term *creditor* is defined in 11 U.S.C. § 101(10)(c) to include an entity holding a *community claim*, a term defined in 11 U.S.C. § 101(7). Since it appears that all categories of obligations under section 766.55(2) are community claims, *see infra* §§ 6.92–104, with disallowance under certain circumstances, then almost any payment on an antecedent obligation by either spouse with marital property funds or with the debtor's nonmarital property funds during the preference time period is voidable. *See Pedlar, supra* § 6.76, at 386–88; 4 *Collier, supra* § 6.72, ¶ 547.05.

To constitute an avoidable preference, a transfer must have occurred while the debtor was insolvent. 11 U.S.C. § 547(b)(3). Whether the debtor was insolvent at the time of the transfer is determined by

reference to the definition of the term *insolvent* in 11 U.S.C. § 101(32). The definition states that a debtor is insolvent when “the sum of such entity’s debts is greater than all of such entity’s property,” exclusive of certain exceptions. 11 U.S.C. § 101(32). *Debt* means liability on a claim, 11 U.S.C. § 101(12), and a claim includes a “claim against property of the debtor,” 11 U.S.C. § 102(2). One commentator has stated that an “entity’s debts” should be read to mean “community claims.” Pedlar, *supra* § 6.76, at 387. Such a reading is logical but apparently incorrect because a literal reading of the relevant statutes does not lead to the definition of community claim in 11 U.S.C. § 101(7). *See* 11 U.S.C. §§ 101(12), (5), 102(2). Therefore, even though all obligations under section 766.55(2) are included within the definition of community claim, 11 U.S.C. § 101(7); *see infra* §§ 6.92–.104, for the purpose of distributing the estate, only obligations meeting the definition of *claim against property of the debtor* are used in determining insolvency.

In determining insolvency, the classification of property actually included in the bankruptcy estate and the availability of property under section 766.55(2) may be important. Obligations can meet the definition of community claim whether or not property exists that is available to satisfy such obligations under state law. 11 U.S.C. § 101(7); *see infra* §§ 6.95–.104. However, the definition of claim against property of the debtor depends on the nature of the obligation and the classification of property actually in the estate. If marital property assets in the estate are available to satisfy the category of debt under section 766.55(2)(c)–(d), then the creditor has a claim against the debtor’s property. 11 U.S.C. § 102(2); *see infra* § 6.94.

The following example illustrates the difference between a community claim and a claim against the debtor’s property.

➤ **Example.** Assume that the estate consists of marital property assets owned by the debtor and the debtor’s nonfiling spouse that are traceable only to the debtor’s earnings. The premarriage creditor of the debtor’s spouse has a community claim because there could conceivably have been marital property assets in the estate that were traceable to the earnings of the nondebtor spouse. Wis. Stat. § 766.55(2)(c)1. However, because the estate does not actually contain such assets, the creditor does not have a claim against the debtor’s property. The obligation, therefore, is not included in measuring the debtor’s insolvency under 11 U.S.C. § 547(b)(3)

because it is not a claim against the debtor's property and hence is not one of the "entity's debts" under 11 U.S.C. § 101(32).

➤ *Example.* A tort or nonfamily-purpose obligation of the nonfiling spouse is collectible only from the nondebtor's one-half of marital property. Such an obligation would not be counted to determine insolvency since it is not a claim against the debtor's property and so is not part of the "entity's debts." Such appears to be the case, even though the trustee may be attempting to recover marital property funds transferred by the nondebtor in satisfaction of a tort or nonfamily-purpose obligation of that spouse.

Furthermore, the insolvency test measures the entity's debts against "such entity's property." 11 U.S.C. § 101(32). The term *entity* is defined to include a "person, estate, trust [and] governmental unit." 11 U.S.C. § 101(15). The entity's property is not necessarily synonymous with the bankruptcy estate determined under 11 U.S.C. § 541 because the estate may include the nondebtor spouse's interest in marital property as well as the debtor's. If only the debtor's property is used to measure insolvency, only one-half the marital property assets in the bankruptcy estate are used in the insolvency calculation. Whether one-half or all of the marital property assets are used in this calculation is by no means clear, since the Bankruptcy Code usually treats such assets as a whole, rather than as fractional interests. *See, e.g.*, 11 U.S.C. § 541(a)(2); *see also In re Passmore*, 156 B.R. 595, 599 (Bankr. E.D. Wis. 1993).

Even if all, rather than one-half, of the marital property assets were included in measuring the entity's property, the nonmarital property of the nonfiling spouse would not be included. It is possible that if *all* of both spouses' property were included in evaluating solvency, the addition of the nondebtor's individual and predetermination date property would render the spouses solvent, thereby protecting the otherwise preferred creditor. The lack of a solvency test based on both spouses' property and obligations has been criticized, *see Pedlar, supra* § 6.76, at 386–88, but such a solvency test remains unavailable under the Bankruptcy Code.

(3) Fraudulent Transfers [§ 6.88]

The trustee or debtor-in-possession is empowered to set aside certain transfers made by the debtor or debtor's spouse before filing. 11 U.S.C.

§§ 548, 544(b). A transfer subject to avoidance might have been made by the debtor to the nonfiling spouse. *See, e.g., Hinsley v. Boudloche (In re Hinsley)*, 201 F.3d 638 (5th Cir. 2000) (holding that partition agreement entered into in contemplation of divorce was fraudulent as to husband's creditors); *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008 (5th Cir. 1992) (holding that granting to wife of security interest in debtor's assets was fraudulent as to creditors even though debtor's wife had previously made unsecured loans to debtor).

A spouse's failure to assert his or her rights in a dissolution action may result in a fraudulent transfer that is voidable by the trustee. In *Conti-Commodity Services, Inc. v. Clausen (In re Clausen)*, 44 B.R. 41 (Bankr. D. Minn. 1984), the former husband allowed his former wife to receive the family home with substantial equity by default. Citing *Britt*, 334 F.2d 896, for the proposition that a divorce decree constitutes a transfer to the extent that one party receives more than one-half of the property divided, the court found that the debtor had transferred property with the intent to hinder, delay, or defraud creditors and denied him a discharge under 11 U.S.C. § 727(a)(2)(A). *See also Corzin v. Fordu (In re Fordu)*, 201 F.3d 693 (6th Cir. 1999). *But see Harman v. Sorlucco (In re Sorlucco)*, 68 B.R. 748 (Bankr. D.N.H. 1986) (holding that marital settlement agreement fell within "reasonable range" of what court would have ordered if property division were litigated; court thus did not set aside agreement); *Grady*, 128 B.R. 462 (holding that because former spouse received only her property in divorce, there was no transfer to avoid). *See also* Steven J. Schwartz, *Marital Dissolution and Bankruptcy: The Rights of the Bankruptcy Trustee to Administer Community Property and to Avoid and to Recovery Property Divisions*, 28 Cal. Bankr. J. 523 (2006).

The trustee in *Liebzeit v. Universal Mortgage Corp. (In re Larson)*, 346 B.R. 486 (Bankr. E.D. Wis. 2006), sought to set aside the perfection of a homestead mortgage that the husband alone had granted while married. Had the mortgage perfection been set aside, the mortgage would have been preserved for the benefit of the bankruptcy estate, and loan payments made by the debtor would have inured to the benefit of unsecured creditors rather than the mortgage holder. *See* 11 U.S.C. §§ 544(a)(3), 550. The loan was a refinance, and the debtor and his nondebtor spouse were married after the debtor had taken out an initial mortgage and before the refinance. The wife did not sign the mortgage that the husband took out after the marriage, contrary to the requirement of section 706.02(1)(f). However, Wisconsin law provides that, if a

defective mortgage secures a loan that pays off a valid mortgage, equitable subrogation allows the holder of the defective mortgage to stand in the shoes of the prior valid mortgage holder. See *State Bank of Drummond v. Christophersen*, 93 Wis. 2d 148, 286 N.W.2d 547 (1980). Therefore, to the extent the prior mortgage was paid by the existing creditor, the trustee in *Larson* could not set aside the creditor's mortgage interest.

(4) Lien Avoidance [§ 6.89]

In addition to liens that may be avoided as preferences or fraudulent transfers, liens that are unsecured because the value of the property subject to the lien is less than the amount of the claim may be avoided, usually by the debtor. 11 U.S.C. § 506. The debtor may also avoid (1) nonpossessory, non-purchase money security interests in certain exempt property and (2) judicial liens on exempt property, except those that secure support debts. 11 U.S.C. § 522(f). Judicial liens securing a payment to the debtor's former spouse that arose pursuant to a divorce decree are usually not avoidable. *Farrey v. Sanderfoot*, 500 U.S. 291 (1991); *Foss v. Foss*, 200 B.R. 660 (B.A.P. 9th Cir. 1996) (holding that liens to secure payment of property division could not be avoided). However, if a judicial lien attaches to a community property asset that the debtor later acquires under a divorce decree, the debtor may still avoid the lien, provided all requirements of 11 U.S.C. § 522(f) are met. *Law Offices of Moore & Moore v. Stoneking (In re Stoneking)*, 225 B.R. 690 (B.A.P. 9th Cir. 1998); *In re Schmiedel*, 236 B.R. 393 (Bankr. E.D. Wis. 1999). Because the debtor had an interest in the asset when the lien attached and the lien impairs an exemption, it may be avoided (notwithstanding the fact that the debtor's ownership interest was later augmented to full ownership by the debtor's acquisition of the former spouse's interest in the asset, to which the lien had also attached). *Stoneking*, 225 B.R. 690; *Schmiedel*, 236 B.R. 393.

Statutory liens are not avoidable under 11 U.S.C. § 522(f). Section 49.854(2)(a) provides an example of a statutory lien for child support in Wisconsin:

If a person obligated to pay support fails to pay any court-ordered amount of support, that amount becomes a lien in favor of the department [of children and families] upon all property of the person. The lien becomes effective when the information is entered in the statewide support lien docket under

par. (b) and that docket is delivered to the register of deeds in the county where the property is located

The property subject to the lien is real or personal property in which the payer has a “recorded ownership interest.” Wis. Admin. Code § DCF 152.03(7).

g. Exemptions [§ 6.90]

Under bankruptcy law, as under state law, a debtor is entitled to retain certain property free of the creditors’ right to collect. 11 U.S.C. § 522(d); Wis. Stat. §§ 815.18, .20, 425.106; *see also 7 Collier, supra* § 6.72, at 815–34. This is to allow the debtor to retain the necessities of life and the means to make a living, notwithstanding the right of creditors to satisfy their claims.

The Bankruptcy Code allows a debtor to claim either the assets described in 11 U.S.C. § 522(d) or the assets available under state law, but it allows states to prevent the use of federal bankruptcy exemptions. 11 U.S.C. § 522(b). Wisconsin has not enacted legislation to prevent use of the federal exemptions, which gives Wisconsin debtors the choice of state or federal exemptions. A debtor must use the state or federal list in its entirety and may not choose on an asset-by-asset basis. 11 U.S.C. § 522(b). Spouses filing a joint case must both choose either the state list or the federal list—one spouse may not use the state list and the other the federal list. *Id.* If a choice is available and the spouses cannot agree, they are deemed to have chosen the federal list. *Id. But see In re Hendrick*, 45 B.R. 965 (Bankr. M.D. La. 1985) (allowing nondebtor former wife to take state-law exemptions in community property).

Although all marital property assets are included in a bankruptcy estate, under federal law only “an individual debtor” may claim certain assets as exempt. 11 U.S.C. § 522(b)(1). This means that the nondebtor spouse does not have a right to remove assets from the estate as exempt. *In re DeHaan*, 275 B.R. 375 (Bankr. D. Idaho 2002); *Kapila v. Morgan (In re Morgan)*, 286 B.R. 678 (Bankr. E.D. Wis. 2002); *Burman v. Homan (In re Homan)*, 112 B.R. 356, 359–60 (B.A.P. 9th Cir. 1989) (holding that nondebtor spouse was not allowed under Fed. R. Bankr. P. 4003(a) to supplement exemptions claimed by debtor, even though list was incomplete). *See also In re Victor*, 341 B.R. 775, 781 (Bankr. D.N.M. 2006) (holding that filing spouse could claim exemption in only

her one-half interest in community property assets, even though full value of community property assets was in estate); *In re Czerneski*, 330 B.R. 240 (Bankr. E.D. Wis. 2005) (concluding that debtor did not establish “mixing” of marital property with his spouse’s individual property and was not allowed to claim exemption in her asset); David R. Knauss, Comment, *What Part of Yours Is Mine?: The Creation of a Marital Property Ownership Interest by Improving Nonmarital Property Under Wisconsin’s Marital Property Law*, 2005 Wis. L. Rev. 855. *But see Flinn v. Morris (In re Steward)*, 227 B.R. 895, 899 (B.A.P. 9th Cir. 1998) (holding that subsequent filing by other spouse and administrative consolidation of cases gave second spouse right to claim bankruptcy exemptions); *In re Crouch*, 33 B.R. 271, 274 (Bankr. E.D.N.C. 1983) (holding that exemptions must be claimed in good faith and not to defeat other spouse’s rights). Although a spouse’s state-law exemptions might keep certain 11 U.S.C. § 541(a)(2)(B) assets out of the estate (because they are only in the estate “to the extent” the assets are subject to recovery for certain claims), once marital property assets are included in the estate, the nondebtor may not claim exemptions to remove the assets from the estate. *See supra* § 6.76.

The effect on use of the federal exemptions of the debtor’s owning only a one-half interest in each item of marital property is unclear. Each exemption under 11 U.S.C. § 522(d) is for “the debtor’s interest” in each item listed. If the nondebtor may not claim his or her interest in each item of exempt property, then it would follow that these items must be sold (if nondivisible) and one-half the proceeds given to the debtor as exempt and the other half, which is the marital property interest of the nondebtor, included in the estate. 11 U.S.C. § 363(h). The nondebtor spouse’s interest in a joint-tenancy asset is not in the bankruptcy estate, in contrast to an asset classified as community property, which is in the estate in its entirety. *See supra* §§ 6.74–.77.

This rule was demonstrated in *In re Page*, 171 B.R. 349 (Bankr. W.D. Wis. 1994). In *Page*, the debtor wife attempted, pursuant to 11 U.S.C. § 522(f), to remove a garnishment lien on a check for deer damage payable to the nondebtor husband. The husband was ineligible for a discharge, having received a Chapter 7 discharge within six years before the debtor’s filing. The debtor claimed the federal exemptions under 11 U.S.C. § 522(d). The entire check was property of the estate; however, the court held that only an individual debtor could claim exemptions under 11 U.S.C. § 522(b) and (d). *Id.* at 352. Therefore, the debtor could claim only her one-half interest as exempt and could remove the

lien only from her one-half interest, not from the full amount of the check.

The court in *In re Barnes*, 14 B.R. 788, 790 (Bankr. N.D. Tex. 1981), however, took a unitary approach to the treatment of community property. The debtors were entitled to an income-tax refund, and only the wife had taxable income. The refund was due on account of excess withholding of her earned income, over which she had sole management and control. At that time, spouses could use different exemption laws, and the husband took the federal exemptions, which allowed an exemption for a tax refund, and the wife took the state exemptions, which did not. The court held that the community property tax refund was in the consolidated estate, and either spouse could claim an exemption in the entire amount, regardless of which spouse earned it. The court disagreed with *In re Smith*, 5 B.R. 227 (Bankr. S.D. Ohio 1980), not a community property case, in which the court in a joint case allowed exemption by only one spouse of the “debtor’s interest” in a tax refund earned by only that spouse.

Under Wisconsin law, the debtor’s interest in each item listed is exempt, but the debtor’s spouse is also entitled to an exemption from execution for his or her interest in the item, and with the exception of income, the spouses’ exemptions may be combined to claim a single asset as exempt. Wis. Stat. § 815.18(8); *Bank One, Appleton, NA*, 176 Wis. 2d at 223. Arguably, the grant of state exemptions under 11 U.S.C. § 522(b) incorporates the state’s grant to both spouses of the right to retain exempt assets. This interpretation is in keeping with the policy of preserving assets for the debtor to maintain the necessities of life and the means to make a living. Wis. Stat. § 815.18(1); see 3 *Collier, supra* § 6.72, ¶ 522.02. The ruling in *Page*, discussed above, is not inconsistent with this interpretation, as the asset in question in that case was not exempt under Wisconsin law.

The alternative available under 11 U.S.C. § 522(b)(3)(A) refers to claiming “any property,” rather than the debtor’s interest in property, exempt under the state exemptions or under federal exemptions other than 11 U.S.C. § 522(d) (i.e., under the federal nonbankruptcy exemptions). Debtors claiming assets eligible for an exemption under state law must refer to the particular Wisconsin statute being applied to determine if it is the asset or the debtor’s interest in the asset that is exempt. See, e.g., Wis. Stat. §§ 425.106(1), 815.18(3), .20; see also 7 *Collier, supra* § 6.72, at 815–34 (federal nonbankruptcy exemptions).

On the other hand, for the debtor choosing the alternative available under 11 U.S.C. § 522(b)(1), the federal exemptions under 11 U.S.C. § 522(d) allow exemption of only “the debtor’s interest” in the list of assets.

The Wisconsin homestead-exemption statute, section 815.20, allows an exemption for a homestead occupied and owned in whole or in part by a debtor. The statute states that the exemption may be claimed for a homestead owned by a husband and wife jointly, in common, or as marital property. Therefore, for a debtor claiming the Wisconsin exemptions, it appears that the protection extends to the entire homestead, not merely the debtor’s fractional interest.

A debtor may claim only property of the estate as exempt. 11 U.S.C. § 522(b). If one spouse files a bankruptcy petition, which brings all marital property into his or her bankruptcy estate under 11 U.S.C. § 541(a)(2), and the other spouse subsequently files, property that may not be claimed by the nondebtor spouse is liquidated in the first estate. Thus, the asset is not in the estate of the second spouse and may not be claimed. However, if spouses file a joint petition, assets classified as marital property are in both estates. *Ageton v. Cervenka (In re Ageton)*, 14 B.R. 833 (B.A.P. 9th Cir. 1981); *In re Barnes*, 14 B.R. 788 (Bankr. N.D. Tex. 1981). Substantive consolidation may be appropriate under such circumstances, especially as to the marital property assets in both bankruptcy estates. *Ageton*, 14 B.R. 833; *Barnes*, 14 B.R. 788; see 2 *Collier, supra* § 6.72, ¶ 302.05; see also Fed. R. Bankr. P. 1015, 2009.

If the same property is in subsequent estates, which occurs if one spouse files a bankruptcy petition and claims an exemption in a marital property asset and the other spouse later files, an exemption may be claimed again in the same asset. In *Texaco, Inc. v. Bartlett (In re Bartlett)*, 24 B.R. 605, 608 (B.A.P. 9th Cir. 1982), which arose under the California community property system, the entire homestead was claimed as exempt in each spouse’s bankruptcy. The debtor claimed state (California) exemptions, and her husband in a previous case had claimed the same assets under the federal exemptions. The court held that a debtor is not limited to one exemption of his or her interest in a community property asset; debtors and their spouses may claim the asset as many times as necessary to preserve the exemption.

The Wisconsin statute allowing an exemption for tools and equipment used by a debtor in earning a living applies to property used “in the business of the debtor or the business of a dependent of the debtor.”

Wis. Stat. § 815.18(3)(b). For the purpose of claiming exemptions, the term *dependent* is defined to include the debtor's spouse, regardless of whether the spouse is actually dependent. 11 U.S.C. § 522(a)(1); *cf.* Wis. Stat. § 815.18(2)(d) (“‘Dependent’ means any individual, including a spouse, who requires and is actually receiving substantial support and maintenance from the debtor.”). A bankruptcy court, interpreting the analogous New Mexico exemption statute, disallowed the exemption claimed by one joint debtor spouse for tools of a business in which only the other joint debtor was active, even though the tools were community property. *In re Bryan*, 126 B.R. 108 (Bankr. D.N.M. 1991). The court reasoned that the spouse had no business and could not claim such an exemption. The New Mexico statute did not apply to the business of a dependent of the debtor as does section 815.18(3)(b). Even though the Wisconsin definition of dependent provides that the dependent must be actually receiving support, the definition under 11 U.S.C. § 522(a)(1) does not, and the bankruptcy definition applies whether the debtor is claiming state or federal exemptions under 11 U.S.C. § 522(b). Consequently, a Wisconsin debtor should be able to claim an exemption in assets used solely in the business of the other spouse.

2. Involuntary Petitions [§ 6.91]

Section 303 of the Bankruptcy Code deals with involuntary bankruptcy petitions filed by creditors. The creditors qualified to initiate such petitions are limited to those having claims against the person (as opposed to claims against the property of a spouse who is not the obligated spouse). 11 U.S.C. § 303(b). The debtor must be the incurring spouse to be personally liable, unless the debtor is the obligated spouse under the necessities doctrine. *See supra* §§ 6.4–6. A creditor having a claim only against the debtor's property, such as a creditor entitled to reach marital property assets to satisfy a family-purpose obligation incurred by a spouse under the family-purpose doctrine, Wis. Stat. § 766.55(2)(b), is not qualified to file an involuntary petition for the bankruptcy of the nonincurring spouse. *See* 11 U.S.C. § 303.

The test for granting an involuntary petition is whether “the debtor is generally not paying such debtor's debts as such debts become due.” 11 U.S.C. § 303(h)(1). The “debtor's debts” do not include obligations incurred by the debtor's spouse. *In re Karber*, 25 B.R. 9, 13 (Bankr. N.D. Tex. 1982). Therefore, creditors as to obligations incurred by a debtor's spouse may not initiate a petition for involuntary bankruptcy of

the nonobligated spouse. See *King v. Fidelity Nat'l Bank*, 712 F.2d 188, 190 (5th Cir. 1983); *Karber*, 25 B.R. at 13; see also *In re Gale*, 177 B.R. 531 (Bankr. E.D. Mich. 1995); *In re Jones*, 112 B.R. 770 (Bankr. E.D. Va. 1990); 2 *Collier*, *supra* § 6.72, ¶ 303.07; *Pedlar*, *supra* § 6.76, at 354–57. Furthermore, one spouse may not force the other to involuntarily join in a joint petition. *In re McDonald*, No. Civ. A. 93-4176, 1994 WL 160484 (E.D. La. Apr. 22, 1994).

3. Claims Against Debtor and Debtor's Spouse [§ 6.92]

a. In General [§ 6.93]

All claims sought to be discharged by a debtor must be included in the bankruptcy schedules, and the creditors listed must be notified that the bankruptcy petition has been filed. 11 U.S.C. § 523(a)(3). All creditors, including those having community claims, see *infra* §§ 6.95–.104, are entitled to notice. 11 U.S.C. § 342(a). Since it appears that marital property assets are part of the bankruptcy estate regardless of who has possession of them or how they are held, see *supra* §§ 6.74–.77, any creditor having a claim against the nondebtor spouse should file a claim in the bankruptcy estate of the debtor spouse who did not incur the debt. This filing is necessary to reach marital property assets that would have been available to the creditor of the nondebtor spouse if the bankruptcy had not been filed. Also, under some circumstances, creditors of the nondebtor spouse may be entitled to distributions of the debtor's individual property that would not be available under state law. See *infra* § 6.105. It is particularly important that creditors keep records of the names and addresses of, and possibly other identifying information relating to, debtors' spouses to ensure that claims can be filed in such cases.

➤ **Note.** Claims between former spouses arising in a dissolution decree, which must be addressed in the bankruptcy of a former spouse who is obligated by the decree, are beyond the scope of this chapter. However, under certain circumstances, these obligations may relate to the former ownership of community property. See, e.g., *Smith v. Smith (In re Smith)*, 229 B.R. 792 (Bankr. E.D. Cal. 1998) (holding that obligation to pay former spouse or debtor her share of community

property divided by divorce decree was excepted from discharge under 11 U.S.C. § 523(a)(15)).

b. Claims Against Debtor or Debtor's Property **[§ 6.94]**

In general, a claim is any right to payment. 11 U.S.C. § 101(5). Section 102(2) of the Bankruptcy Code defines the term claim against the debtor to include a claim against the debtor's property. It appears from the literal language of that section that an obligation that may be satisfied from marital property in which the debtor has an interest constitutes a claim against the debtor. Creditors having a right to recover property of the debtor because those rights arose before the pre-petition death of the debtor's spouse or before the pre-petition dissolution of the debtor's marriage would also have claims against property of the debtor. *See supra* §§ 6.44–.47.

➤ *Note.* Although the legislative history of 11 U.S.C. § 102(2) indicates the statute was intended to apply only to nonrecourse mortgages for which the debtor was not personally liable, the U.S. Supreme Court in *Johnson v. Home State Bank*, 501 U.S. 78 (1991), held the section applicable in that case, which involved a mortgage on the debtor's real estate for which the debtor was not personally liable. The literal language clearly made the application of 11 U.S.C. § 102(2) appropriate, and the mortgage was held to be a claim.

All obligations for which the debtor is personally liable constitute claims against the debtor. A family-purpose obligation incurred by the nondebtor spouse, which under section 766.55(2)(b) may be satisfied from all marital property assets, is likewise a claim under the Bankruptcy Code because it is a claim against property of the debtor. 11 U.S.C. § 102(2). Other obligations described in section 766.55(2)(c)–(d) may or may not be claims against the debtor or the debtor's property, depending on the nature of the obligation and the classification of property in the estate. For example, tort and nonfamily-purpose obligations of the nonfiling spouse are collectible only from the nonfiling spouse's nonmarital property assets and from the nonfiling spouse's share of marital property—not from the debtor's property. If there are marital property assets in the bankruptcy estate that are available to satisfy the category of debt under section 766.55(2)(c)–(d) (such as accumulation of

the debtor's marital property wages, which are available to satisfy a premarriage obligation of the debtor), then the creditor has a claim. This distinction is probably not crucial, however, because a creditor's having a community claim, which is used to determine the distribution of assets, turns on the ability to satisfy the obligation from hypothetical assets of a particular classification, not actual assets. *See infra* §§ 6.95–.104.

In a bankruptcy proceeding, the issue of whether a creditor's right to payment constitutes a claim against the debtor is relevant under certain circumstances that are not related to payment, such as in determining insolvency for the purpose of avoiding preferences. *See supra* §§ 6.85–.89.

c. Community Claims [§ 6.95]

(1) In General [§ 6.96]

Another important definition affecting the rights of creditors in a bankruptcy case is the definition of the term community claim. 11 U.S.C. § 101(7). Whether a claim is a community claim affects which sub-estates under 11 U.S.C. § 726(c) are used to pay the claim. *See infra* § 6.105. It also determines whether the discharge injunction under 11 U.S.C. § 524(a)(3) prevents recovery by the creditor of marital property assets acquired after the discharge. *See infra* §§ 6.106–.110. The total amount of community claims is also used to determine a debtor's eligibility for filing a Chapter 13 case under 11 U.S.C. § 109(e), whether or not the debtor is personally liable for the debts in question. *In re Monroe*, 282 B.R. 219 (Bankr. D. Ariz. 2002). Analysis of the various types of obligations under section 766.55 is necessary to see if they meet the definition of community claim. *See also supra* §§ 6.74–.77, *infra* § 6.105.

A community claim is a claim that arose before the commencement of the bankruptcy case and for which property described in 11 U.S.C. § 541(a)(2) (community property that is property of the estate, *see supra* §§ 6.74–.77), is liable, “whether or not there is any such property at the time of the commencement of the case.” 11 U.S.C. § 101(7). Therefore, no reference need be made to the actual classification of property in the estate to determine a creditor's status. If it is hypothetically possible for the estate to hold marital property assets described in 11 U.S.C. § 541(a)(2) that would be available to satisfy the creditor's claim, then

the creditor qualifies as having a community claim. There are no provisions under 11 U.S.C. § 101(7) for different classes of community claims; therefore, if a creditor achieves that status, the creditor will be treated for distribution purposes in the same manner as other community creditors in the same class. See 2 *Collier, supra* § 6.72, ¶ 101.07; *FDIC v. Soderling (In re Soderling)*, 998 F.2d 730 (9th Cir. 1993) (holding that restitution for federal crime may be satisfied from community property under California law and thus is community claim); *Grimm v. Grimm*, 82 B.R. 989, 991–93 (Bankr. W.D. Wis. 1988). But see *infra* § 6.104 (disallowance of some claims).

It appears that *all* categories of obligations under section 766.55(2), whether incurred by the debtor spouse or the nondebtor spouse, meet the definition of community claim under 11 U.S.C. § 101(7) for the reasons set forth in sections 6.97–.104, *infra*.

See also *Arcadia Farms Ltd. v. Rollinson (In re Rollinson)*, 322 B.R. 879 (Bankr. D. Ariz. 2005) (holding that note signed by both spouses in favor of wife's employer as reimbursement for wife's embezzlement was community claim).

Claims are determined as of the filing of the case, notwithstanding that they might be paid well after filing. Thus, the court in *In re Nelson*, 308 B.R. 343 (Bankr. E.D. Wis. 2004), held that claims allowed in a debtor-husband's Chapter 13 case could continue to be paid through the plan, even though after the case was filed, the debtor-wife converted her case to Chapter 7 and received her discharge. The wife's Chapter 7 discharge would prevent recovery of community property under 11 U.S.C. § 524(a)(3), and community property wages funded the husband's Chapter 13 plan; however, the allowance of claims in the husband's case took place before the Chapter 7 discharge, and the wife's subsequent discharge had no effect.

(2) Support Obligations [§ 6.97]

An obligation for support, which one spouse can recover from the other, may be satisfied from all marital property assets and from all other assets of the obligated spouse. Wis. Stat. § 766.55(2)(a). Since the assets recoverable by one spouse having a support claim against the other are assets described in 11 U.S.C. § 541(a)(2), a support obligation of either spouse qualifies as a community claim.

(3) Obligations Incurred in Interest of Marriage or Family [§ 6.98]

Family-purpose obligations may be satisfied from all marital property assets and from all other property of the incurring spouse. Wis. Stat. § 766.55(2)(b); *see supra* §§ 6.7–.22. It is immaterial whether a family-purpose obligation is incurred by the debtor or the debtor’s spouse or whether the debtor or the debtor’s spouse is obligated under the necessities doctrine; in any of these situations, the family-purpose obligation may be satisfied from property described in 11 U.S.C. § 541(a)(2)(A) and (B). Therefore, a family-purpose obligation incurred by either spouse is a community claim.

➤ *Comment.* The presumption that all obligations are incurred in the interest of the marriage or the family places most claims in this category. *See* Wis. Stat. § 766.55(1).

(4) Premarriage Obligations [§ 6.99]

An obligation, including a tort, incurred by the debtor before marriage, or one attributable to an obligation of the debtor that arose before marriage, may be satisfied from the debtor’s nonmarital property assets and from marital property assets that would have been available if the marriage had not taken place. Wis. Stat. § 766.55(2)(c)1.; *see supra* § 6.24. Earnings of a married debtor are an example of a type of marital property asset available to the debtor’s premarriage creditor. Such funds are marital property described in 11 U.S.C. § 541(a)(2). Therefore, a debtor’s premarriage obligation is a community claim. 11 U.S.C. § 101(7). It is immaterial whether the estate contains such property. *Id.*

A premarriage obligation of the nondebtor spouse may be satisfied from marital property assets that would have belonged to the nondebtor if the marriage had not taken place. Wis. Stat. § 766.55(2)(c)1. Such marital property assets include, for example, the accumulation of earned income of the nondebtor. If they exist, these earnings are includible in the bankruptcy estate because they are “liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor’s spouse, to the extent that such interest is so liable.” 11 U.S.C. § 541(a)(2)(B); *see supra* § 6.76. Since the designation of a claim as a community claim is made without

reference to the actual classification of property in an estate, it is only necessary that the estate can theoretically hold such property. Consequently, the premarriage creditor of the nondebtor spouse has a community claim in the debtor spouse's bankruptcy estate, whether the estate actually includes an asset that would have been the nondebtor spouse's property but for the marriage. *See, e.g., In re Pfalzgraf*, 236 B.R. 390 (Bankr. E.D. Wis. 1999) (holding that nondebtor spouse's former spouse had community claim for child-support arrearage in debtor's Chapter 13 case).

(5) Obligations Arising Before January 1, 1986 [§ 6.100]

An obligation incurred by a debtor spouse before January 1, 1986, or an obligation attributable to an obligation arising before January 1, 1986, may be satisfied from the debtor's nonmarital property assets and from marital property assets that would have been available but for enactment of the Act. Wis. Stat. § 766.55(2)(c)2.; *see supra* § 6.25. The obligation may therefore be satisfied from marital property described in 11 U.S.C. § 541(a)(2).

The pre-January 1, 1986, obligations of the nondebtor spouse are also community claims for the same reasons that the nondebtor's premarriage obligations are community claims. *See supra* § 6.99; *In re Pfalzgraf*, 236 B.R. 390 (Bankr. E.D. Wis. 1999).

(6) Tort Obligations [§ 6.101]

Tort obligations of the debtor spouse that are incurred during marriage may be satisfied from the debtor's nonmarital property assets and from the debtor's one-half interest in marital property assets. Wis. Stat. § 766.55(2)(cm); *see supra* §§ 6.26–.28. No order of satisfaction is required. Since marital property assets described in 11 U.S.C. § 541(a)(2) include the debtor's one-half interest in those assets, the debtor's tort obligation is a community claim. 11 U.S.C. § 101(7). *See also In re Silver*, 367 B.R. 795 (Bankr. D.N.M. 2007), *aff'd*, 378 B.R. 418 (B.A.P. 10th Cir. 2007) (holding that tort-judgment creditor of debtor's husband, for judgment obtained before divorce, had standing as community creditor to move to revoke discharge).

Marital property assets included in the estate under 11 U.S.C. § 541(a)(2) also include the nondebtor spouse's one-half interest in such assets. These marital property assets are available under the Act to satisfy the tort obligations of the nondebtor spouse. Wis. Stat. § 766.55(2)(cm); *see supra* §§ 6.26–.28. Therefore, a tort obligation of the nondebtor spouse is also a community claim. 11 U.S.C. § 101(7).

Premarriage and pre-effective date tort obligations are considered premarriage and pre-effective date obligations. *See supra* §§ 6.99, .100. Tort obligations arising while the spouses are married and after January 1, 1986, but before both spouses live in Wisconsin fall into the category of obligations recoverable without reference to the Act. *See infra* § 6.103, *supra* § 6.30.

(7) Other Obligations [§ 6.102]

Obligations incurred by the debtor during marriage that are not incurred in the interest of the marriage or the family may be satisfied first from nonmarital property assets of the debtor and then from the debtor's one-half interest in marital property assets, in that order. Wis. Stat. §§ 766.55(2)(d), .01(8); *see supra* §§ 6.26–.28. The estate may include the debtor's interest in the marital property assets subject to recovery for an "other" claim under section 766.55(2)(d), which qualifies the obligation as a community claim. 11 U.S.C. § 101(7).

The nondebtor spouse's other obligations may be satisfied first from the nondebtor's nonmarital property assets and then from the nondebtor's one-half interest in marital property assets, in that order. Wis. Stat. §§ 766.55(2)(d), .01(8); *see supra* §§ 6.26–.28. The nondebtor's interest in marital property assets available under section 766.55(2)(d) is property described in 11 U.S.C. § 541(a)(2); consequently, the other obligations of the nondebtor spouse are community claims. *See Phillips v. Phillips (In re Phillips)*, 175 B.R. 901 (Bankr. E.D. Tex. 1994) (holding that debtor's former wife's claims for pre-petition misconduct were community claims).

(8) Obligations Not Provided for Under Act [§ 6.103]

The definition of the term during marriage refers to the period during which both spouses reside in Wisconsin that begins on the determination date and ends at dissolution or the death of a spouse. Wis. Stat. § 766.01(8). Obligations incurred while spouses are married and after January 1, 1986, but before the spouses move to Wisconsin are not incurred during marriage. *See id.* Similarly, obligations incurred after a spouse no longer resides in Wisconsin are not incurred during marriage. *See id.* Therefore, such obligations incurred by either spouse do not fit any of the categories under section 766.55(2). Presumably, such obligations are recoverable without reference to the Act. The creditor could recover assets based on the personal liability of the spouse under the common law system of ownership. Assets classified as marital property, such as the wages of the incurring spouse, could be recovered to satisfy such obligations. These obligations may therefore be satisfied from property described in 11 U.S.C. § 541(a)(2), and so they would be community claims.

An example of how such an obligation might become an issue in the bankruptcy context arose in *In re Sweitzer*, 111 B.R. 792 (Bankr. W.D. Wis. 1990) (citing 3 Keith A. Christiansen et al., *Marital Property Law in Wisconsin* § 13.10c, at 13-23, 13-24 (State Bar of Wisconsin ATS-CLE 2d ed. 1986 & Supp. 1988)). In that case, only the wife was a bankruptcy debtor. In 1988, while the spouses were married and both were residents of Ohio, judgment on a bank debt was entered against the husband alone. After the spouses moved to Wisconsin, the wife filed her petition under Chapter 7 and received her discharge. The Ohio creditor then attempted to garnish the husband's wages in execution on the judgment against him. The debtor and her husband contended that the injunction under 11 U.S.C. § 524(a)(3) prevented recovery from after-acquired marital property, including the husband's wages. *See infra* § 6.108.

The discharge injunction applies only to community claims, *see* 11 U.S.C. § 524(a)(3), and the *Sweitzer* court rejected the spouses' assertion that the obligation was a community claim as defined by 11 U.S.C. § 101. The court reasoned that under conflict-of-laws principles, Ohio law controlled the obligation. Since Ohio is not a community property state, for purposes of this action the husband's wages were not

community property, and hence there was no community claim. *Sweitzer*, 111 B.R. at 795.

Such a result is inconsistent with the language of 11 U.S.C. § 101(7) and the holding of *Pacific Gamble Robinson Co. v. Lapp*, 622 P.2d 850 (Wash. 1980), which the *Sweitzer* court cited to support its conclusion. Another state's (e.g., Ohio's) law might determine the enforceability of the judgment and prescribe the universe of property available for recovery (a result consistent with section 766.55(3)), but it cannot change the classification of that property. As the court noted in *Pacific Gamble Robinson*:

[A] fair application of Colorado law to [a] debt in an action brought in Washington is that the same property subject to payment of a debt in Colorado, including . . . wages and acquisitions, is likewise subject to payment of the debt in Washington, *notwithstanding such property is characterized as "community" under Washington law.*

Id. at 857 (emphasis added). In *Sweitzer*, the spouses' determination date had occurred before the wife's bankruptcy petition was filed, and the property in question (the husband's wages) constituted marital property funds and hence community property described in 11 U.S.C. § 541(a)(2). Under 11 U.S.C. § 101(7), a community claim is a claim for which "property of the kind specified in § 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case." Since community property described in 11 U.S.C. § 541(a)(2) was available for recovery by the creditor in *Sweitzer* when Ohio law was applied, the definition of community claim applied, and it appears that the injunction should have been applied to prevent recovery of after-acquired marital property of the debtor and her husband.

The *Sweitzer* court chose to apply section 766.55(3) in determining what property would have been available for satisfaction of the obligation if the bankruptcy had not intervened and recovery had been attempted in Wisconsin. Since the debt did not arise during marriage, the Act did not apply, and the assets available to the creditor had the bankruptcy not occurred would be the same. However, the obligation is still a community claim. *See also In re Porter*, No. C-92-4089 FMS, 1993 WL 106884 (N.D. Cal. Apr. 5, 1993) (holding that IRS claim was community claim, even though it was separate debt under California law,

because it could be satisfied only from debtor's share of community property).

There might be circumstances in which an obligation might not be a community claim if the jurisdiction in which the obligation was incurred was a community property state and the laws of that jurisdiction prohibited recovery from community property. *See Merlino v. Weinstein (In re Merlino)*, 62 B.R. 836 (Bankr. W.D. Wash. 1986) (discussed in section 6.104, *infra*).

(9) Disallowance or Partial Disallowance of Certain Community Claims [§ 6.104]

It appears that a claim on a nonfamily-purpose obligation incurred by the nondebtor spouse could be disallowed if the nondebtor spouse has sufficient nonmarital property assets to satisfy the claim. Section 502(b)(1) of the Bankruptcy Code states that a claim may be disallowed if it is unenforceable against the debtor or the debtor's property under any applicable law. The fact that the individual property assets and predetermination date property assets of the incurring spouse must be applied to the obligation before marital property assets may be reached should be sufficient for disallowance, as long as the nondebtor spouse has sufficient individual property assets and predetermination date property assets to satisfy the claim. If these nonmarital assets of the nondebtor spouse are sufficient for satisfaction, there would be no assets in the estate from which the creditor could recover.

If a creditor having such a claim against the nondebtor spouse has unsuccessfully attempted to collect from nonmarital property, the creditor may wish to allege this in its claim. However, because of the time limit for filing claims (90 days after the first date set for the meeting of creditors, Fed. R. Bankr. P. 3002(c)), the creditor should file a claim whether or not collection from the nondebtor's nonmarital property assets has been attempted. It might be possible to attempt recovery from the nondebtor's nonmarital property assets after the claim is filed but before distributions are made. Conversely, the debtor or other party in interest may object to a claim if the creditor has not attempted recovery from the nonmarital assets of the nondebtor spouse.

A claim to which the Act does not apply may be disallowed for reasons applicable to the jurisdiction in which it was incurred. *See* 11

U.S.C. § 502(b)(1); *see, e.g., Merlino v. Weinstein (In re Merlino)*, 62 B.R. 836 (Bankr. W.D. Wash. 1986) (applying Washington law to disallow separate creditor's claim when estate included only community property).

The debtor in that case had incurred a separate debt under Washington law, and as a result only his separate property was subject to recovery by the creditor. Since community property could not be used to satisfy the debt, the creditor had a noncommunity rather than a community claim. Noncommunity claims were payable only out of sub-estate C (nonmarital property and other property) and not any other sub-estate. Since the debtor had only community property—which could be used to pay creditors under sub-estates A, B, and D, but not sub-estate C—the creditor could recover nothing from the bankruptcy estate. A court reached a similar result in applying Idaho law in *In re Hicks*, 300 B.R. 372 (Bankr. D. Idaho 2003).

A claim on a nonfamily-purpose obligation incurred by the nondebtor spouse can be partly a community claim and partly a noncommunity claim, much in the same way that an undersecured creditor can have a claim that is partly secured and partly unsecured. *See* 11 U.S.C. § 506. To the extent that the nondebtor spouse has nonmarital property available for satisfaction, the claim should be disallowed. Similarly, a claim could be allowed in part and disallowed in part based on the classification of property in the estate itself. *See Merlino*, 62 B.R. 836 (holding that under Washington law, creditor could recover only separate property, and only community property was in bankruptcy estate; thus, classification of actual estate assets can result in disallowance of claim).

► **Example.** Assume that a debtor's bankruptcy estate has \$5,000 in marital property assets generated by the debtor spouse and \$2,000 in marital property assets generated by the nondebtor spouse. One of the nondebtor spouse's nonfamily-purpose creditors is owed \$20,000. The nondebtor spouse has no nonmarital property. Only the \$2,000 of the marital property assets generated by the nondebtor would be subject to recovery under Wisconsin law, Wis. Stat. § 766.55(2)(d), and the remaining amount of the claim would be disallowed, since 11 U.S.C. § 502(b)(1) provides that a claim will be disallowed to the extent it is unenforceable against the debtor or property of the debtor under any applicable law. The creditor's \$2,000 claim would share pro rata with other community claims.

In addition, it might be that a claim on a nonfamily-purpose obligation incurred by the debtor spouse can be partly a community claim and partly a noncommunity claim. It is not clear from 11 U.S.C. § 101(7) whether the definition of community claim is satisfied only if *both* spouses' interests in hypothetical community property assets are recoverable or whether it is sufficient if only the *debtor's* interest is recoverable. Tort obligations, for example, may be satisfied only from the tortfeasor spouse's nonmarital property and from the tortfeasor spouse's interest in marital property. Wis. Stat. § 766.55(2)(cm). It is arguable that a tort obligation does not give rise to a community claim because the creditor may not recover both spouses' interests in any type of marital property asset. *But see In re Porter*, No. C-92-4089 FMS, 1993 WL 106884 (N.D. Cal. Apr. 5, 1993) (holding that separate debt for postseparation taxes was community claim and allowing tax lien on debtor's one half of proceeds of sale of community property house). Alternatively, it is arguable that even if only one half of a marital property asset is recoverable for a tort claim, this is sufficient to meet the definition of community claim. If the latter interpretation were correct, it might be necessary to allow the claim in part and disallow the claim in part. Since 11 U.S.C. § 502(b)(1) provides that a claim will be disallowed to the extent it is unenforceable against the debtor or property of the debtor under any applicable law, the tort creditor's claim might be disallowed to the extent it would be necessary to pay that claim from the nontortfeasor's marital property interest in the estate. A claim for an obligation under section 766.55(2)(d) or for a predetermination date obligation might similarly require disallowance of a portion of the claim if allowance would result in payment from the nonobligated spouse's interest either in marital property assets or in nonmarital property assets in the estate. This issue could arise in a case in which one spouse filed, or it could arise in a joint case when claims against one spouse would be disallowed if it is necessary to distribute the other spouse's interest in marital property assets.

If a portion of a community claim is disallowed because of how the estate's assets are classified, it might be necessary to invoke the doctrine of marshaling assets, requiring the trustee to pay, for example, a tort creditor from assets attributable to the debtor and to pay other community claimants from marital assets attributable to the nondebtor spouse. The standards applicable in Wisconsin to the doctrine of marshaling of assets are found in *Moser Paper Co. v. North Shore Publishing Co.*, 83 Wis.2d 852, 860, 266 N.W.2d 411 (1978). This

result appears to be incompatible with the distribution scheme of 11 U.S.C. § 726(c). *See infra* § 6.105.

4. Administration of Bankruptcy Estate; Payment of Claims [§ 6.105]

The bankruptcy estate is administered by a trustee or by a debtor-in-possession having the powers of a trustee. *See* 11 U.S.C. §§ 704, 1106, 1107, 1202, 1302. Among other things, the trustee is responsible for converting the estate to cash, paying expenses, and making distributions to creditors, all under the jurisdiction of the bankruptcy court. *See* 11 U.S.C. §§ 704, 1106, 1107, 1202, 1302. The bankruptcy estate includes both nonmarital property of the debtor and marital property of both spouses, *see supra* §§ 6.74–77; claims may include all the categories of obligations of either or both of the spouses listed under section 766.55(2), *see supra* §§ 6.92–104. Since all marital property assets are in both spouses' estates if both are debtors, it is a practical necessity that the estates be consolidated for administration. *Ageton*, 14 B.R. at 835–36; *In re Knobel*, 167 B.R. 436 (Bankr. W.D. Tex. 1994). *But see Hicks*, 300 B.R. 372 (holding that joint debtors' estates had to be administered separately because wife's estate had separate property that was not recoverable under Idaho law for certain claims against husband; community property was in both estates).

When community property is included in the estate, the trustee, after paying administrative expenses, pays various types of claims in the following order and manner:

1. *Sub-estate A—marital property.* First, community claims against the debtor or the debtor's spouse are paid from marital property, except to the extent that such property is solely liable for the debts of the debtor and not his or her spouse. 11 U.S.C. § 726(c)(2)(A).

➤ *Comment.* The exception refers to states using the managerial system of incurring obligations, *see supra* § 5.11, and does not apply in Wisconsin, since all marital property is included in this sub-estate.

2. *Sub-estate B—not applicable.* Second, to the extent that community claims against the debtor are not paid from the first sub-estate, such

community claims are paid from community property that is solely liable for the debtor's debts. 11 U.S.C. § 726(c)(2)(B).

➤ **Comment.** This sub-estate does not apply in Wisconsin, since there is no such category under section 766.55(2).

3. *Sub-estate C—nonmarital property and other property.* Third, to the extent that all claims against the debtor, including community claims against the debtor, are not paid from the previous two sub-estates, such claims are paid from other property available only for the debts of the debtor (i.e., individual and predetermination date property). 11 U.S.C. § 726(c)(2)(C).

➤ **Comment.** Property in this sub-estate also includes inheritances, marital settlements, and life insurance proceeds to which the debtor becomes entitled within 180 days of filing and any voidable transfers made by the debtor or the debtor's spouse, such as fraudulent conveyances or preferences recovered by the trustee. *See supra* §§ 6.85–.89.

4. *Sub-estate D—any remaining property.* Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid from the previous sub-estates, such claims are paid from all remaining property of the estate. 11 U.S.C. § 726(c)(2)(D).

Claims of creditors are paid from the property of the sub-estates, in order, beginning with all claims qualifying under 11 U.S.C. § 726(c)(2)(A) and exhausting all property in that sub-estate, and then proceeding through the sub-estates in 11 U.S.C. § 726(c)(2)(B), (C), and (D). Within the sub-estates, claims are paid according to priorities set forth in 11 U.S.C. § 507. 11 U.S.C. § 726(a). Certain claims may qualify under more than one sub-estate. For example, an obligation incurred by a debtor may be paid from sub-estate A (marital property) and then, to the extent the obligation is not satisfied, from sub-estate C (nonmarital property). A creditor having an obligation incurred by the debtor's spouse may also receive a pro rata share of sub-estate A, but a creditor in this case would have no right to recover from sub-estate C. However, if the debtor's individual property in sub-estate C exceeds the amount necessary to pay all the debtor's personal obligations, any funds remaining in sub-estate A, B, or C would fall into sub-estate D and would then be available to pay the claims incurred by the debtor's

spouse. It appears in this instance that the nonmarital property of one spouse may be used to satisfy community claims incurred by the other spouse, a result that would not occur under section 766.55(2) (unless the obligation is for necessities). *See supra* §§ 6.2–.31.

The Bankruptcy Code provides no procedure for classifying assets for placement in the various sub-estates, but the trustee or debtor-in-possession probably could obtain bankruptcy court approval of a proposed classification of assets following notice to all creditors, since their rights may be affected by the classification. 6 *Collier, supra* § 6.72, ¶ 726.05. It may also be necessary to identify sub-estates in Chapter 11 and Chapter 13 proceedings to determine whether proposed payment plans result in creditors' receiving less than they would under a Chapter 7 bankruptcy. Since all obligations of the debtor and the debtor's spouse are classified as community claims (subject to possible disallowance, *see supra* § 6.104), and all of both spouses' property is presumed to be marital property, Wis. Stat. § 766.31(2), such classification would not be necessary in most cases. It is necessary to classify property in more complicated estates containing both marital and nonmarital property and in situations in which claims are filed for obligations incurred by both spouses.

Administrative expenses are paid from property of the estate "as the interest of justice requires." 11 U.S.C. § 726(c)(1); *see also* Pedlar, *supra* § 6.76, at 370. If administrative expenses are incurred in connection with the administration of a particular sub-estate, that sub-estate is charged with the expenses. General expenses for overall administration would usually be equitably prorated among the sub-estates having assets, since this would be equitable in most cases. Pedlar, *supra* § 6.76, at 370.

As was previously noted, the categories of obligations under section 766.55(2) do not precisely fit the sub-estate categories designated in 11 U.S.C. § 726(c). Nevertheless, the federal bankruptcy rules for determining distribution to creditors supersede the state-law rules of debt satisfaction. *See* 6 *Collier, supra* § 6.72, ¶ 541.15. Simply stated, the effect appears to be that since all types of obligations under section 766.55(2) may be satisfied from all or part of marital property that could hypothetically be owned by spouses, any obligation of either the debtor or the debtor's spouse within section 766.55(2) is a community claim under 11 U.S.C. § 101(7). All creditors having community claims share pro rata in available marital property under sub-estate A. Unless part of

a claim is disallowed, *see supra* § 6.104, this pro rata sharing gives a distinct advantage to certain creditors, such as a tort creditor of either spouse who under the Wisconsin Marital Property Act may reach only the tortfeasor spouse's one-half interest in marital property. Wis. Stat. § 766.55(2)(cm); *see also* Pedlar, *supra* § 6.76, at 363.

Recoveries of preferential transfers under 11 U.S.C. § 547 and other voidable transfers, *see supra* §§ 6.85–.89, are included in sub-estate C. Such recoveries are included in this category because they are property “other than property of the kind specified in section 541(a)(2) of this title.” 11 U.S.C. § 726(c)(2)(C). These are transfers of any property by the debtor or transfers of marital property by the debtor's spouse, if the transfers were subject to avoidance by the trustee.

➤ **Comment.** The placement of the recoveries discussed above in sub-estate C—the sub-estate available to pay only the debts of the debtor and not those of the debtor's spouse—has been criticized. *See* Pedlar, *supra* § 6.76, at 372. Logically, it seems that these recoveries should be in the sub-estate to which the property would have belonged had the voided transfer never occurred, but this does not appear to be the case.

5. Discharge [§ 6.106]

a. Effect on Marital Property Acquired After Filing [§ 6.107]

(1) During Marriage [§ 6.108]

In many, if not most, instances, a married debtor under the Wisconsin Marital Property Act who files for bankruptcy will be joined in the petition by his or her spouse. *See supra* § 6.73. However, joint filing is not always necessary to achieve the practical protection of the Bankruptcy Code for both spouses. *See In re Strickland*, 153 B.R. 909 (Bankr. D.N.M. 1993); *Gonzales v. Costanza (In re Costanza)*, 151 B.R. 588 (Bankr. D.N.M. 1993); *Karber*, 25 B.R. at 12 (holding that creditors having community claims against either spouse are precluded by 11 U.S.C. § 524(a)(3) from collecting from community property acquired by either spouse after bankruptcy of only one spouse); *see also* Jennifer L. Street, *The Community Property Discharge in Bankruptcy: A Fair*

Result or a Creditor's Trap?, 25 N.M. L. Rev. 229 (1995). One situation calling for a single-spouse filing is that in which the nondebtor spouse has substantial nonmarital property. When only one spouse files, the issue arises whether and under what circumstances a creditor of a family-purpose obligation who has received notice of the debtor spouse's bankruptcy and is subject to the debtor's discharge may recover from the nondebtor spouse.

Marital property acquired by either spouse after the bankruptcy is filed may not be reached in a postpetition action by a pre-petition creditor listed in the bankruptcy. Discharge of the debtor acts as an injunction prohibiting creditors holding community or noncommunity claims from proceeding against the debtor's interest in after-acquired separate or community property (in Wisconsin, nonmarital or marital property) assets. 11 U.S.C. § 524(a). An increase in the value of an exempt community property asset that passes through bankruptcy should also be protected. *See Schmiedel*, 236 B.R. 393. This injunction also necessarily prohibits creditors with community claims from proceeding against the nondebtor spouse's interest in community (marital) property assets acquired after the debtor spouse's bankruptcy. A spouse's interest in community or marital property is an undivided interest in the whole; the spouses' interests in a particular asset may not be severed. This rule has the effect of insulating the interests of both the debtor and the nondebtor spouse in marital property. *But see In re Page*, 171 B.R. 349 (Bankr. W.D. Wis. 1994) (holding that lien was avoided only on debtor's one-half interest in marital property asset).

In bankruptcy actions under chapters other than Chapter 7, the automatic stay may be in effect for long periods of time, thus preventing creditors from recovering before it is known whether the discharge will be granted. *See In re Passmore*, 156 B.R. 595 (Bankr. E.D. Wis. 1993) (indivisibility of spouses' interests necessitated application of automatic stay, as well as subsequent discharge, to both halves of marital property funds). Also, the application of the automatic stay to a nondebtor spouse's marital property assets would prevent the creditor from proceeding against a co-debtor spouse to whom the stay under 11 U.S.C. §§ 1201 and 1301 applies because the marital property acquired after filing would eventually be protected by the discharge under 11 U.S.C. § 524(a)(3). The stay does not apply to recovery of the liable nonfiling spouse's separate property. *Brown v. Kastner (In re Kastner)*, 197 B.R. 620, 624 (Bankr. E.D. La. 1996).

Given that a creditor is not prohibited from recovering nonmarital property of a nonfiling spouse who is liable on a debt for a filing spouse's community claim, the court in *In re Moore*, 318 B.R. 679 (Bankr. W.D. Wis. 2004), held that the creditor did not violate the automatic stay in scheduling a supplemental examination of the debtor's nonfiling wife. The creditor made clear that it was only attempting to obtain information about nonmarital property, and the wife was personally liable with the debtor on the judgment debt. *Cf. Chesnut v. Brown (In re Chesnut)*, 300 B.R. 880 (Bankr. N.D. Tex. 2003) (sanctioning creditor for violation of automatic stay because it proceeded with foreclosure after being notified of debtor's claimed community interest in real estate titled as nonfiling wife's separate property), *rev'd*, 311 B.R. 446 (N.D. Tex. 2004), *rev'd*, 422 F.3d 298 (5th Cir. 2005) (affirming bankruptcy court's decision).

The operation of the injunction under 11 U.S.C. § 524(a)(3) applies to debts incurred by the nondebtor as well as the debtor. That is, the discharge prohibits the nondebtor spouse's creditors holding community claims from proceeding against the nondebtor's or the debtor's after-acquired community property.

➤ *Example.* Assume that spouse *A* incurs a family-purpose obligation to creditor *X* and is current with installment payments. *A*'s spouse, *B*, files a petition in bankruptcy listing *X* as a creditor; *X* receives notice. Because *A* has been making current payments, *X* does not file a claim in *B*'s bankruptcy estate and does not share in the distribution of all of *A* and *B*'s nonexempt marital property. After the bankruptcy, *A* stops making payments. The result is that *X* may not recover from *A*'s wages or any of *A* and *B*'s marital property assets that are acquired after the bankruptcy. *See* 11 U.S.C. § 524(a)(3).

The situation in the above example occurred in *Strickland*, 153 B.R. 909, although the filing of a claim was not at issue. The wife hired the plaintiff, an attorney, to represent her in a family-law matter involving a child of a prior marriage, thus incurring a community debt. The husband later filed a voluntary Chapter 7 petition for bankruptcy. The court held that even though the wife did not file a bankruptcy case, 11 U.S.C. § 524(a)(3) precluded the plaintiff from recovering from the spouses' after-acquired community property. *See also Costanza*, 151 B.R. 588. Even though after-acquired community or marital property is protected by discharge, the court in *Strickland*, 153 B.R. at 913, observed that the

nondebtor spouse's creditor could nevertheless recover from the nondebtor spouse's separate property. *See also First Louisiana Bus. & Indus. Dev. Corp. v. Dyson (In re Dyson)*, 277 B.R. 84 (Bankr. M.D. La. 2002) (holding that Chapter 13 discharge also protects both spouses' interest in after-acquired community property); *Kastner*, 197 B.R. at 624 (holding that bankruptcy court had no jurisdiction over creditor's claim against nonfiling spouse's separate property).

The injunction provided for by 11 U.S.C. § 524(a)(3) applies only to community property acquired *after* the commencement of the case; it does not apply to such property owned before the case was filed and still owned by the debtor and his or her spouse after the case is closed. A debtor may continue to own a community property asset before and after bankruptcy in several circumstances. For example, since Wisconsin allows a debtor to choose state or federal exemptions, a community property asset may have qualified as exempt under federal law but not under state law. Nevertheless, 11 U.S.C. § 522(c) protects exempt property from being recovered for most types of debts discharged in the bankruptcy proceedings, and this would make the asset unavailable to creditors after one spouse's bankruptcy. Also, the asset may have increased in value as a result of market factors or the payment of a claim for which the community property asset is collateral. Such appreciation in the value of a community property asset would likewise be community property, unless the asset becomes mixed property under section 766.63, and the increase in value would be community property "acquired" after bankruptcy and protected by the injunction. An exception might be a community property asset abandoned by the trustee under 11 U.S.C. § 554, and such an asset could be subject to recovery after bankruptcy. *See also Sanwa Bank Cal. v. Chang*, 105 Cal. Rptr. 2d 330 (Ct. App. 2001) (holding that asset initially owned as community property, fraudulently transferred to wife as her separate property before husband's bankruptcy, and not administered by the trustee, was community property and not protected by discharge injunction from recovery by creditor).

(2) After Termination of Marriage by Death or Dissolution [§ 6.109]

If the marriage is dissolved after one spouse receives a discharge and the nondebtor spouse receives former marital property assets that were acquired after the bankruptcy or were exempt in the bankruptcy, then the

injunction under 11 U.S.C. § 524(a)(3) no longer prohibits a creditor from proceeding against the nondebtor to recover those assets. *See* Wis. Stat. § 766.55(2m). This result occurs because 11 U.S.C. § 524(a)(3) prohibits recovery only of “property of the debtor of the kind specified in section 541(a)(2)” —namely, assets classified as marital property. After dissolution, former marital property assets are no longer classified as marital property in the hands of a former spouse. *Von Burg v. Egstad (In re Von Burg)*, 16 B.R. 747 (Bankr. E.D. Cal. 1982) (holding that discharge injunction does not protect assets of personally obligated nondebtor former spouse because spouses were divorced before filing and former wife’s assets were not community property acquired after commencement of case). The purpose of a discharge is to protect the debtor’s “fresh start,” not to provide a fresh start for a former spouse who does not file a bankruptcy case. Commenting on the potential effect of divorce of a debtor previously protected by the other spouse’s discharge, the court in *Costanza* observed, “[I]f he does not treat her better than his creditors, she will, by divorcing him, deny his discharge.” 151 B.R. at 590.

Similar reasoning applies after the death of the discharged debtor spouse. Former marital property owned by the surviving spouse is no longer property described in 11 U.S.C. § 541(a)(2) (community property), and the injunction under 11 U.S.C. § 524(a)(3) does not apply. *See also* Wis. Stat. § 859.18(3)(b) (providing for recovery from surviving spouse’s marital property).

Outside the bankruptcy context, the income of a surviving obligated spouse is available to satisfy obligations resulting from an extension of credit or a tax obligation to the state. Wis. Stat. § 859.18(3)(a); *see infra* ch. 12. Such income is not classified as marital property after the death of the obligated spouse, but it appears that the surviving nondebtor spouse’s income is recoverable by a creditor of such an obligation, even though the obligation was discharged in the bankruptcy of the deceased obligated spouse.

b. Denial of Discharge or Dischargeability of Debt of Debtor or Denial of Hypothetical Discharge or Dischargeability of Debt of Debtor's Spouse [§ 6.110]

Under certain circumstances, a discharge may be unavailable to a debtor, or certain debts may not be discharged. *See* 11 U.S.C. §§ 727, 523. The grounds for completely denying a discharge relate primarily to misconduct during the bankruptcy or to the receipt of a discharge less than six years before filing. 11 U.S.C. § 727. Also, the discharge of a particular debt may be disallowed because of the type of debt (such as certain student loans or debts relating to support of dependents) or because of fraud, use of a false financial statement, or other intentional wrongdoing committed by the debtor in connection with incurring the obligation. 11 U.S.C. § 523(a), (c).

Obligations that are nondischargeable because they are in a particular category, such as support of dependents, may be recovered at any time, provided that the action does not violate the automatic stay under 11 U.S.C. § 362. Exceptions to discharge under 11 U.S.C. § 523(a)(2), (4), (6), and (15) (obligations incurred by fraud, use of a false financial statement, certain intentional torts, and certain family obligations other than those for support) must be determined by the bankruptcy court in an adversary proceeding commenced by the creditor within the time allowed. *See* Fed. R. Bankr. P. 4007; 11 U.S.C. § 523(c). If no such action is commenced, the debt is discharged. 11 U.S.C. § 523(c); *see also* 11 U.S.C. §§ 1141(d), 1228(a), 1328(c). *But see* 11 U.S.C. § 1328(a) (debts of kind specified in 11 U.S.C. § 523(a)(2), (4), (6), and (15) are not excepted from Chapter 13 discharge).

Section 524(a)(3) of the Bankruptcy Code states that in a case involving community property, the injunction prohibiting recovery by a creditor holding a community claim applies to all after-acquired separate and community property assets of the debtor. There is, however, an exception for those creditors holding community claims that have been excepted from discharge under 11 U.S.C. §§ 523 and 1328(a) or that would have been excepted if the debtor's spouse had filed a bankruptcy petition on the same day as the filing spouse, whether or not the discharge based on the community claim is waived. 11 U.S.C. § 524(a)(3), (b)(2). Therefore, a creditor wishing to object to the discharge of its debt may base the objection on acts committed by the

debtor's spouse as well as by the debtor. 11 U.S.C. § 524(a)(3), (b)(2). This is because it would be inequitable to allow a spouse who incurred an obligation by fraud or other wrongful act to obtain the advantage of the bankruptcy discharge through the discharge obtained by his or her spouse. Absent this provision, the wrongdoer would be insulated by the injunction in 11 U.S.C. § 524(a)(3) against a creditor's attempting to obtain satisfaction from marital property acquired after the bankruptcy filing. *See supra* §§ 6.107–109.

The court in *Grimm v. Grimm*, 82 B.R. 989 (Bankr. W.D. Wis. 1988), analyzed the Act's effect on a creditor's right to collect after-acquired marital property for a nondischargeable debt incurred by one spouse. There was a judgment in state court against the husband for conversion, and the wife, a joint debtor, asked to be dismissed as a party in the adversary proceeding filed to determine dischargeability. The court noted that if the debt were found nondischargeable, the injunction of 11 U.S.C. § 524(a)(3) would not protect either spouse's interest in after-acquired marital property. *Id.* at 993–94. Furthermore, the creditor had a community claim and could share in either spouse's estate. *Id.* at 991–92; *see also supra* §§ 6.92–104. Since the creditor's right to recover would not be impaired and there was no allegation of personal liability, the court dismissed the wife as a party. *Grimm*, 82 B.R. at 994; *see also Soderling*, 998 F.2d 730 (holding that restitution for federal crime was nondischargeable as to separate and community property); *Case v. Maready (In re Maready)*, 122 B.R. 378 (B.A.P. 9th Cir. 1991) (holding that nondischargeable debt of one spouse may be satisfied from after-acquired community property only if debt was community claim; no notice to nondebtor spouse necessary to determine if debt was nondischargeable); *Arcadia Farms Ltd. v. Rollinson (In re Rollinson)*, 322 B.R. 879 (Bankr. D. Ariz. 2005) (concluding that wife's nondischargeable debt, memorialized by promissory note signed by both spouses that established nondischargeable debt as community claim, subjected all community property to recovery after discharge); *Brown v. Kastner (In re Kastner)*, 197 B.R. 620 (Bankr. E.D. La. 1996) (holding that nonfiling husband's debt for fraud and embezzlement was recoverable from both spouses' after-acquired community property); *Sophos v. Hibbs (In re Hibbs)*, 161 B.R. 259 (Bankr. C.D. Cal. 1993) (holding that creditor of nondischargeable debt against husband could reach both spouses' postpetition community property); *Midi Music Ctr., Inc. v. Smith (In re Smith)*, 140 B.R. 904 (Bankr. D.N.M. 1992); *Meneley Motors, Inc. v. Giantvalley (In re Giantvalley)*, 14 B.R. 457 (Bankr. D. Nev. 1981) (holding that nondischargeable debt could be enforced

against same property that would have been available under state law if bankruptcy had not occurred); *Williams v. Bernardelli (In re Bernardelli)*, 12 B.R. 123 (Bankr. D. Nev. 1981).

If a creditor of the nondebtor spouse has a basis for objecting to the discharge of a debt on account of conduct by the nondebtor spouse that would have prevented discharge of the debt if the nondebtor spouse had been in bankruptcy, the creditor must file the objection in the bankruptcy of the debtor spouse within the time limits set for the debtor—that is, 60 days from the first date set for the meeting of creditors. 11 U.S.C. § 524(b)(2)(B); Fed. R. Bankr. P. 4004; *Karber*, 25 B.R. 9. *But see Costanza*, 151 B.R. at 589 n.3 (declining to determine whether 60-day time limit applied to hypothetical discharge). This concept is referred to as an objection to the *hypothetical discharge*. If the objection is successful, the claim is not subject to the discharge injunction. 3 *Collier*, *supra* § 6.72, ¶ 524.01.

➤ **Practice Tip.** The above rule again demonstrates the importance of creditors' knowing the names and addresses of, and other pertinent information about, debtors' spouses.

The nondebtor spouse is a necessary party to an action by a creditor objecting to the hypothetical discharge of the nondebtor spouse. *Judge v. Braziel (In re Braziel)*, 127 B.R. 156 (Bankr. W.D. Tex. 1991). If the spouses have filed separate bankruptcy cases, the objection to the dischargeability of a debt should be brought only in the case of the alleged wrongdoer. *Smith*, 140 B.R. 904. However, if the alleged wrongdoer has filed a Chapter 13 bankruptcy and the innocent spouse has filed a Chapter 7 bankruptcy, the action should be brought in the innocent spouse's case. *See id.*

If the discharge is denied for a particular obligation, the injunction under 11 U.S.C. § 524(a)(3) does not prevent the creditor from recovering after-acquired community property, even if the spouse who did not incur the obligation was granted a discharge, as was the case in *Valley National Bank of Arizona v. LeSueur (In re LeSueur)*, 53 B.R. 414 (D. Ariz. 1985). The debtors had filed a joint bankruptcy petition, and the court found that only the husband's debt to the plaintiff creditor was nondischargeable by reason of a false financial statement. The wife was granted a discharge. Nevertheless, the court found that the wife's post-petition community property would be subject to recovery even though the wife was not at fault. Citing 3 *Collier on Bankruptcy* ¶ 524.01, at

524–11 (15th ed. 1985), the court stated that “the Code’s clear policy is that the economic sins of either spouse shall be visited upon the community when a discharge is denied.” *LeSueur*, 53 B.R. at 416. The court also noted that the denial of a discharge as to the husband did not change the obligation to a separate obligation (analogous to a nonfamily-purpose obligation in Wisconsin), which under applicable state (Arizona) law would protect a portion of the wife’s community property. The loan in question, even though procured by fraud, had been incurred for various family purposes, and it would have been recoverable from all community property if no bankruptcy had intervened. *Id.* at 415–16; *see also Soderling*, 998 F.2d 730 (9th Cir. 1993); *Sophos v. Hibbs (In re Hibbs)*, 161 B.R. 259 (Bankr. C.D. Cal. 1993).

Debtors and spouses may not alternate filing every three years to avoid the six-year prohibition against repeated discharges under 11 U.S.C. § 727(a)(8). Section 524(b)(1) of the Bankruptcy Code states that the injunction against a creditor’s proceeding to collect community property acquired after the commencement of the case to satisfy a discharged obligation does not apply if the debtor’s spouse (1) filed a bankruptcy petition within six years of the debtor’s filing and (2) did not receive or would not have received a discharge had the spouse filed at the same time as the debtor. The objection to the spouse’s hypothetical discharge under this section must be filed within the time limits set for objecting to the debtor’s discharge. 11 U.S.C. § 524(b)(2)(B); *Seattle First Nat’l Bank v. Marusic (In re Marusic)*, 139 B.R. 727 (Bankr. W.D. Wash. 1992) (denying debtor discharge because debtor’s spouse had received discharge within six years and would have been denied discharge under 11 U.S.C. § 727(a)(8)).

► **Note.** When the *Marusic* case was decided, the law provided that a debtor would be denied a discharge in a Chapter 7 bankruptcy proceeding if the debtor had received a discharge in an earlier bankruptcy case within six years of filing the subsequent case. BAPCPA extended this period to eight years. 11 U.S.C. § 727(a)(8).

c. Claims of Spouses and Dependents [§ 6.111]

A support obligation owed to a spouse, a former spouse, or minor children is not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(5). An obligation constituting a debt or division of property is dischargeable only under Chapter 13. *See* 11 U.S.C. §§ 523(a)(15), 1328(a)(2). If a

debtor seeks to discharge an obligation arising out of section 766.70, the analysis used to determine the dischargeability is the same whether the obligation is to a spouse or a former spouse (i.e., whether the obligation is for support or for property division under bankruptcy law). See Sommer & McGarity, *supra* § 6.6, ch. 6.

6. Reaffirmations [§ 6.112]

A debtor may reaffirm a debt under 11 U.S.C. § 524(c), thereby creating a new enforceable promise to pay. The newly created obligation may or may not fall within the family-purpose doctrine. If it does, then marital property acquired after the bankruptcy may be recovered to satisfy the new obligation. The means of determining whether a family purpose exists is the same for a reaffirmation as for any other obligation when it becomes necessary to determine the category of obligation under section 766.55(2). In community property states, the renewal of a community obligation has been found presumptively to obligate the community; however, the reaffirmation is subject to scrutiny to determine whether a family purpose existed at the time of the reaffirmation, not at the time the original debt was incurred. See *Gannon v. Robinson*, 371 P.2d 274 (Wash. 1962) (holding that reaffirmation of debtor's divorce obligation to former wife was ineffective because statutory provisions for reaffirmation agreements were not followed); see also *In re Ellis*, 103 B.R. 977, 981 (Bankr. N.D. Ill. 1989) (same); *Lumby v. Lumby*, 116 Wis. 2d 347, 341 N.W.2d 725 (Ct. App. 1983) (same). For example, the reaffirmation of a secured debt that allows the debtor to keep the family car probably would be regarded as a family-purpose debt, allowing the creditor to collect from all marital property. Wis. Stat. § 766.55(2)(b). The reaffirmation of an unsecured debt may also have a family purpose under certain circumstances, such as when the debt is to a family member or was co-signed by a family member.

➤ **Comment.** It is not clear whether the debtor's spouse may effectively reaffirm a debt, with the result that 11 U.S.C. § 524(a)(3) will not apply to the debt and the creditor may recover marital property acquired after the case is commenced. The requirements for a binding reaffirmation agreement under 11 U.S.C. § 524(c)–(d) apply only to the debtor, and it appears that the nonfiling spouse could not fulfill these requirements.

VI. Sample Complaint for Damages [§ 6.113]

A. In General [§ 6.114]

The following is a sample complaint for damages in which it is alleged that only one spouse is personally liable, but recovery is sought from marital property. It is a sample only and does not purport to be all-inclusive. Each pleading must be tailored to the circumstances of the parties.

4. Defendant Fred Smith is the sole proprietor of a business known as Smith Electrical Contracting. His business address is 818 Industrial Park Boulevard, Milwaukee, Wisconsin 53299. His business is providing commercial and residential electrical contracting services.

5. On January 2,____, plaintiff and defendant Fred Smith entered into a written contract, a copy of which is attached to this complaint as Exhibit A.

6. Under the terms of the contract, defendant Fred Smith agreed, for the contract price of \$10,000, to provide electrical service for a family room addition being built on plaintiff's house. The work was to have been completed by March 1,_____.

7. Defendant Fred Smith failed to perform the work in a skillful manner. The wiring was completely inadequate for the air conditioning system, and there were fewer outlets and fewer circuits than agreed on in the contract. Defendant Fred Smith failed after several attempts to correct the situation.

8. As a result of defendant Fred Smith's breach, plaintiff was forced to hire another electrical contractor to correct and complete the work, at a cost of \$15,000.

9. This obligation is incurred by defendant Fred Smith in the interest of defendant's marriage and family.

WHEREFORE, plaintiff requests that the court:

1. Grant judgment to plaintiff against defendant Fred Smith, individually, in the amount of \$15,000;

2. Declare this obligation to be in the interest of the marriage and the family of defendants Fred Smith and Jane Doe Smith;

3. Declare that any marital property held by Fred Smith or Jane Doe Smith or both be available for satisfaction of this obligation; and

4. Grant plaintiff such other relief as is appropriate under the circumstances.

Dated: _____.

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Marriage Agreements

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I. Scope of Chapter [§ 7.1]

This chapter focuses on the different types of contractual agreements spouses may create to define their property rights. The formal requirements for marriage agreements, the subject matter that such agreements may involve, and various planning considerations are discussed. In addition, the chapter includes sample marriage agreement forms.¹

II. Marriage Agreements in General [§ 7.2]

In most states, the right of spouses to enter into contractual arrangements affecting their economic relationship and their property has been recognized historically as a matter of either common law or statutory law.

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, and 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). Textual references to the Wisconsin Statutes are indicated as “chapter xxx” or “section xxx.xx,” without the designation “of the Wisconsin Statutes.”

These contractual arrangements can be loosely divided into (1) agreements entered into before or during marriage primarily to govern the spouses' property rights and tax consequences after the death of one of them, and perhaps also their financial relationship during marriage, and (2) property settlement agreements or stipulations entered into in immediate contemplation of the dissolution of the marriage (or during the pendency of an action for dissolution) to fix the spouses' support, maintenance, and property rights. *See, e.g., Ray v. Ray*, 57 Wis. 2d 77, 82, 203 N.W.2d 724 (1973). In recent years, there has been an increasing tendency to blur the distinction between the two categories. This occurs when provisions for support, maintenance, and asset division in the event of separation or divorce are included in the first type of agreement even though no separation or divorce is immediately contemplated. *See infra* §§ 7.107, 7.133–140.

➤ **Note On Terminology.** Marriage agreements entered into before marriage are variously referred to as *premarital* or *prenuptial agreements*. Those entered into after the parties are married are referred to as *postmarital* or *postnuptial agreements*. For convenience, all agreements affecting the spouses' property rights during marriage or at death (as distinguished from dissolution property settlement agreements or stipulations), whether entered into before or during marriage, are generically referred to as *marriage agreements* in this chapter. The term *marital property agreement* as defined in section 766.01(12) is included in the generic reference.

➤ **Note.** In some states, including those adopting the Uniform Marital Property Act in its original (1983) version, the requirements for premarital and postmarital agreements differ. Requirements for Wisconsin marital property agreements are discussed in sections 7.15–.70, *infra*.

The term marital property agreement refers specifically to an agreement that complies with the requirements of section 766.58. The term also includes anticipatory marital property agreements described in section 766.585, *see infra* § 7.26, and various statutory property classification agreements described in sections 766.587, 766.588, and 766.589, *see infra* §§ 7.71–98. With the exception of anticipatory marital property agreements under section 766.585 and the now-expired statutory individual property classification agreements under section 766.587, the statutory provisions concerning marital property agreements

apply only to agreements entered into after December 31, 1985, the day before the effective date of 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 the Wisconsin Marital Property Act]. Marital property agreements are discussed in detail in sections 7.3–.118, *infra*.

Marriage agreements have been and will continue to be used in a wide variety of situations by married persons as well as by persons about to marry. A partial checklist of these situations follows.



***Checklist: Common Situations
in Which Marriage Agreements Are Used***

- In a second marriage when one or both of the parties have property, have children by a prior marriage, and desire to leave all or most of their estates (especially that portion acquired before remarriage) to their respective children
- In a first or second marriage when one party has received or will receive substantial inherited wealth or an interest in a closely held business
- In a marriage later in life when children are not involved, but when one or both of the parties have significant responsibilities for the care and support of a parent or other dependent relative
- When there is a need to clarify the terms of a prior marriage agreement between the spouses that arguably does not address itself to the community property system contained in the Wisconsin Marital Property Act.
- When one or both of the spouses are parties to buy-sell arrangements with respect to business assets
- When the parties wish to maintain ownership of their property based on title (or alternatively to provide for the classification of their property as individual property as defined in the Act), and also, to the extent possible, to

maintain a system of debt satisfaction based on who incurred the obligation (an “opt-out” agreement)

- When the parties wish to make the marital property provisions of the Act applicable to most or all of their existing property after the determination date (an “opt-in” agreement)
- When the parties wish to classify their property to simplify the probate of their estates
- When the parties wish to classify only certain assets, provide debt satisfaction rules for certain liabilities, or define management and control rights concerning certain assets, particularly when specific bequests of property or specific nonprobate assets will be left to third persons at the death of either of the parties
- When the parties prefer a nonprobate transfer of their property at death through a will substitute agreement, rather than a transfer by will or intestacy

III. Marital Property Agreements Under the Act [§ 7.3]

A. In General [§ 7.4]

The enactment of statutory provisions relating to marriage agreements (referred to as *marital property agreements* in the Act) reveals a legislative intent to define the attributes and requirements of such agreements and to promote greater contractual freedom between married persons. 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, 60–68 (1985), reprinted in 13 Community Prop. J., July 1986, at 1, 33–38.

B. Freedom to Vary Effect of Chapter 766 by Contract [§ 7.5]

1. In General [§ 7.6]

The right of married persons (or persons about to marry) to vary the effect of chapter 766 contractually is expressly recognized in section 766.17(1). The comment to section 3 of the Uniform Marital Property Act (UMPA), *reprinted in app. A, infra*, from which section 766.17(1) is derived, makes it clear that this message is to be delivered “early and emphatically.” The comment further states:

Thus a couple may opt-out, opt-in, or do both in part. Custom-tailored marital property regimes are possible. The Act [UMPA] permits a couple to move its marital economics from status to contract and encourages a type of interspousal contractual freedom little known in common law states. It is important to the operation of the Act [UMPA] that the significance of this section be carried through to the use and application of its various provisions.

UMPA § 3 cmt.

The comment specifically singles out the following areas as suitable subjects for contractual modification of the Act’s effects:

1. Classification of property generally;
2. Management and control;
3. Classification of life insurance;
4. Classification of employee benefits;
5. Disposition of property at the dissolution of the marriage; and
6. Disposition of property at death.

See id. The list is not intended to be exhaustive. *Id.* It is with this fundamental UMPA principle in mind that one approaches marital property agreements under the Act. See sections 7.28–.38, *infra*, for a detailed discussion of the permissible subject matter of marital property agreements.

Although the Act creates its own complete system of property classification for married persons, *see supra* ch. 2, it also specifically contemplates that additional forms of property ownership may be created by the agreement of the spouses. *See* Wis. Stat. § 766.17(1). As the comment to UMPA section 3 notes, “The Act’s [UMPA’s] property system applies if it is not changed,” and “[c]ustom-tailored marital property regimes are possible.” Given the broad language in section 766.58(3)(a)–(h), *see infra* §§ 7.28–.38, there appears to be clear authority for spouses to adopt (or continue to use) common law forms of ownership, such as solely owned property, tenancy in common, and joint tenancy with right of survivorship, after the determination date. *See* Wis. Stat. Ann. § 766.60(4)(b) Legis. Council Notes—1985 Act 37, §§ 124–126 (West 2009) (“Should spouses wish to have the incidents of traditional joint tenancy or tenancy in common, regardless of the classification of the property, they may do so by marital property agreement.”).

➤ **Query.** May a marital property agreement vary the effect of statutory provisions *outside* chapter 766? Section 766.17(1) states that, with certain exceptions, a marital property agreement may vary the effect of chapter 766. 1985 Wisconsin Act 37 [hereinafter 1985 Trailer Bill] did not broaden the reference in section 766.17(1) to include portions of the Wisconsin Statutes beyond chapter 766, even though it transferred the important deferred marital property provisions of former section 766.77 from chapter 766 to chapter 861. 1997 Wisconsin Act 188 [hereinafter 1998 Probate Code Revision Bill] brought clarification to this issue by adoption of section 861.10 as part of the statutes dealing generally with the deferred marital property elective share. Section 861.10(1) specifically provides that the right to elect a deferred marital property elective share may be waived by a surviving spouse in whole or in part, either before or after marriage, by a provision in a marital property agreement that is enforceable under section 766.58. The statute further provides, in section 861.10(2), that a waiver of “all rights” (or equivalent language) in a present or prospective spouse’s property or estate, or in a complete divorce property settlement agreement, operates as a waiver of all rights to the deferred marital property elective share. Less clear is whether the other rights, allowances, and exemptions contained in subchapter III of chapter 861, Wis. Stat. §§ 861.17–.43, are subject to variance or waiver by marital property agreement. Section 766.58(3)(h), which permits spouses to agree in a marital property agreement about “[a]ny other matter affecting either or both

spouses' property not in violation of public policy or a statute imposing a criminal penalty," may be sufficient to permit the parties to negate, modify, or expand the other rights, allowances, and exemptions in subchapter III of chapter 861, as well as statutory provisions in other chapters that are of economic significance. This interpretation is consistent with the UMPA section 3 comment that specifically envisages contractual modification of the Act with respect to dispositions of property at death.

➤ **Note.** It should be borne in mind that marital property agreements are not the only method of reclassifying property under the Act. Gifts, unilateral statements under section 766.59, written consents under section 766.61(3)(e), written instruments conveying an interest in a security as defined in section 705.21(11), and even conveyances are all alternative means to accomplish reclassifications. Wis. Stat. § 766.31(10).

2. Limitations on Freedom to Vary [§ 7.7]

a. In General [§ 7.8]

The freedom of spouses to arrange the economic affairs of their marriage by contract is not without limitation. Spouses are subject to six specific statutory exceptions referred to in subsections 766.17(1) and (2) and in subsections 766.58(2) and (14). These exceptions, which are discussed in sections 7.9–14, *infra*, may not be varied by marital property agreement. All but two of these exceptions (the protection of a creditor's right to satisfaction of obligations at the death of a spouse, and limitations on the effect of an agreement for Wisconsin income tax purposes) are found in more or less similar form in UMPA.

b. Duty of Good Faith [§ 7.9]

The duty of a spouse to act in good faith with respect to matters involving marital property or other property of the other spouse may not be varied by a marital property agreement. *See* Wis. Stat. § 766.15. If the marital property agreement provides that the spouses will have no marital property, the effect of this section is substantially diminished, because one spouse will have little occasion to act in regard to the property of the other.

c. Protection of Creditors' Interests During Marriage [§ 7.10]

Under sections 766.55(4m) and 766.56(2)(c), a provision in a marital property agreement will not bind a creditor who does not have actual knowledge of the provision (or is not furnished a copy of the agreement) at the time the obligation to the creditor is incurred, or in the case of an open-end credit plan, at the time the plan is entered into.

This limitation makes it virtually impossible for the spouses to restrict in advance the right of involuntary creditors (such as tort-judgment creditors or governmental entities imposing fines or penalties) to reach all property that would have been classified as marital property absent the agreement, because ordinarily such creditors will have no actual knowledge of the terms of the marriage agreement. The provision works similarly for voluntary creditors unless the creditor has actual knowledge of the agreement or a copy is provided to the creditor by the credit applicant before the credit is granted or an open-end credit plan is entered into. *See* Wis. Stat. §§ 766.55(4m), .56(2)(c); *see also Bank One, Appleton, NA v. Reynolds*, 176 Wis. 2d 218, 500 N.W.2d 337 (Ct. App. 1993). The circumstances under which marital property agreements may limit the property that the federal and Wisconsin taxing authorities may reach in satisfaction of tax obligations are discussed in chapter 9, *infra*.

The efficacy of a marital property agreement to prevent inclusion of a nondebtor spouse's individual property assets in the debtor spouse's bankruptcy estate was illustrated in *Rinehart v. Meek (In re Grady)*, 128 B.R. 462 (Bankr. E.D. Wis. 1991), although the effect of section 766.55(4m) was not discussed in the opinion. The spouses had entered into a postmarital agreement that declared their intention to opt out of the Act and to classify all assets titled in their individual names (including earnings, income, and appreciation) as solely owned property treated as though they were unmarried. When the spouses divorced, their divorce settlement agreement and judgment allocated assets consistent with the ownership of the assets under the agreement.

The former husband then filed a bankruptcy petition. The bankruptcy trustee sought to recover the property received by the former wife on the ground that the divorce decree effected a transfer that was intended to hinder, delay, or defraud the former husband's creditors within the

meaning of section 242.04(1)(a), a provision of the Uniform Fraudulent Transfer Act. The trustee argued that because the former wife had commingled her earnings with inherited and gift property received from her family during the marriage, all of the funds had become marital property under section 766.63 and were therefore reachable by the former husband's creditors. *Id.* at 464–65. The bankruptcy court rejected this argument, holding that a marital property agreement may vary the effect of the Wisconsin Marital Property Act and adopt property classifications that preclude the necessity of tracing. Accordingly, the court held that the trustee had failed to prove that the former husband had any marital property interest in the assets awarded to the former wife that could be reached for the bankruptcy estate. Thus, there was no transfer for the trustee to avoid and recover for the bankruptcy estate.

For further discussion of the effect of classification of property by marital property agreement upon bankruptcy proceedings, see chapter 6, *supra*. See section 6.37, *supra*, for additional discussion about what suffices to give a creditor notice or actual knowledge of a marital property agreement. For a specific discussion of statutory provisions applicable to the satisfaction of obligations at the death of a spouse, see section 7.12, *infra*.

d. Protection of Bona Fide Purchasers' Interests **[§ 7.11]**

A marital property agreement may not vary the effect of the Act's provision protecting the interests of a bona fide purchaser who purchases marital property from a spouse having the right of management and control. *See* Wis. Stat. § 766.57(3). This provision is included to enhance commercial certainty under a system in which the holding of title no longer necessarily indicates ownership rights. If the marital property agreement provides that the spouses have no marital property, this exception has little consequence.

**e. Protection of Creditors' Interests at Death
When Assets Are Transferred by Will
Substitute Agreement [§ 7.12]**

A marital property agreement may not vary the effect of the spousal debt satisfaction scheme established by section 859.18 except in limited circumstances. This limitation on the scope of marital property agreements is not found in UMPA. *See* Wis. Stat. § 859.18(2), (6). The applicable statutes are complex, and their relationship is not entirely smooth. Nonetheless, it appears that the intention of section 859.18(6) is to emphasize that assets transferred outside the probate estate by will substitute agreement remain available for debt satisfaction even though these assets are not otherwise subject to the probate claims procedures of chapter 859.

➤ **Note On Terminology.** In the following discussion, a person to whom an obligation is owed by a spouse is referred to as a creditor. The term *creditor* is used here in its general sense and is not to be confused with the defined term in section 766.01(2r) or section 859.18(1)(b).

Section 766.55(8) states that after the death of a spouse, property is available for satisfaction of obligations as provided in section 859.18. Section 766.17(2) provides that the effect of a marital property agreement on property available for satisfaction of an obligation after the death of a spouse is governed by section 859.18(6). The latter subsection states that a provision in a marital property agreement that provides for the disposition of either or both of the spouses' property upon the death of a spouse (i.e., a will substitute provision) does not affect property available for satisfaction of obligations under section 859.18 unless (1) the property was not available for satisfaction under the marital property agreement while both spouses were alive; and (2) the agreement is binding on the creditor under section 766.55(4m) or section 766.56(2)(c) because the creditor had actual knowledge of the provision or was furnished a copy of the agreement. Thus, unless the property was unavailable to the creditor while both spouses were alive because the agreement was binding on the creditor, the basic rule for satisfaction of obligations at death under section 859.18 continues to apply. The basic rule of section 859.18 is as follows: property that, but for the death of the spouse, would have been available under section 766.55(2) for satisfaction of an obligation continues to be available for satisfaction,

with several significant exceptions noted in the statute. *See* Wis. Stat. § 859.18(2)–(5).

Property classified by agreement as one spouse’s individual or solely owned property would not generally be available to a creditor under section 766.55(2) to satisfy an obligation incurred by the other spouse under any of the following circumstances:

1. If the creditor had actual knowledge of the provisions of the marital property agreement when the obligation to the creditor was incurred or the open-end plan was entered into;
2. If the existence of a currently effective marital property agreement was disclosed to the creditor and the creditor was provided with a copy of the agreement before credit was granted or the plan entered into; or
3. If the creditor consented in writing to be bound by the agreement’s provisions.

See Wis. Stat. §§ 766.55(4), (4m), .56(2)(c). These same rules should hold true upon the death of one of the spouses to protect special debt-satisfaction arrangements between the spouses in a marital property agreement.

➤ **Comment.** Section 859.18(6) makes clear that property not available for debt satisfaction under the terms of a marital property agreement while both spouses were alive does not become available upon the death of one of the spouses if the creditor was bound by the provisions of the agreement under the notice statutes, sections 766.55(4m) and 766.56(2)(c). Interestingly, the statute does not mention creditors who are bound because they consented in writing to be bound by the agreement provision under section 766.55(4), although there is no policy reason not to continue to treat such a creditor as bound following the death of one of the spouses. Clearly, however, the spousal debt-satisfaction scheme of section 859.18 may not be displaced by a marital property agreement that (1) the creditor did not have actual knowledge of when the obligation arose, (2) was not disclosed to the creditor and a copy provided before credit was granted or the plan entered into, or (3) the creditor did not consent to in writing.

f. Protection of Child's Right to Support [§ 7.13]

A marital property agreement may not adversely affect the right of a child to support. *See* Wis. Stat. § 766.58(2). This limitation is consistent with the law before the adoption of the Act: under pre-Act law, an agreement by a spouse that limited his or her legal responsibilities to support a child probably would be declared void as against public policy. *See* Wis. Stat. § 49.90(1m), (2) (providing that each parent has equal obligation to support his or her minor children and that any parent who fails to provide maintenance is subject to court order to compel such maintenance); *see also* Wis. Stat. § 765.001(2). For a discussion of the modification of spousal support obligations by agreement, see sections 7.34 and .133–.140, *infra*. For a discussion of the duty to support minor children, see chapter 5, *supra*, and chapter 11, *infra*.

➤ **Note.** The Act does not bar a marital property agreement from providing that the income and assets of a new spouse are not available for satisfaction of child support obligations with respect to the other spouse's children by a former marriage. Nor does the Act prohibit excluding the new spouse's income and assets from consideration in determining the amount of support the other spouse's children by a prior marriage are entitled to receive.

g. Limitations on Marital Property Agreement's Effect for Wisconsin Income Tax Purposes [§ 7.14]

The effect of a marital property agreement for state income tax purposes is limited as set forth in chapter 71. *See* Wis. Stat. § 766.58(14). The chief limitation provides that a marital property agreement does not affect the determination of either (1) the income that is taxable by the state of Wisconsin or (2) the person who is required to report taxable income to the state of Wisconsin during any period that one or both of the spouses are not domiciled in Wisconsin. *See* Wis. Stat. § 71.10(6)(c). If both spouses are domiciled in Wisconsin, the agreement will not affect these issues unless it is filed with the Wisconsin Department of Revenue (DOR) before an assessment is issued. *Id.*

The inability of a marital property agreement to operate retroactively, particularly in the year of the dissolution of a marriage, constitutes a major practical limitation on the effectiveness of marital property agreements for Wisconsin income tax purposes. This and other limitations on the effectiveness of marital property agreements for income tax purposes are found not only in the Wisconsin Statutes, but also in the DOR's administrative rules and information releases. *See, e.g.,* Wisconsin Dep't of Revenue, Publ'n No. 113, *Federal and Wisconsin Income Tax Reporting Under the Marital Property Act* (Jan. 2010), at <http://www.dor.state.wi.us/pubs/pb113.pdf>.

C. Requirements for Marital Property Agreements

[§ 7.15]

1. In General [§ 7.16]

Marital property agreements are the primary statutory vehicle for carrying out the “almost unlimited contractual freedom” granted to spouses regarding their property and the economics of their marriage. UMPA § 10 cmt. The comment to UMPA section 10 contemplates that a marital property agreement “will usually be a postmarital agreement” and that there may be “many of them made at numerous times during a marriage.” The comment also recognizes that premarital agreements are on a different footing and that once the spouses have outlined their respective rights and responsibilities in a premarital agreement, such an agreement is likely to be changed infrequently, if at all.

2. Formal Requirements [§ 7.17]

a. Document [§ 7.18]

Section 766.58(1) sets forth the formal requirements of marital property agreements. Such an agreement must be a “document” signed by both spouses. Wis. Stat. § 766.58(1).

b. Appropriate Parties [§ 7.19]

Only spouses may be parties to a marital property agreement. Wis. Stat. § 766.58(1). Thus, contracts involving the spouses and third parties, such as land contracts, mortgages, bank or brokerage accounts, and buy-sell agreements, are not included within the definition of a marital property agreement. On the other hand, a trust agreement executed and self-trusted by both spouses (with no third party involved) may meet the requirements of section 766.58(1).

A guardian of a spouse's estate may execute a marital property agreement with the ward's spouse, or with the ward's intended spouse. Wis. Stat. § 54.20(2)(h). This authority may only be exercised with the court's prior written approval following petition. Wis. Stat. § 54.20(2)(intro).

➤ **Comment.** Section 54.20(2)(h) specifically prohibits a guardian from making, amending, or revoking a will for the ward. It is not clear what effect this rule has on a guardian's ability to enter into a will substitute marital property agreement with the other spouse purporting to dispose of either the incompetent spouse's property, or the property of both spouses, at death. The legislative history of the predecessor to this provision indicates that a guardian's authority "includes but is not limited to" the power to "create, for the benefit of the married person or others, revocable or irrevocable trusts of marital property and other than marital property which may extend beyond . . . the life of the married person." 1985 Wis. Act 37, § 184. For links to this Act and others amending the Wisconsin Marital Property Act, see appendix B, *infra*. Nor is it clear whether a person who is the guardian of the estate of his or her spouse may participate in the making (or amendment) of a marital property agreement that works to his or her benefit. Under these circumstances, the court may appoint a temporary guardian under section 54.50 to act for the incompetent spouse.

c. Consideration [§ 7.20]

A marital property agreement is enforceable without consideration. Wis. Stat. § 766.58(1).

Although no consideration is required to support a marital property agreement under section 766.58(1), it has been held that consideration or “value” is required for the agreement to apply in bankruptcy. In the unpublished decision in *Kaiser v. Pappas*, No. 87-C-211-S (W.D. Wis. May 9, 1989) (unpublished opinion), the issue was whether potential spousal rights under the Act constituted a reasonably equivalent value for the transfer of certain stock. The debtor-husband and his wife had entered into a premarital agreement in 1983. The opinion does not set forth or describe the agreement’s provisions. Following the enactment of the Wisconsin Marital Property Act in 1984 but before its effective date, the spouses’ attorney advised them that the Act might have an impact on their agreement when the Act became effective on January 1, 1986. In exchange for one-half the debtor-husband’s stock in a business corporation, in late 1985 the wife agreed to execute a supplement to the premarital agreement unequivocally opting out of the Act and reaffirming the provisions of the 1983 agreement.

After summarily rejecting the argument that marital harmony was sufficient value to support the stock transfer, the U.S. District Court considered whether the potential property rights that might accrue under the Act constituted a reasonably equivalent value that would support the stock transfer for purposes of section 548 of the Bankruptcy Code, 11 U.S.C. § 548 (fraudulent transfers and obligations). The trustee in bankruptcy contended that they did not and sought to recover the transferred stock for the bankrupt husband’s estate.

In dicta, the court spent some time examining section 766.58(12), which purports to preserve marital property agreements entered into before the Act. *See infra* § 7.121 (discussing this provision). The court noted that the meaning of this statute was far from clear and that the 1983 premarital agreement may not have barred a number of rights that might accrue to the wife under the Act, such as (1) marital property rights in the debtor-husband’s earned income, or in income from property titled in his name, and received after the determination date; (2) the right to an elective share in deferred marital property upon the husband’s death; (3) marital property rights that arise through the mixing of marital property with property of other classifications after the determination date; and (4) marital property rights relating to increases in asset value brought about by the uncompensated or undercompensated efforts of either spouse after the determination date.

Assuming for the sake of argument that the foregoing rights arose in the first place, the court concluded that they were all future rights that accrued gradually and did not constitute a presently enforceable right when the transfer of stock to the wife took place in 1985. The court held that the interest in future accretion of property rights through a marital property regime does not constitute a present interest in property. Further, the debtor-husband could exert some control over the accretions, either by terminating the marital relationship or by moving to another jurisdiction. The court viewed the value required by 11 U.S.C. § 548 as limited to the transfer of existing or antecedent property rights or debts. The court held that contingent future rights did not meet the definition.

Although accrual of future marital property rights may not be sufficient consideration or value to prevent the voiding of an asset transfer within the reach of 11 U.S.C. § 548, the surrender of such rights may be adequate and full consideration for transfer tax purposes.

d. Witnesses and Acknowledgment [§ 7.21]

Neither witnesses nor an acknowledgment before a notary is required for a marital property agreement. However, if the agreement, or a memorandum or affidavit concerning its essential provisions, is to be recorded as a document affecting title to real estate, it must be authenticated or acknowledged and must identify the land to which it relates. Wis. Stat. § 706.05(2). If the marital property agreement is to operate on realty or tangible personal property located in another jurisdiction, the agreement should comply with the other jurisdiction's formal requirements. The laws of other jurisdictions may require acknowledgment or recording. *See* William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* § 136 (2d ed. 1971); *see also* 2 Alexander Lindey & Louis I. Parley, *Lindey and Parley on Separation Agreements and Antenuptial Contracts* §§ 90.01–.20 (2d ed. 1999 & Supp.).

3. Requirements for Amendment or Revocation [§ 7.22]

a. In General [§ 7.23]

Generally, a marital property agreement may be amended or revoked only by a later marital property agreement. Wis. Stat. § 766.58(4). There are, however, some exceptions to this rule, as noted below:

1. The statutory terminable marital property classification agreement, *see infra* § 7.175, and the statutory terminable individual property classification agreement, *see infra* § 7.178, specifically authorize one spouse to terminate the agreement at any time by giving signed notice of termination to the other spouse. The termination is effective 30 days after notice is given. Wis. Stat. §§ 766.588(4)(a), .589(4)(a).
2. A nonstatutory marital property agreement may be structured in such a way as to permit termination by the unilateral action of one spouse, as discussed at section 7.117, *infra*; an example appears at section 7.160, *infra*.
3. A will substitute marital property agreement may be amended by a surviving spouse with regard to property subject to the agreement if the agreement provides for the nontestamentary disposition of the property to third persons at the surviving spouse's death, provided that the agreement does not bar the amendment. Wis. Stat. § 766.58(3)(f); *see infra* § 7.101.

The amending or revoking document seemingly must itself comply with the requirements for enforceability of a marital property agreement, including the necessary formalities and minimum disclosures. *See supra* §§ 7.17–.21, *infra* § 7.48. It should be possible to use mutual waivers of disclosure on simple amendments and possibly on revocations if the revocation does not produce a significantly disparate impact on the spouses. Revocations that make the Act applicable to the spouses' property on revocation may require less disclosure.

Presumably, a guardian, acting with the court's prior written approval under section 54.20(2), may execute a marital property agreement that constitutes an amendment or revocation.

➤ *Query.* May spouses amend or revoke a marital property agreement when one or both of the spouses have moved out of Wisconsin? As previously noted, under section 766.58(4) a marital property agreement may only be amended or revoked by a later marital property agreement. Yet under sections 766.03(2) and 766.01(8), the Act applies only while both spouses are married and domiciled in Wisconsin, and unless the Act applies, it is impossible to have a marital property agreement under section 766.58. Thus, in theory, it is impossible for spouses to amend or revoke a Wisconsin marital property agreement once one or both have established a domicile elsewhere. A practical—and reasonable—approach to resolving this dilemma would be for the courts to recognize any amending or revoking document that is signed by both spouses, because it would clearly comply with the spirit of section 766.58(4), even though technically it may not be a marital property agreement.

To summarize, the statutory requirement that both spouses sign a marital property agreement (including an amendment or revocation), *see* Wis. Stat. § 766.58(1), (4), seems to admit of no unilateral right to modify or revoke. However, a mutually agreed-upon actuating provision in a marital property agreement that permits either spouse to terminate the agreement’s applicability or to reclassify property subject to the agreement, either prospectively or retroactively, should not run afoul of the prohibition against unilateral amendment and revocation. *See infra* § 7.117.

➤ *Comment.* It is not certain whether the statutory requirement for mutual action applies to documents referred to in a marital property agreement. For example, a will substitute marital property agreement might include provisions purporting to transfer property at a spouse’s death to an “outside” trust that is to remain amendable by one spouse alone after the execution of the marital property agreement. Because section 766.58(4) does not address itself to other documents that are referred to in a marital property agreement, the better view is that unilateral amendment of the trust would not violate the statutory requirement.

b. Revocation by Operation of Law [§ 7.24]

Under some limited circumstances, provisions in a marital property agreement are revoked by operation of law. Under section 766.58(3)(f),

provisions for nontestamentary disposition of property at death to the other spouse or third parties under a will substitute marital property agreement are automatically revoked upon dissolution of the marriage, as provided in section 767.375(1). Section 767.375(1) provides that unless a judgment of annulment, divorce, or legal separation provides otherwise, such a judgment revokes a marital property agreement provision providing that

1. Upon the death of either spouse, any of either or both spouses' property, including after-acquired property, passes without probate to a designated person, trust, or other entity by nontestamentary disposition; or
2. One or both of the spouses will make a particular property disposition in a will or other governing instrument, as defined in section 854.01(2). Under section 854.01(2), the term *governing instrument* includes, among other things, wills, deeds, trust instruments, contracts, insurance or annuity policies, retirement plans, beneficiary designations, instruments of nonprobate transfer under chapter 705, and exercises of a power of appointment.

Note that the balance of the marital property agreement between the spouses apparently is not affected by these statutes.

➤ **Comment.** The virtue of section 767.375(1) is that a judgment of dissolution automatically ends *any* provisions in a marital property agreement calling for testamentary or nontestamentary dispositions of property at the death of one or both of the spouses, regardless of whether the transferee or transferees of the property are the other spouses or third parties. In this regard, the statute is similar to but broader than section 854.15, which provides that any provision in a will or other governing instrument executed before an annulment or divorce in favor of the decedent's former spouse or a relative of the former spouse is revoked by the annulment or divorce.

4. Marital Property Agreements Executed Before Marriage [§ 7.25]

Persons intending to marry may execute a marital property agreement before marriage, but the agreement becomes effective only upon their

marriage. Wis. Stat. § 766.58(5). This provision is consistent with the common law rule that a premarital agreement becomes binding only upon the solemnization of the marriage. See *Hepinstall v. Wixson (In re Hepinstall's Estate)*, 35 N.W.2d 276, 278 (Mich. 1948); *Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978).

5. Anticipatory Marital Property Agreements [§ 7.26]

Section 766.585 permits spouses or unmarried persons who subsequently marry each other to enter into an anticipatory marital property agreement. This provision also applies to nonresident spouses or spouses-to-be who wish to enter into an anticipatory marital property agreement before establishing their domicile in Wisconsin. Section 766.585(1) states that after April 4, 1984, and before their determination date, such persons may execute a marital property agreement under section 766.58 that is intended to apply only after their determination date to the same extent that persons may execute a marital property agreement after their determination date.

An anticipatory marital property agreement does not apply before the determination date, in contrast to pre-Act marriage agreements intended to be applicable immediately upon execution, see *infra* §§ 7.119–146. When an anticipatory marital property agreement does become applicable, it has the same effect as if executed after the determination date. The anticipatory marital property agreement provision also makes clear that the law in effect on the date the marital property agreement becomes applicable (i.e., chapter 766)—not the law in effect on the date of its execution—applies to the agreement's execution, enforceability, and other legal effects. Wis. Stat. § 766.585(2).

6. Oral Marital Property Agreements [§ 7.27]

Section 766.58(1) requires that a marital property agreement be a “document,” presumably written, and signed by the parties. Nearly all community property states have statutes requiring that marital agreements be in writing. Some require acknowledgment or recording. See William A. Reppy, Jr. & Cynthia A. Samuel, *Community Property in the United States* 24 (2d ed. 1982).

➤ **Comment.** The potential applicability of the doctrine of partial or full performance to marriage agreements governed by the pre-Act statute of frauds is discussed in section 7.125, *infra*. Unlike section 241.02(1) (which no longer applies to marital property agreements under the Act, *see* Wis. Stat. § 241.02(2)), section 766.58(1) does not state the effect of a failure to comply with the requirement that a marital property agreement be a document. It can be argued that the section 766.58(1) documentation requirements are self-contained and that any agreement that fails to meet them is simply invalid. The other argument is that because the Act does not state whether a purported oral marital property agreement is void or merely unenforceable, it does not go as far as the previous statute of frauds to declare all oral agreements void. Under this view, the requirement of a signed document may be approached somewhat less stringently. There may be circumstances so compelling that a court will be willing to enforce an oral marital property agreement. Consistent with the safeguards for determining whether there has been sufficient performance to take a marriage agreement out of the statute of frauds, *see infra* § 7.125, the equitable doctrine of partial or full performance could be used to enforce an oral marriage agreement that one of the spouses has relied on to his or her substantial detriment. Assuming that those safeguards are applied, the enforcement of a couple's oral agreement through application of the partial or full performance doctrine appears to be consistent with the freedom of choice conferred by the Act. Consistent, too, is the expectation that there will be a much greater need for property agreements between spouses under the Act than was the case before, thus creating more situations in which application of the doctrine may be appropriate.

➤ **Example.** *Hall v. Hall*, 271 Cal. Rptr. 773 (Ct. App. 1990), is illustrative of the above principles. The case arose under the California version of the Uniform Premarital Agreement Act. The specific question posed to the court was whether a substantial change in position in reliance on an oral premarital agreement would take the agreement out of the uniform act's statute-of-frauds requirement that the agreement be in writing and signed by both parties. The court held that the traditional equitable exceptions to the statute of frauds (such as partial or full performance) remained viable under the terms of the uniform act, even though the uniform act did not specifically reference these exceptions. In *Hall*, the wife had quit working, begun taking Social Security early, and advanced substantial funds to her

husband in return for the husband's promise to provide for her financial security in the form of a life estate in his residence if he predeceased her. The court concluded that, because of the wife's expectancy interest arising from her detrimental reliance on the husband's promise, the wife was entitled to specific performance of the agreement.

D. Subject Matter of Marital Property Agreements

[§ 7.28]

1. In General [§ 7.29]

Section 766.58(3) recognizes a broad range of topics as appropriate subjects for a marital property agreement. Both section 766.58(3)(h) and the comment to UMPA section 10 make clear that the statutory list is not intended to be exclusive. The permissible subjects of a marital property agreement include those enumerated in sections 7.30–.38, *infra*.

2. Property Rights and Obligations [§ 7.30]

The first subject recognized as appropriate for a marital property agreement is property rights and obligations in the broadest sense of those terms. Included are rights in and obligations with respect to either or both spouses' property "whenever and wherever acquired or located." Wis. Stat. § 766.58(3)(a). This provision is designed to encompass prospective or retroactive classification of property or obligations, including future earnings and acquisitions of property. Classification or reclassification of property by marital property agreement is specifically recognized elsewhere in the Act. *See, e.g.*, Wis. Stat. § 766.31(7)(d), (10).

The term *property* is broadly defined in section 766.01(15) to include present or future interests, legal or equitable interests, and vested or contingent interests in real or personal property. Accordingly, the language in section 766.58(3)(a) should be broad enough to permit reclassification by marital property agreement of assets held in the revocable trust of one or both of the spouses without the necessity of first withdrawing the assets from the trust. The right to revoke alone (and not necessarily any retained beneficial interest) should be treated as

tantamount to outright ownership of individual assets held by the trustee of a revocable trust and should thus permit their reclassification by agreement.

A question may arise when a marital property agreement classifies the spouses' assets as marital property in only general terms and either or both of the spouses own deferred employment benefits or life insurance policies. At issue is the application of

1. The terminable interest rule of section 766.62(5) to deferred employment benefits and to assets in an individual retirement account (IRA) that are traceable to the rollover of deferred employment benefits; and
2. The "frozen interest" valuation rule of section 766.61(7) to the noninsured spouse's property interest in a life insurance policy designating the other spouse as owner and insured.

With regard to the terminable interest rule in section 766.62(5), section 766.58(7)(a) specifically provides that, unless the marital property agreement expressly provides otherwise, a marital property agreement that classifies deferred employment benefits (or assets in an IRA account traceable to a rollover of those benefits) as marital property does not affect (i.e., overrule) the operation of the terminable interest rule. Similarly, with regard to the frozen interest valuation rule in section 766.61(7), section 766.58(7)(b) specifically states that unless the marital property agreement expressly provides otherwise, a marital property agreement that classifies as marital property the noninsured spouse's interest in a policy naming the other spouse as the owner and insured does not affect the operation of the frozen interest rule.

These statutory provisions make clear that if the terminable interest rule in section 766.62(5) or the frozen interest rule in section 766.61(7) are to be negated, they must be negated by specific provisions. For examples of specific language to negate the operation of these statutory rules, see paragraphs I.B. and I.C. of the agreement form at section 7.151, *infra*.

➤ **Note.** It may not be possible to waive by marital property agreement property rights in deferred employment benefits under qualified plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461. Deferred

employment benefits are significant components in the wealth of many Wisconsin residents, and recent federal decisions cast doubt on the ability of one spouse (or spouse-to-be) to waive ERISA rights in the other spouse's deferred employment benefits via provisions in a marriage agreement alone, when there is no subsequent postmarriage execution of a formal waiver document meeting the specific requirements of ERISA. The precise issue is whether general waivers of rights contained in a marriage agreement, executed either before or after marriage, operate as an effective written waiver of survivor benefits under the requirements of ERISA, and as reflected in I.R.C. § 417(a)(1) and (2). A developing line of cases tends to indicate that general waivers contained in marriage agreements are not sufficient. See *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992) (holding that wife-to-be's general waiver of rights in premarital agreement did not operate as effective waiver under I.R.C. § 417(a)(2)(A)); see also *Pedro Enters. v. Perdue*, 998 F.2d 491 (7th Cir. 1993); *Howard v. Branham & Baker Coal Co.*, No. 91-5913, 1992 WL 154571 (6th Cir. July 6, 1992) (unpublished opinion); *Zinn v. Donaldson Co.*, 799 F. Supp. 69 (D. Minn. 1992); *Nellis v. Boeing Co.*, No. 91-1011-K, 1992 WL 122773, at *5 (D. Kan. May 8, 1992). But see *Brown v. Hopkins (In re Estate of Hopkins)*, 574 N.E.2d 230 (Ill. App. Ct. 1991). Even if the marriage agreement specifically obligates a spouse to execute a waiver meeting the requirements of I.R.C. § 417(a)(2)(A), the courts may still refuse to order the spouse to sign a waiver after the employee spouse's death if the waiver was never presented to the nonemployee spouse for signature before the employee spouse's death. See *Callahan v. Hutsell, Callahan & Buchino, P.S.C.*, 813 F. Supp. 541, 547 (W.D. Ky. 1992), *vacated and remanded without published op.*, 14 F.3d 600 (6th Cir. 1993); see also Lynn Wintriss, *Practice Tips: Waiver of Rights Under the Retirement Equity Act on Premarital Agreements*, 19 ACTEC Notes 82 (1993); *infra* ch. 10.

➤ **Practice Tip.** One possible drafting approach to dealing with the failure of a spouse to waive ERISA survivor benefits as required by a marital property agreement is to offset any qualified plan benefits payable at death to the spouse against any other amounts payable to that spouse under the terms of the agreement. But see *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (holding, in divorce property-settlement context, that federal preemption with respect to railroad retirement benefits precluded use of offset against other community property).

3. Management and Control [§ 7.31]

The second subject recognized as appropriate for a marital property agreement is management and control of the property of either or both of the spouses. *See* Wis. Stat. § 766.58(3)(b); *see also supra* ch. 4 (discussing scope of management and control). A marital property agreement may provide that a nontitled spouse is given the exclusive right to manage and control an asset. This authorization would be binding on third parties having notice of the agreement. In effect, the agreement operates much like a power of attorney, but it is not unilaterally revocable by one spouse unless it specifically so provides.

In addition to providing for management and control of specific assets regardless of ownership, a marital property agreement may also designate the survivorship marital property form of holding marital property assets. *See* Wis. Stat. § 766.58(3)(b), (c). Such a designation should be effective to add a survivorship feature to marital property assets even if the documents of title to the assets are not changed. *See infra* § 7.118.

4. Disposition at Dissolution, Death, or Other Event [§ 7.32]

The third subject recognized as appropriate for a marital property agreement is the disposition of any of the property of either or both of the spouses upon the dissolution of the marriage, death, or the occurrence or nonoccurrence of any other event. *See* Wis. Stat. § 766.58(3)(c). Section 766.38(3)(c) allows the spouses to agree that certain property will be transferred into trust at the death of the first spouse to die, or that certain identified assets may be disposed of by a spouse before the death of the first of them, or at the death of either, without regard to the property's classification. Subject to the requirements of sections 767.61(3)(L) and 767.56(8), a marital property agreement may deal with the topics of property division and maintenance in the event of the dissolution of the marriage. *See infra* § 7.107; ch.11.

➤ **Note.** A provision in a marital property agreement requiring a spouse to make a disposition of property upon death or upon the occurrence or nonoccurrence of some event is a contractual undertaking to make a future transfer of property. This is to be

contrasted with using the marital property agreement as a will substitute under section 766.58(3)(f). The latter provision allows the spouses to dispose of assets without probate by nontestamentary means upon the death of either or both of the spouses. *See infra* §§ 7.35, 7.100–106. If a spouse fails to make an agreed-upon disposition by will, trust, beneficiary designation, or other means under section 766.58(3)(c), the failure would give rise to a claim against the deceased spouse’s estate. By contrast, will substitute provisions under section 766.58(3)(f) are directly dispositive and require no collateral documents to carry them out.

5. Modification or Elimination of Spousal Support

[§ 7.33]

The fourth subject recognized as appropriate for a marital property agreement is the modification or elimination of spousal support. *See* Wis. Stat. § 766.58(3)(d). Section 766.58(9) contains two significant exceptions to the general rule that a marital property agreement may modify or eliminate spousal support, which are as follows:

1. Section 766.58(9)(a) provides that a marital property agreement may not result in a spouse’s having “less than necessary and adequate support” during the marriage, taking into consideration all sources of support.
2. Section 766.58(9)(b) provides that a marital property agreement may not render a spouse eligible for public assistance at the time of the dissolution of the marriage or the termination of the marriage by death. If a marital property agreement does render a spouse eligible for public assistance, the court may require the other spouse or the other spouse’s estate to provide the support necessary to avoid that eligibility. Wis. Stat. § 766.58(9)(b).

The first exception, regarding adequate support during the marriage, is not found in UMPA. It is, however, consistent with Wisconsin’s legislative policy, expressed in subsections 49.90(1m), (2), and (4), that spousal maintenance may be compelled.

The second exception, regarding eligibility for public assistance, was taken from UMPA section 10(i), but with a further change—namely, that the eligibility for public assistance may be reviewed at the death of a

spouse as well as at the dissolution of the marriage. This provision is intended to dovetail with the probate court's authority under section 861.35 to provide support to the surviving spouse from the decedent spouse's estate. *See* Wis. Stat. Ann. § 766.58(9)(b) Legis. Council Notes—1985 Act 37, §§ 112–121 (West 2009).

➤ *Comment.* By adding the first exception discussed above and changing the second, the modification of the language of UMPA section 10(i) may diminish the usefulness of marital property agreements in resolving questions of spousal support with complete certainty. The “necessary and adequate” test in section 766.58(9)(a) for support during marriage is not defined. Presumably, this test will be measured by the standards for support and maintenance found in sections 767.501 and 767.56.

➤ *Query.* May the parties to a marital property agreement completely waive the section 861.35 special allowance for the support of a surviving spouse? No guidance is found in section 766.17 or section 766.58. Section 861.35(3)(e) itself indicates that the probate court should consider “whether the provisions of a marital property agreement will create a hardship for the surviving spouse” as one of several factors in making the special allowance under section 861.35. The overriding policy concern in these not entirely harmonious statutory sections seems to be to protect the surviving spouse from the provisions of an otherwise enforceable marital property agreement if it would result in extreme adversity. With that said, complete waivers of support at the death of a spouse should be permissible under section 766.53(3)(d), but the spouses should understand that these may not be enforceable if the waiver renders a surviving spouse eligible for public assistance or otherwise creates a hardship.

6. The Making of a Will, Trust, or Other Arrangement [§ 7.34]

The fifth subject recognized as appropriate for a marital property agreement is the making of a will, trust, or other arrangement to carry out the marital property agreement. *See* Wis. Stat. § 766.58(3)(e). The Act clearly authorizes contractual terms requiring certain provisions in the spouses' testamentary documents, as well as contractual terms requiring transfers of specific property to one spouse or third parties during

lifetime or at death. The Act's presumptions and property ownership rules favoring marital property are likely to necessitate marital property agreements dealing with these subjects whenever the spouses are not content to have most or all of their assets classified as marital property.

➤ **Note.** Provisions under section 766.58(3)(e) for the making of a will, trust, or other arrangement to carry out the marital property agreement are similar to provisions under section 766.58(3)(c) for the disposition of property on dissolution of the marriage, death, or the occurrence or nonoccurrence of some event, *see supra* § 7.32. Both kinds of provisions are executory in nature, requiring future action by one or both of the spouses to accomplish them. They are to be contrasted with will substitute provisions that dispose of assets without probate by nontestamentary means on the death of one or both spouses under section 766.58(3)(f). If a spouse fails to make a will, trust, or other arrangement as required by the marital property agreement, the remedy of the aggrieved spouse is to commence an action against the other spouse or file a claim against the other spouse's estate. By contrast, will substitute provisions under section 766.58(3)(f) are directly dispositive and require no collateral documents or actions to carry them out.

It is possible that joint and contractual wills signed by both spouses, as well as separate agreements between spouses to make wills, may also meet the technical definition of a marital property agreement in subsections 766.58(1), (3)(c), and (3)(e). It is unclear whether future judicial decisions regarding such documents and third-party rights under them will develop independently under section 766.58, or whether the courts will continue to look to section 853.13 and to earlier common-law decisions involving contracts to make wills. *See, e.g., Pederson v. First Nat'l Bank*, 31 Wis. 2d 648, 143 N.W.2d 425 (1966); *Seher v. Kurz (In re Estate of Cochrane)*, 13 Wis. 2d 398, 108 N.W.2d 529 (1961); *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831 (1929); *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924); *cf. Pindel v. Czerniejewski (Estate of Czerniejewski)*, 185 Wis. 2d 892, 592 N.W.2d 702 (Ct. App. 1994); *see also Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N.W. 440 (1903) (discussing agreement to make gifts to third parties on occurrence of certain events).

7. Will Substitute Provisions [§ 7.35]

The sixth subject recognized as appropriate for a marital property agreement is the authorization of will substitute provisions—that is, provisions that on the death of either spouse, any property of either or both of the spouses, including after-acquired property, will pass without probate to a designated person, trust, or entity by nontestamentary disposition. Wis. Stat. § 766.58(3)(f). Will substitute marital property agreements of this sort have their genesis in a Washington statute. *See* Wash. Rev. Code § 26.16.120 (West, WESTLAW current with amendments received through January 15, 2010); *see also* UMPA § 10 cmt. Commencing with the effective date of the Act, these agreements created a new estate planning vehicle. *See infra* §§ 7.99–.106 (detailed discussion of will substitute agreements).

8. Choice of Law [§ 7.36]

The seventh subject recognized as appropriate for a marital property agreement is choice of the law governing the construction of the agreement. *See* Wis. Stat. § 766.58(3)(g). Note that section 766.58(3)(g) authorizes only choice of the law that will govern construction of the agreement, not choice of the law that will govern its validity or enforceability. Careful drafting ordinarily dictates use of a choice-of-law clause that is intended to govern validity and enforceability as well as construction. Perhaps the courts will deem validity and enforceability to be covered by the catchall provision, section 766.58(3)(h), discussed in section 7.37, *infra*.

May spouses, only one of whom is domiciled in Wisconsin, choose the law of a single state—that is, either the law of Wisconsin or the law of the other state—to govern their property rights and the construction of a marital property agreement? Neither section 766.58(3)(g) nor any other part of section 766.58 expressly deals with the choice of a domicile. In part, this may reflect the fact that domicile depends not only on intention but also on physical presence, the latter of which an agreement clearly cannot confer.

In any event, it is an open question whether dual-domicile spouses may elect to have the Act's provisions apply to their marriage. Under sections 766.01(8) (defining *during marriage*) and 766.03 (applicability of the Act), the Act applies only during periods in which *both* spouses

are domiciled in Wisconsin. If the Act does not apply, neither does the statutory section dealing with marital property agreements, section 766.58, including its choice-of-law provision, section 766.58(3)(g).

Section 766.03(1) does recognize some exceptions to the general rule that the Act applies only while both spouses are domiciled in Wisconsin. The statute references section 766.58(5) (permitting persons intending to marry to enter into a marital property agreement that becomes effective upon their marriage); section 766.58(12) (providing that provisions in a document signed before the determination date by spouses or by unmarried persons who subsequently marry that affect the property of either of them and is enforceable by either without reference to chapter 766, are not affected by chapter 766); and section 766.585 (permitting spouses or unmarried persons who subsequently marry to execute a marital property agreement under section 766.58 that is intended to apply only after their determination date).

Thus, if the parties (at least one of whom is not domiciled in Wisconsin) execute a marriage agreement in Wisconsin that seeks to apply the property regime described in the Act and indicates that Wisconsin law is to govern the validity and construction of the agreement, two results are possible. If the agreement is intended to apply only after the determination date, section 766.585(1) indicates that the agreement *cannot* apply before the determination date. A determination date will not occur as long as one of the spouses continues to be domiciled outside of Wisconsin, and thus the choice-of-law provision in section 766.58(3)(g) would remain in suspense. On the other hand, if the agreement is intended to apply in whole or in part before the determination date, section 766.585(3) indicates that the agreement is governed by section 766.58(12), which in turn provides that the agreement is enforceable by either of the parties without reference to chapter 766 and is not affected by chapter 766 except as provided otherwise in a marital property agreement made after the determination date. This is likely to throw the court back to an analysis of the Wisconsin law applicable to marriage agreements before the Act, *see infra* §§ 7.122–.146, or the law with respect to marriage agreements that has since developed independent of the Act. In view of the above, it appears doubtful that parties to a marital property agreement will be able to adopt a Wisconsin marital property regime unless both parties are domiciled in Wisconsin.

Note that a consensual community property regime based on contract alone and without the force of state law would not be accorded the income tax benefits that flow to a legal system of community property.

9. Other Matters Affecting Property [§ 7.37]

The final subject appropriate for a marital property agreement covers any other matter that affects the property of either or both of the spouses and does not violate public policy or a statute imposing a criminal penalty. *See* Wis. Stat. § 766.58(3)(h). Section 766.58(3)(h) is derived from and is substantially identical to UMPA section 10(c)(8). For reasons that are not clear, the UMPA provision is not as broad as section 3(a)(8) of the Uniform Premarital Agreement Act, 9B U.L.A. 373 (1983) [hereinafter Uniform Premarital Agreement Act], which permits the spouses to contract with respect to “any other matter, *including their personal rights and obligations*, not in violation of public policy or a statute imposing a criminal penalty,” without limiting the matters to those affecting property (emphasis added).

Section 766.58(3)(h) was cited by the court of appeals 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)), in holding invalid on public policy grounds a marital property agreement, the application of which would have resulted in a spouse’s circumventing the indigency requirements for public-expense legal representation of criminal defendants under section 977.07.

10. Noneconomic Matters [§ 7.38]

Section 766.58 purports to deal only with property and economic considerations. No special mention is made of the kinds of personal rights or obligations that the parties sometimes might wish to include in a marriage agreement. Among these might be the spouses’ responsibilities for child rearing, housework, religious matters, and the like. It can be argued that the failure of section 766.58(3) to mention personal rights and obligations implies that they are not a permissible subject in a marital property agreement. On the other hand, it can also be argued that, based on the broad contractual freedom conferred by section 766.17, these contractual provisions will be enforced to the extent that they are enforceable under otherwise applicable law. *See Avitzur v.*

Avitzur, 446 N.E.2d 136 (N.Y. 1983) (holding that provisions in agreement requiring arbitration of religious obligations before specified rabbinical panel were enforceable as “secular terms,” even though agreement was entered into as part of religious ceremony); *Schwarzman v. Schwarzman*, 388 N.Y.S.2d 993, 998 (Sup. Ct. 1976) (stating that provisions in valid premarital agreement regarding religious upbringing of children are enforceable if in child’s best interests).

One commentator has advanced several reasons to explain why noneconomic provisions in marriage agreements are not appropriate subjects for judicial enforcement:

Where the antenuptial contract purports to regulate aspects of the marriage other than support or finances, the foregoing objections to judicial enforcement [i.e., judicial economy and avoidance of increased legal regulation of the marriage relationship] apply with equal force. The few cases which have arisen in the past have refused to enforce agreements to obtain a divorce, agreements not to defend a divorce action, agreements respecting sexual relations between the spouses, and in one unusual case the agreement that the children of the wife’s prior marriage would not live with the parties. Most such cases rest on the traditional view that the incidents of marriage are established by law and may not be altered by the parties. This of course is not a reason but merely another way of stating the result, and it is somewhat inconsistent with the courts’ contemporary willingness to permit control of alimony and maintenance by antenuptial agreement. Nevertheless, the results of these cases may be justified as saving the time and energies of the courts and as taking the realistic position that the intimate day to day conduct of married persons cannot be controlled by judicial decision, whether or not the decision is based upon the parties’ own contract.

Homer H. Clark, Jr., *Antenuptial Contracts*, 50 U. Colo. L. Rev. 141, 163 (1979) (footnotes omitted). On the other hand, this commentator recognized that marriage agreements dealing with noneconomic issues may be useful as a means of revealing the expectations of (and thus possible conflicts between) persons contemplating marriage. *Id.*

➤ **Practice Tip.** Because section 766.58(3) is silent on the permissibility of including noneconomic matters in a marital property agreement, and because the enforceability of noneconomic provisions is open to some doubt, it may be desirable to deal with noneconomic matters in a separate document.

E. Enforceability of Marital Property Agreements [§ 7.39]

1. In General [§ 7.40]

Regardless of whether executed before or during marriage, a marital property agreement under the Act is enforceable at any time

1. If the agreement was not unconscionable when made;
2. If it was voluntarily executed; and
3. If, before or at the time of execution of the agreement, the spouse received fair and reasonable disclosure, under the circumstances, of the other spouse's property and financial obligations, or had notice of the other spouse's property and financial obligations.

See Wis. Stat. § 766.58(6). Stated another way, the agreement will fail if the spouse against whom enforcement is sought proves *any one* of the following: unconscionability when the agreement was made; involuntary execution; or inadequate disclosure and lack of notice. The burden of proof is on the spouse seeking to avoid the agreement. *Id.* Neither *unconscionability* nor *fair and reasonable disclosure under the circumstances* is defined in the Act. As yet, there are no court decisions involving UMPA in Wisconsin or elsewhere to provide guidance, other than decisions involving related uniform acts, *see infra* § 7.43, or commercial law analogies, *see infra* § 7.44. Moreover, the persuasiveness of decisions involving pre-Act agreements, *see infra* §§ 7.122–.131, in the context of marital property agreements under the Act remains unknown. For a discussion of the categories and attributes of pre-Act marriage agreements, see section 7.120, *infra*.

Apart from the Act's requirements, if the marital property agreement is to be enforceable as an arrangement for property division in the event of dissolution, there is an additional requirement that it must be equitable as to both parties. Wis. Stat. § 767.61(3)(L); *see infra* §§ 7.133–.140. For a comparison with the common law standards of enforceability of marriage agreements, see sections 7.122–.131, *infra*.

It should be noted that the enforceability provisions contained in section 766.58(6) differ significantly from the provisions of UMPA

section 10. UMPA provides two standards for the enforceability of marital property agreements. One, contained in section 10(f), governs the enforceability of marital property agreements executed during marriage. The other, contained in section 10(g), governs the enforceability of marital property agreements executed before marriage and is based on section 6 of the Uniform Premarital Agreement Act. Assuming that a marital property agreement was voluntarily executed, the enforceability tests contained in UMPA subsections 10(f) and (g) differ in one key respect. Under UMPA section 10(g), a premarital agreement is enforceable unless it is shown *both* that it was unconscionable when made *and* that there was no fair and reasonable disclosure, no waiver of disclosure, or no notice of the other spouse's property and financial obligations. Under the UMPA section 10(f) standard for postmarital agreements, *either* unconscionability *or* inadequate disclosure alone is a ground for avoiding the agreement.

Section 766.58(6) adopted the UMPA section 10(f) *postmarital* agreement standard as the sole test for enforceability of *both* premarital and postmarital agreements but added certain changes discussed in section 7.48, *infra*. These changes preclude a complete waiver of disclosure in many instances. The result is that under the Act, either unconscionability or inadequate disclosure is a ground for avoidance of a voluntarily executed premarital or postmarital agreement. Thus, avoidance of premarital agreements is made easier under the Wisconsin statute than it would be under UMPA section 10. For a comparison of the enforceability standards under the Act, UMPA, and the Uniform Premarital Agreement Act, see June Miller Weisberger, *Spousal Property Agreements: An Evolving Concept in Wisconsin and Elsewhere*, 5 Wis. Women's L.J. 43, 69–76 (1990).

2. Unconscionability [§ 7.41]

a. In General [§ 7.42]

The requirement that a marital property agreement not be unconscionable when made is somewhat analogous to the fairness test for marriage agreements under pre-Act common law, although the fairness test also includes fraud and duress. *See infra* § 7.128. The statute specifies that unconscionability is an issue to be decided by the court as a matter of law. Wis. Stat. § 766.58(8). The apparent meaning of this provision is that unconscionability is not to be treated as a

question of fact to be submitted to a jury for resolution but rather is reserved to the court for determination after consideration of the relevant facts.

There is tension between the unconscionability standard of section 766.58(6)(a) and the equitableness standard found in the divorce property division statute, section 767.61(3)(L). Section 766.58(6)(a) renders a marital property agreement unenforceable if it was “unconscionable when made.” Section 767.61(3)(L), on the other hand, has been interpreted to permit the court to refuse to enforce the agreement as a vehicle for property division at the dissolution of the marriage if, through significantly changed circumstances, it is “inequitable as to either party” at the time of dissolution, even though it might have been conscionable (i.e., fair and reasonable) when made. *See Button v. Button*, 131 Wis. 2d 84, 388 N.W.2d 546 (1986); *cf. Schumacher v. Schumacher*, 131 Wis. 2d 332, 388 N.W.2d 912 (1986); *see also infra* §§ 7.133–.140. Accordingly, it can be said that the enforceability standards of section 766.58(6) apply with certainty only at the death of one of the spouses or in an enforcement proceeding during the ongoing marriage. The unconscionability portion of the statutory test appears to be replaced by the equitableness standard of section 767.61(3)(L) at dissolution. Neither the courts nor the legislature has attempted to harmonize the two statutes. *See infra* § 7.107.

Although they have not done so yet, it is likely that the appellate courts will be called on to determine what constitutes unconscionability for purposes of section 766.58(6)(a). Resolution of this issue will not be free of difficulty. Like pornography, unconscionability is difficult for the courts to define, but “they know it when they see it.” Stated another way, the determination tends to be subjective.

b. Under Uniform Acts [§ 7.43]

The unconscionability test embodied in section 766.58(6)(a) is contained in UMPA section 10(f) and emanates from a series of uniform acts. The first is the Uniform Premarital Agreement Act. Section 6 of the Uniform Premarital Agreement Act provides that unconscionability is one element for avoiding premarital agreements. As discussed in section 7.40, *supra*, UMPA section 10(g) included the substance of section 6 of the Uniform Premarital Agreement Act, but these provisions were not included in section 766.58(6).

The comment to Uniform Premarital Agreement Act section 6 quotes extensively from the Commissioners' Note to Uniform Marriage and Divorce Act section 306. The latter is particularly instructive because it discusses the early antecedents of the test for unconscionability in the commercial context and interprets their application to marital relations. The relevant portion of the comment in the Uniform Premarital Agreement Act states

The following discussion set forth in the Commissioners' Note to section 306 of the [Uniform Marriage and Divorce Act] is equally appropriate here:

“Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law where its meaning includes protection against one-sidedness, oppression, or unfair surprise (see section 2-302, Uniform Commercial Code), and in contract law, *Scott v. U.S.*, 12 Wall (U.S.) 443 (1870) ('contract . . . unreasonable and unconscionable but not void for fraud'); *Stiefler v. McCullough*, 174 N.E. 823, 97 Ind. App. 123 (1931); *Terre Haute Cooperage v. Branscome*, 35 So. 2d 537, 203 Miss. 493 (1948); *Carter v. Boone County Trust Co.*, 92 S.W.2d 647, 338 Mo. 629 (1936). It has been used in cases respecting divorce settlements or awards. *Bell v. Bell*, 371 P.2d 773, 150 Colo. 174 (1962) ('this division of property is manifestly unfair, inequitable and unconscionable'). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

“In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement and any other relevant evidence, such as the conditions under which the agreement was made, including the knowledge of the other party.”

Section 306 of the Uniform Marriage and Divorce Act authorizes the parties to a marriage to enter into a written separation agreement attendant on their separation or the dissolution of their marriage. Section 306(b) further provides that the terms of the separation agreement (with certain limited exceptions) are binding on the court unless the court finds that the separation agreement is unconscionable. In this respect, the statute is analogous to section 767.255(3)(L), except that the uniform act test is stated in terms of unconscionability rather than inequity.

Illinois (along with seven other states) has adopted the substance of the Uniform Marriage and Divorce Act, 750 Ill. Comp. Stat. Ann. 5/101 to 5/802 (West, WESTLAW current through P.A. 96-891 of the 2010 Reg. Sess.), and its decisions on the enforcement of separation agreements are therefore instructive in ascertaining the scope of unconscionability. The Illinois Appellate Court has held that if an agreement is unreasonably favorable to one party and the circumstances surrounding execution indicate that the other party did not have a meaningful choice, the agreement may be held to be unconscionable. See *In re Marriage of Richardson*, 606 N.E.2d 56, 65 (Ill. App. Ct. 1992); *In re Marriage of Carlson*, 428 N.E.2d 1005, 1010–11 (Ill. App. Ct. 1981); cf. *In re Marriage of Van Zuidam*, 516 N.E.2d 331, 333–34 (Ill. App. Ct. 1987) (stating that agreement is not unconscionable if it is negotiated over several months, both parties were represented by counsel, agreement is not overly one-sided, and there are no allegations of fraud). Additional considerations include whether the agreement was the result of duress, fraud, misrepresentation, or concealment of assets at the time of execution, and whether the agreement was one-sided or oppressive considering the parties' economic circumstances. See *In re Marriage of Tabassum*, 881 N.E.2d 396 (Ill. App. Ct. 2007) (appeal denied); *In re Marriage of Smith*, 518 N.E.2d 450 (Ill. App. Ct. 1987); *In re Marriage of Miller*, 424 N.E.2d 1342 (Ill. App. Ct. 1981). The Illinois Appellate Court decisions make clear that something more than mere unfairness is necessary to invalidate an agreement. *In re Marriage of Lorton*, 561 N.E.2d 156, 160 (Ill. App. Ct. 1990); *In re Marriage of Van Zuidam*, 516 N.E.2d 331, 334 (Ill. App. Ct. 1987); *In re Marriage of Kloster*, 469 N.E.2d 381 (Ill. App. Ct. 1984). The Illinois Appellate Court has also stated that traditional commercial law concepts of unconscionability must be applied to determine whether the economic results of a separation agreement are unconscionable. *In re Marriage of Foster*, 451 N.E.2d 915, 918–19 (Ill. App. Ct. 1983).

A Missouri decision under the Uniform Marriage and Divorce Act stated that unconscionability was “inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it.” *Peirick v. Peirick*, 641 S.W.2d 195, 197 (Mo. Ct. App. 1982). However, in another case arising under the Uniform Marriage and Divorce Act, a Kentucky court held that a separation agreement will not be held unconscionable solely on the basis that it is a bad bargain. See *Peterson v. Peterson*, 583 S.W.2d 707, 712 (Ky. Ct. App. 1979).

Two cases cited in the comment to Uniform Premarital Agreement Act section 6 also assist in fleshing out the concept of unconscionability applicable to marriage agreements (as opposed to separation agreements). In *Ferry v. Ferry*, 586 S.W.2d 782 (Mo. Ct. App. 1979), the court struck down a premarital agreement waiving support and property division because (1) it appeared that one of the parties was operating under an erroneous assumption when the agreement was entered (namely, that the agreement was necessary to protect the anticipated inheritance of her child by a prior marriage); (2) that party did not have independent counsel, was given only limited time to review the agreement, and did not receive an accurate disclosure of assets; and (3) the agreement was unreasonably favorable to the other party. The court noted that “[c]onscionability is the same standard employed in commercial law, meaning protection against onesidedness, oppression or unfair surprise.” *Id.* at 786.

In the second case, *Newman v. Newman*, 653 P.2d 728 (Colo. 1982), the court determined that portions of a premarital agreement that waived maintenance on the dissolution of the marriage were not unconscionable when the affected spouse had reasonable means of self-support at the time of dissolution. The court declined to apply an unconscionability standard to the agreement’s property division provisions, observing that such agreements are subject to a fairness review at divorce “within the common law context of review for fraud, overreaching, or sharp dealing.” *Id.* at 733. According to the court, the analysis takes place at the time of execution of the contract and not at the time of separation. (The rule in Wisconsin for agreements intended to be enforceable at dissolution is different. *See infra* § 7.107.) Thus, despite a considerable disparity of monetary consideration, the agreement in *Newman* was upheld because the spouse against whom enforcement was sought was aware of the other spouse’s wealth when the agreement was made and had decided not to obtain independent counsel. Compare *Newman* with *In re Marriage of Meisner*, 715 P.2d 1273 (Colo. Ct. App. 1985), in which the court cited *Newman* for the proposition that a premarital agreement barring maintenance will be found unconscionable if the spouse seeking maintenance is left without means of reasonable support, either because of a lack of property or a condition of unemployability.

In adopting its version of the Uniform Premarital Agreement Act, New Jersey added a statutory definition of unconscionability. An unconscionable premarital agreement is an agreement that, as a result of a party’s lack of property or unemployability, would

1. Render a spouse without a means of reasonable support;
2. Make a spouse a public charge; or
3. Provide a standard of living far below that which was enjoyed before the marriage.

N.J. Stat. Ann. § 37:2-32 (West, WESTLAW current with laws effective through L.2010, c. 6). While not intended to be all-inclusive, this statutory definition at least covers the most egregious situations. Note, however, that the definition does not require that dire changes in economic circumstances be the result of overreaching, concealment, sharp dealing, or borderline fraud.

c. Wisconsin Commercial Law Analogies [§ 7.44]

The discussion and citations in section 7.43, *supra*, relating to various uniform acts, form a backdrop for a review of other Wisconsin statutes and cases that contain standards for finding unconscionability in contracts. For example, the Wisconsin Consumer Act, Wis. Stat. chs. 421–427, contains a statutory list of factors bearing on the issue of unconscionability. See Wis. Stat. § 425.107. Cases decided under this statute, as well as those decided under section 402.302 of the Uniform Commercial Code, may be useful in defining unconscionability for purposes of section 766.58(6)(a).

In *Discount Fabric House v. Wisconsin Telephone Co.*, 117 Wis. 2d 587, 345 N.W.2d 417 (1984), the Wisconsin Supreme Court, quoting extensively from *Allen v. Michigan Bell Telephone Co.*, 171 N.W.2d 689, 692–94 (Mich. Ct. App. 1969), divided the determination of unconscionability into the following two questions: (1) What are the parties' relative bargaining power, economic strength, and sources of supply—in a word, their options? and, (2) is the challenged term substantively reasonable? *Discount Fabric House*, 117 Wis. 2d at 601. The court cited *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), for the proposition that unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party. *Discount Fabric House*, 117 Wis. 2d at 601. The court refers to James J. White and Robert J. Summers, *Uniform Commercial Code* (1972), for an explanation of the procedural and

substantive aspects of unconscionability. *Procedural unconscionability* consists of absence of meaningful choice, superiority of bargaining power, unfair surprise, sharp practices, or deception. *Substantive unconscionability* consists of unfair terms (including overall imbalance), an unfair price, or an unfair disclaimer of a legal obligation. White and Summers explain that courts have had difficulty defining unconscionability because it is not a concept but a determination. Therefore, rather than trying to define the term, courts should be concerned with citing factors to be considered in determining whether a contract is unconscionable. See, e.g., Wis. Stat. § 425.107; see also *Leasefirst v. Hartford Rexall Drugs, Inc.*, 168 Wis. 2d 83, 483 N.W.2d 585 (Ct. App. 1992); *Pietroske, Inc. v. Globalcom, Inc.*, 2004 WI App 142, 275 Wis. 2d 444, 685 N.W.2d 884.

Within the context of family relationships, courts have indicated a willingness to apply stricter scrutiny to transactions, requiring good faith and conscientious dealing. See *Bogie v. Bogie*, 41 Wis. 209 (1876). The affectionate and trusting atmosphere that pertains in a contract between parent and child also exists in contracts between husband and wife or persons who are engaged to be married, with similar legal consequences. See, e.g., *Newman*, 653 P.2d at 732; see also *Button*, 131 Wis. 2d at 95. The self-interest assumed to be present in the commercial context may not be assumed in the marital context.

Courts in other jurisdictions that have reviewed marriage agreements for unconscionability have been somewhat inconsistent in formulating standards for defining the term. It is not clear whether Wisconsin courts will (1) limit unconscionability to the middle ground between an unequal (but not necessarily unfair) bargain, on the one hand, and various species of active misrepresentation and fraud, on the other; or (2) include fraud and misrepresentation in the term's definition along with overreaching, gross inequality, and unfair advantage. The answer is likely to emerge from future judicial decisions interpreting the Act.

d. Effect of Not Retaining Separate Counsel **[§ 7.45]**

When legal counsel is retained in connection with a marital property agreement, the fact that both parties are represented by one counsel, or that one party is represented by counsel and the other party is not represented, does not by itself render the agreement unconscionable or

unenforceable. Wis. Stat. § 766.58(8). This provision is clearly intended to cover the situation in which both spouses are willing to use the services of a single attorney or firm to prepare a marital property agreement, as well as the situation in which one of the spouses is represented by an attorney, and the other prefers neither to be represented by that attorney nor to retain any other. The clarifying amendments to section 766.58(8) adopted by the 1985 Trailer Bill deleted a requirement that made this provision conditional on each spouse waiving independent representation in writing, because in practice the requirement might have proved to be a trap for the unwary if the written waiver were overlooked or omitted.

If dual representation by itself is not a determinative factor bearing on the unconscionability of a marital property agreement, it may become one when considered in conjunction with other factors tending to show unconscionability. These might include gross disparity of benefits under the agreement, inadequate disclosure, and lack of time to review the agreement before execution. For further discussion of the question of independent representation, see section 7.128, *infra*.

➤ **Practice Tip.** An attorney preparing a marital property agreement for both spouses must carefully consider potential conflicts of interest under the Rules of Professional Conduct for Attorneys. See *infra* ch. 14. The 1985 Trailer Bill Supplemental Nontax Note to section 766.58(8) makes clear that the statutory language is not intended to address the ethical considerations required of a lawyer under the Rules of Professional Conduct for Attorneys in situations of this sort. See Wis. Stat. Ann. § 766.58 Legis. Council Comm. Supplemental Notes Relating to 1985 Act 37 (West 2009).

e. Effect of Not Making Provision for Spouse [§ 7.46]

It should be possible for a party to a marital property agreement—a party represented by counsel, in possession of a fair and reasonable disclosure of the other party’s property and financial obligations, and not acting under duress or with inadequate time to consider the matter—to voluntarily choose to take no property from his or her spouse. Neither the Act nor its legislative history contains any hint that it is necessary to make some financial provision for a spouse in a marital property

agreement to ensure that the agreement will not be unconscionable. The absence of financial provisions is not uncommon in marital property agreements executed before marriage by spouses-to-be, each of whom has significant personal assets. This is particularly true of marriages occurring later in life. Cases such as *Newman*, 653 P.2d 728, indicate that such agreements should not be deemed unconscionable.

3. Voluntary Execution [§ 7.47]

The requirement of voluntary execution contained in section 766.58(6)(b) is analogous to the common law requirement that marriage agreements be free from duress. *See infra* §§ 7.55, .128.

However, voluntary execution may involve more than the mere absence of duress. In *In re Marriage of Matson*, 730 P.2d 668, 671 (Wash. 1986), the Washington Supreme Court listed the following factors as possibly indicative of involuntariness: “The bargaining positions of the parties, sophistication of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date.” Although one of these factors alone may not be sufficient to invalidate a marital property agreement, the conjunction of several may well do so. *See also Bonds v. Bonds*, 5 P.3d 815 (Cal. 2000), for an extensive discussion of the requirements for voluntary execution under the California version of section 6 of the Uniform Premarital Agreement Act. In *Bonds*, the court cited the importance of evidence of coercion or lack of knowledge, including such factors as the proximity of the execution of the agreement to the wedding; a surprise in the presentation of the agreement; the presence or absence of independent counsel or of an opportunity to consult with independent counsel; inequality of bargaining power, in some cases indicated by the relative ages and sophistication of the parties; whether there was full disclosure of assets; and the parties’ understanding of the rights being waived under the agreement, or at least their awareness of the intent of the agreement. *Id.* at 824–25.

With regard to independent advice, a crucial issue seems to be not so much whether the spouse claiming invalidity actually consulted with counsel but rather whether that spouse had the *reasonable opportunity* to obtain independent counsel. *See, e.g., Greenwald v. Greenwald*, 154 Wis. 2d 767, 782–83, 454 N.W.2d 34 (Ct. App. 1990) (finding premarital

agreement voluntarily executed in situation in which husband's attorney advised wife to retain independent counsel to review agreement, but wife rejected advice and signed agreement); *see also Woolwine v. Woolwine*, 519 So. 2d 1347 (Ala. Civ. App. 1987).

On the other side of the coin are cases in which the spouse asserting invalidity had no reasonable opportunity to obtain counsel. In that situation, the agreement is at risk of being considered involuntary. *Norris v. Norris*, 419 A.2d 982 (D.C. 1980) (noting that, when husband first proposed premarital agreement several weeks before marriage, wife initially consulted with attorney and refused to sign premarital agreement, but husband later asked wife to execute agreement one hour before ceremony); *Lutgert v. Lutgert*, 338 So. 2d 1111 (Fla. Dist. Ct. App. 1976) (noting that agreement was presented to wife on day before wedding, and wife had no opportunity to consult with independent counsel); *Zimmie v. Zimmie*, 464 N.E.2d 142 (Ohio 1984) (noting that wife first learned of agreement one day before wedding); *In re Estate of Crawford*, 730 P.2d 675 (Wash. 1986) (noting that wife first learned of agreement at husband's attorney's office three days before wedding); *Matson*, 730 P.2d 668 (noting that agreement was first presented four days before wedding by attorney representing both husband and wife, and attorney did not explain legal significance of wife's waiver of community property rights). One party's threats or interference in connection with the other party's efforts to secure independent counsel normally will invalidate a premarital agreement. *See Casto v. Casto*, 508 So. 2d 330 (Fla. 1987); *Sogg v. Nevada State Bank*, 832 P.2d 781 (Nev. 1992).

Several of these issues arose in *In re Marriage of Foran*, 834 P.2d 1081 (Wash. Ct. App. 1992). In this case the court held that, under Washington law, if a premarital agreement is economically unfair, the party seeking enforcement of the agreement will be required to prove that each party entered into the agreement both voluntarily *and* intelligently. The court concluded that the wife, who was not represented by counsel and who was seriously disadvantaged by the agreement in an economic sense, had not entered into it voluntarily and intelligently, because the evidence indicated that she had not fully understood the agreement's legal and economic consequences. Facts influencing this conclusion included the following: (1) the husband's lawyer prepared the agreement and the wife first saw it a day before she and the husband left on a trip to be married; (2) the husband had physically abused the wife before the marriage; (3) the husband's

attorney had informed the wife that he represented only the husband and recommended that she seek independent counsel but did not explain why it was important that she do so; and (4) the wife likely did not have adequate time to review the agreement.

Under Wisconsin law, the same result perhaps would be reached under an analysis of duress or undue influence, *see infra* §§ 7.55, .56, rather than that of “intelligent” execution. This follows from the fact that section 766.58(6)(b) requires only voluntary execution for enforceability of a marital property agreement. For further discussion of the difficult position of the lawyer under these circumstances, see chapter 14, *infra*.

Nonetheless, a premarital agreement presented for execution only a short time before the wedding date might be held valid if there is evidence that the parties had informally discussed it or negotiated its terms before a draft of the agreement was prepared and presented. *See In re Marriage of Byrne*, 535 N.E.2d 14 (Ill. App. Ct. 1989) (noting that desirability of agreement was discussed by parties; agreement was then drafted by wife’s attorney at her request, and signed by parties several days before wedding without wife again consulting with her attorney); *In re Marriage of Adams*, 729 P.2d 1151 (Kan. 1986) (noting occurrence of informal discussions for a week, including consultation with attorney; draft of agreement was presented for execution one hour before marriage); *Howell v. Landry*, 386 S.E.2d 610 (N.C. Ct. App. 1989) (informal discussion for one month preceding wedding; draft agreement presented one day before wedding, and party claiming invalidity negotiated last-minute changes); *In re Marriage of Leathers*, 779 P.2d 619 (Or. Ct. App. 1989) (noting that agreement was discussed in general terms for “extended period of time” before wedding; formal document presented evening before wedding); *Williams v. Williams*, 720 S.W.2d 246 (Tex. App. 1986) (noting that informal discussions took place six months before marriage; agreement was presented one day before marriage); *Hengel v. Hengel*, 122 Wis. 2d 737, 365 N.W.2d 16 (Ct. App. 1985) (noting that agreement was signed by wife after husband threatened to postpone wedding plans; wife had received draft agreement weeks before wedding, consulted with her lawyer, negotiated a change, and knew “many months” before wedding that husband would not remarry without an agreement); *see also Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984). Cases upholding an agreement are often difficult to distinguish on their facts from cases invalidating the agreement, indicating that the issue of voluntariness is fact-sensitive and subject to case-by-case analysis.

However, even if the disadvantaged party presented with a marital property agreement shortly before the wedding date is able to consult with counsel, there is no guarantee that counsel will have adequate time to give meaningful advice. *See Orgler v. Orgler*, 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989). *But see DeLorean v. DeLorean*, 511 A.2d 1257 (N.J. Super. Ct. Ch. Div. 1986) (holding that in a case in which a disadvantaged party consulted counsel hours before wedding and signed agreement despite counsel's recommendation that agreement not be executed, agreement was not necessarily rendered invalid). See also the discussion of an attorney's ethical responsibilities under these circumstances in chapter 14, *infra*.

4. Disclosure [§ 7.48]

Just as disclosure is an important element in the validity of pre-Act marriage agreements, it is also critical to the enforceability of marital property agreements under the Act. (Pre-Act marriage agreements are discussed generally in section 7.120, *infra*, and disclosure in such agreements is discussed in section 7.126, *infra*.) Under section 766.58(6)(c), a marital property agreement is not enforceable if the spouse seeking to avoid the agreement can prove that the following two conditions existed at or before the execution of the agreement:

1. He or she did not receive fair and reasonable disclosure under the circumstances of the other spouse's property or financial obligations; and
2. He or she did not have notice of the other spouse's property or financial obligations.

Notice is a defined term under the Act. A person has notice of a fact if he or she has knowledge of it, receives a notification of it, or has reason to know that it exists from the facts and circumstances known to him or her. Wis. Stat. § 766.01(13).

The two-part disclosure test in section 766.58(6)(c) represents a considerable change from UMPA section 10(f)(3), which specifically recognizes that a spouse's waiver of disclosure (beyond those disclosures actually provided) also meets the test. The clear implication in the change from the UMPA language is that a waiver of disclosure—at least a blanket waiver of disclosure—is not allowed.

The 1985 Trailer Bill Original Nontax Note to section 766.58(6)(c) comments that although it might have been desirable to legislatively establish a minimum-disclosure requirement, it would have been difficult to formulate the requirement so that it would not have been excessive under some circumstances. Accordingly, the disclosure required for an enforceable marital property agreement under the Act depends on the circumstances of each case; it is possible that under some circumstances no disclosure will be required for an enforceable agreement. *See* Wis. Stat. Ann. § 766.58 Legis. Council Notes—1985 Act 37, §§ 112—121 (West 2009). For example, nondisclosure is expected to pass muster in the case of limited marital property agreements, *see infra* §§ 7.116, .155—.157, when the assets being classified or the obligations being assumed represent a relatively small part of the spouses' overall economic picture, or when the spouses have knowledge (or reason to know) of each other's property and financial obligations when the agreement is entered into. Similarly, an agreement opting into the Act is likely to require less disclosure than one opting out. In most cases, the absence of disclosure (coupled with a lack of notice about the other spouse's assets or financial obligations) will result in the agreement's not being enforced if it is attacked by the party against whom enforcement is sought. *See supra* § 7.40.

Any discussion of minimum-disclosure requirements must give consideration to *Schumacher*, 131 Wis. 2d 332, which involved the enforceability of a pre-Act marriage agreement at divorce. The spouses in *Schumacher* had entered into a premarital agreement in which the wife-to-be waived any rights in specifically enumerated assets constituting approximately 88% of the husband-to-be's total net worth. The agreement did not purport to affect the parties' other assets. These other assets were not disclosed in the agreement or contemporaneously with its execution. The court noted that while de minimis omissions alone would not vitiate the agreement, the parties here did not make a sufficient disclosure of their assets to each other to constitute fair and reasonable disclosure for purposes of *Button*, 131 Wis. 2d 84, discussed in sections 7.107 and .135—.138, *infra*. In addition, although the parties apparently had some independent knowledge of each other's finances, the court singled out their failure to exchange lists of assets and liabilities as being at the heart of their failure to make fair and reasonable disclosure.

Although the case did not involve a marital property agreement under the Act, there is language in *Estate of Campbell v. Chaney*, 169 Wis. 2d

399, 485 N.W.2d 421 (Ct. App. 1992), to the effect that if an attorney drafts a premarital agreement without “attaching a financial statement,” a fact-finder might conclude that the attorney failed to use reasonable care. This might be true even if the agreement was later enforced because, for example, the spouse against whom enforcement was sought had prior knowledge of the financial information. *Id.* at 410.

Presumably, *Chaney* will not apply to marital property agreements under the Act because neither section 766.58(6)(c) nor any Wisconsin appellate decision interpreting it requires physical attachment of financial disclosures as a prerequisite to enforceability of a marital property agreement. Moreover, the statute places the burden of establishing unenforceability on the spouse against whom enforcement is sought: he or she must establish affirmatively that, before execution of the agreement, he or she did not receive fair and reasonable disclosure, under the circumstances, of the other spouse’s property or financial obligations, and that he or she did not have notice (i.e., actual knowledge) of the other spouse’s property or financial obligations. Wis. Stat. § 766.58(6)(c).

Under the Act, it appears permissible to disclose assets and liabilities by general groupings or categories. The financial disclosure statements that are part of the statutory terminable property classification agreements, *see infra* §§ 7.175, .178, specifically contemplate disclosure in that fashion.

The statutory disclosure requirements may make self-drafted “kitchen table” marital property agreements lacking financial disclosures unenforceable, particularly when one spouse does not have notice of the other spouse’s assets or obligations and gives up substantial rights. The steps necessary to comply with the statutory “fair and reasonable ... under the circumstances” disclosure requirements are not likely to be well understood by laypersons.

Sample memoranda of assets, liabilities, and income that are intended to meet the fair and reasonable disclosure requirements are set forth in sections 7.169 and .172, *infra*.

5. Other Contract Defenses [§ 7.49]

a. In General [§ 7.50]

The three reasons listed in section 766.58(6) for avoidance of a marital property agreement (unconscionability, involuntariness, inadequate disclosure), *see supra* §§ 7.41–.48, are not intended to be exclusive. The comment to UMPA § 10 indicates that ordinary contract defenses (other than lack of consideration) are also available.

At common law, contracts can be policed from three perspectives: the contract's substance, the parties' status, and the parties' behavior. Courts are generally reluctant to permit a party to avoid a contract based on the substance of its terms for three reasons: (1) courts are ill-equipped to prescribe fair contractual terms; (2) they want to encourage certainty in contract law; and (3) they are reluctant to interfere with freedom of contract. *See* 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 4.1 (4th ed. 2004). However, it should be noted that marriage agreements between spouses, particularly those intended to be enforceable at dissolution, are at least partial exceptions to this general rule. *See Button*, 131 Wis. 2d 84 (noting that equity is “competing public policy” in divorce cases); *see also infra* § 7.133–.140.

b. Incapacity [§ 7.51]

The doctrine of incapacity allows contracts to be avoided based on the parties' status. There are two standards for finding incapacity, one definite and the other uncertain.

The definite basis for finding incapacity is age: contracts made by parties under the legal age to contract are void or voidable unless they are for the purchase of necessities. *Halbman v. Lemke*, 99 Wis. 2d 241, 245, 298 N.W.2d 562 (1980); *see also Madison Gen. Hosp. v. Haack*, 124 Wis. 2d 398, 402–04, 369 N.W.2d 663 (1985). Parties are able to contract at the age of majority (i.e., at age 18) in Wisconsin.

The uncertain basis for finding incapacity is mental infirmity. There are two tests for determining mental capacity: first, whether the party has cognitive understanding of the transaction's nature and consequences (the other party's knowledge of the mental infirmity is irrelevant); and

second, given that the party can understand the transaction, whether he or she is unable to control his or her behavior. Under this second, or volitional, test, the afflicted party can avoid a contract if the other party has knowledge of this inability. Restatement (Second) of Contracts § 15 (1981); *Hauer v. Union State Bank*, 192 Wis. 2d 576, 532 N.W.2d 456 (Ct. App. 1995); *see also Guardianship of Hayes*, 8 Wis. 2d 32, 39, 98 N.W.2d 430 (1959). Intoxicated persons or persons under the influence of drugs are found incapacitated according to this test if the other party has reason to know of the intoxication or drug use. 1 Farnsworth, *supra* § 7.50, § 4.6 at 438.

Therefore, marital property agreements can be avoided if one of the contracting parties (1) is under age 18, (2) lacks cognitive understanding of the transaction's nature and consequences, or (3) can understand the transaction but cannot control his or her behavior and the other party has knowledge of this inability. A marital property agreement voluntarily entered into by an intoxicated person or a person under the influence of drugs, for example, is voidable if the other party had reason to know of the condition.

c. Misrepresentation, Duress, and Undue Influence [§ 7.52]

(1) In General [§ 7.53]

Courts will permit a contract to be avoided because of the behavior of one of the contracting parties if that party abuses the bargaining process by engaging in misleading or coercive conduct. To protect the integrity of a contract system based on informed consent, courts rely on the doctrines of misrepresentation, duress, and undue influence. 1 Farnsworth, *supra* § 7.50, § 4.9.

(2) Misrepresentation [§ 7.54]

Generally, misrepresentation consists of the following four elements: (1) an assertion was made that was not in accord with the facts; (2) the assertion was either fraudulent or material; (3) the assertion was relied on regarding assent; and (4) the reliance was justified. Restatement (Second)

of Contracts § 164 (1981); *see also id.* §§ 161(d), 162; 1 Farnsworth, *supra* § 7.50, §§ 4.10–.14.

The Wisconsin common law definition of fraudulent misrepresentation consists of three, not four, elements. Those elements are as follows:

1. There must be a statement of fact that is untrue.
2. The false statement must be made with intent to defraud and for the purpose of inducing the other party to act on it.
3. The other party must rely on the false statement and must be induced thereby to act to his or her injury or damage.

Merten v. Nathan, 108 Wis. 2d 205, 209 n.2, 321 N.W.2d 173 (1982). There are no Wisconsin decisions specifically involving marriage agreements.

(3) Duress [§ 7.55]

Generally, duress is coercive conduct, including physical compulsion or threat. Restatement (Second) of Contracts § 175 cmt. a (1981). Wisconsin has adopted the modern view of duress, which holds that contracts and transfers may be voided “when procured by business or economic compulsion, as well as by physical coercion.” *Mendelson v. Blatz Brewing Co.*, 9 Wis. 2d 487, 494, 101 N.W.2d 805 (1960). Although all contracts involve an implicit threat (e.g., pay what I demand or go without), the courts have established a four-element test for determining what threats reach the status of duress: (1) a threat, (2) that is improper, (3) manifestation of assent, and (4) that is sufficiently grave to justify the assent. 1 Farnsworth, *supra* § 7.50, §§ 4.16–.18; *see also* Restatement (Second) of Contracts § 176 (1981).

The Act incorporates the doctrine of duress by making voluntary execution a requirement for an enforceable marital property agreement. *See* Wis. Stat. § 766.58(6)(b). The issue of duress is most likely to arise in marital property agreement cases because of the implicit threat in the premarital context to “sign the agreement or I won’t marry you” and in the postmarital context to “sign the agreement or I will divorce you.”

The threat not to marry a person, however, is unlikely to be considered sufficiently grave to justify assent. This threat does not deprive the other person of his or her free will without a reasonable alternative; that is, the other not only is not compelled to go through with the marriage but also is free to marry someone else. Indeed, persons entering a second marriage often do so with the mutual understanding that having a premarital agreement is a condition of their marriage, and failure to work out the terms of an agreement will cause the parties to go their own ways. *See, e.g., Hengel v. Hengel*, 122 Wis. 2d 737, 365 N.W.2d 16 (Ct. App. 1985).

On the other hand, a premarital agreement presented for the first time on the eve or day of the wedding, accompanied by a threat not to go through with the marriage unless the agreement is signed, may not be regarded as freely and voluntarily entered into, *see Lutgert v. Lutgert*, 338 So. 2d 1111 (Fla. Dist. Ct. App. 1976), although a contrary conclusion was reached in *DeLorean*, 511 A.2d 1257.

In *DeLorean*, the husband-to-be presented the wife-to-be with a marriage agreement a few hours before the ceremony and threatened to cancel the marriage if the wife did not sign. The court concluded that although cancelling the wedding might have been embarrassing for the bride-to-be, she was not compelled to go through with the ceremony and therefore had not executed the agreement under duress. 511 A.2d at 1259. *Accord Howell v. Landry*, 386 S.E.2d at 617 (holding that shortness of time between presentation of premarital agreement and date of wedding is insufficient alone to permit finding of duress).

When one party conditions the marriage on execution of a premarital agreement, that fact will not invalidate an agreement. *See Greenwald v. Greenwald*, 154 Wis. 2d 767, 454 N.W.2d 34 (Ct. App. 1990); *see also Walters v. Walters*, 580 So. 2d 1352, 1354 (Ala. 1991); *Liebelt v. Liebelt*, 801 P.2d 52, 55 (Idaho Ct. App. 1990); *Rose v. Rose*, 526 N.E.2d 231 (Ind. Ct. App. 1988). The courts usually give the reason that the threat of a refusal to marry is not wrongful in the eyes of the law and therefore not duress. *Liebelt*, 801 P.2d at 55; *Rowland v. Rowland*, 599 N.E.2d 315, 329 & n.3 (Ohio Ct. App. 1991) (Stephenson, P.J., dissenting).

The courts are divided on whether a threatened refusal to marry a pregnant woman unless she executes a premarital agreement constitutes duress. The courts in *Hamilton v. Hamilton*, 591 A.2d 720 (Pa. Super. Ct. 1991) (noting that woman had been represented by counsel at time of

executing agreement), and *Bassler v. Bassler*, 593 A.2d 82 (Vt. 1991), suggested that there was no duress under these circumstances; in *Williams v. Williams*, 617 So. 2d 1032 (Ala. 1992), and *Rowland*, the courts held that pregnancy, coupled with other factors surrounding the execution of an agreement, may add up to duress.

A postmarital agreement, presented by one spouse to the other with the statement that it is in contemplation of divorce, should not by itself be considered a threat of sufficient gravity to constitute duress, particularly if the other spouse has adequate time to consider the agreement and is able to consult with independent counsel. Most states have no-fault divorce statutes; virtually all states provide for maintenance and equitable property division in the event of divorce. Accordingly, the implicit or explicit threat of divorce is unlikely to render the spouse receiving it powerless. However, the threat of divorce coupled with threats to deprive a spouse of support, custody of children, or property clearly risks being treated as duress. Such conduct could be deemed an economic or personal compulsion sufficiently grave to vitiate a postmarital agreement. *See, e.g., Baltins v. Baltins*, 260 Cal. Rptr. 403 (Ct. App. 1989); *Eckstein v. Eckstein*, 379 A.2d 757 (Md. Ct. Spec. App. 1978); *see also* Restatement (Second) of Contracts §§ 175, 176 (1981).

(4) Undue Influence [§ 7.56]

The typical case of undue influence consists of a victim whose weakness does not quite constitute incapacity and a perpetrator whose improper persuasion does not quite constitute misrepresentation or duress. According to the Restatement (Second) of Contracts § 177 (1981), a claim of undue influence has two elements: (1) a special relationship between the parties, and (2) an improper persuasion of the weaker party by the stronger party. At issue is whether the result was caused by means that seriously impaired the weaker party's free and competent exercise of judgment. Factors considered include imbalance of result, unavailability of independent advice, lack of time for reflection, and susceptibility to influence. 1 Farnsworth, *supra* § 7.50, § 4.20.

The element of a special relationship between the parties is certainly satisfied by marriage and is probably satisfied by an engagement to marry. Although there are no Wisconsin cases defining the special relationship in the context of marriage, a Colorado decision has held that the relationship of spouses and of persons engaged to marry is one of

confidence and trust in which the weaker party may be justified in assuming that the stronger will not act inconsistently with the welfare of the weaker. *Newman v. Newman*, 653 P.2d 728 (Colo. 1982). The element of improper persuasion is met if methods used by the dominant party seriously impair the weaker party's free and competent exercise of judgment.

Wisconsin has adopted a somewhat more complex four-pronged test for determining whether undue influence has occurred in the contractual context. The Wisconsin Supreme Court has held that to prove undue influence, a plaintiff must establish "susceptibility, opportunity to influence, disposition to influence and coveted result." *Onderdonk v. Keepman (In re Estate of Taylor)*, 81 Wis. 2d 687, 699, 260 N.W.2d 803 (1978). In addition, undue influence must be established by clear, satisfactory, and convincing evidence. *Id.*

d. Contrary to Public Policy [§ 7.57]

Contracts may be unenforceable as being contrary to public policy. Agreements between spouses governing property settlements or support in the event of the dissolution of the marriage were once held unenforceable as being contrary to a public policy against impairment of family relationships, but more recently courts have permitted considerable freedom of contract in this area. 2 Farnsworth, *supra* § 7.50, § 5.4, at 48. In Wisconsin, this change has been accomplished by statute, *see infra* §§ 7.133–140, and is subject to further public-policy standards relating to child support and spousal support contained in the Act. *See* Wis. Stat. § 766.58(2), (9).

e. Mistake; Impracticability of Performance [§ 7.58]

Several related judicial doctrines exist to deal with situations in which a basic assumption in a contract fails. These include the doctrines of mistake and of impracticability of performance.

(1) Mistake [§ 7.59]

A contract may be unenforceable because of mutual or unilateral mistake. A *mistake* is defined as a belief that is not in accord with the facts that exist when the contract is made. Restatement (Second) of Contracts § 151 (1981).

To establish a defense of *mutual mistake*, the party must show that (1) a mistake occurred with regard to a basic assumption on which the contract was made—for example, the existence, identity, quality, and quantity of the subject matter; (2) the mistake has a material effect on the exchange of performances so severe that the party cannot fairly be required to perform; and (3) the mistake is not one with respect to which the party bears the risk. *Id.* § 152. The risk is borne by the party who is assigned the risk by the agreement, who is consciously ignorant after deciding not to pursue the answer, or who has been allocated the risk by the court as reasonable under the circumstances.

To establish a claim of *unilateral mistake*, a party must establish the same conditions required for mutual mistake, and in addition must prove either that enforcement of the contract would create unconscionable hardship or that the other party knew or had reason to know of the first party's mistake. *Id.* § 153; 2 Farnsworth, *supra* § 7.50, § 9.3; *see also In re Marriage of Agustsson*, 585 N.E.2d 207 (Ill. App. Ct. 1992); *Ferry v. Ferry*, 586 S.W.2d 782 (Mo. Ct. App. 1979) (discussed at section 7.43, *supra*).

(2) Impracticability of Performance [§ 7.60]

A contract may be voidable because of impracticability of performance. Restatement (Second) of Contracts § 261 (1981). Circumstances may change to such a degree that enforcement of the contract would be inequitable. A party must show that the changed circumstances concern a basic assumption on which the contract was made and that they occurred without negligence or willful action on his or her part. The court may deem the changed circumstances a contingency intended by the parties but not incorporated into the contract. In deciding whether or not to reform the contract, the courts will examine questions such as the following: Was the contingency unforeseeable? Was a remedial clause easy to insert into the contract? *See* 2 Farnsworth, *supra* § 7.50, § 9.6.

In the context of marital property agreements, impracticability could result from

1. Unanticipated loss or destruction of the property that was the subject matter of the agreement;
2. Significant deterioration in the health of one of the spouses;
3. The substantial disability of one of the spouses;
4. Substantial changes in employability of one of the spouses;
5. The birth of a child, particularly an unplanned pregnancy occurring to a middle-aged couple with grown children from prior marriages;
6. A dramatic decline in the spouses' living standard; or
7. A spouse's other profoundly changed circumstances.

The doctrine of unforeseeable change of circumstances appears to be a component in determining the equitableness (and thus the enforceability) of marriage agreements at divorce in Wisconsin and other jurisdictions. *Button*, 131 Wis. 2d 84, established the proposition that an agreement that was fair at the time of its execution may be unfair to the parties at the time of divorce if, as the result of significantly changed circumstances, it no longer comports with the parties' reasonable expectations. *Id.* at 98–99. The Wisconsin Supreme Court has indicated that this is a test of reasonable foreseeability, one that requires the parties to an agreement to consider both the circumstances existing at the execution of the agreement and those that are reasonably foreseeable. *Id.* at 97. Other states have used a similar test when faced with the issue of enforceability of marriage agreements at divorce. *See, e.g., McHugh v. McHugh*, 436 A.2d 8 (Conn. 1980).

In *Warren v. Warren*, 147 Wis. 2d 704, 433 N.W.2d 295 (Ct. App. 1988), the Wisconsin Court of Appeals applied these principles to uphold a premarital agreement. In *Warren*, it was shown that an event not specifically covered by the terms of the premarital agreement—namely, the early retirement of one of the spouses—nonetheless had been discussed during the negotiations. The spouse in question in fact took early retirement shortly after the agreement was signed and before the

marriage. With reference to the reasonable foreseeability test, the court stated:

The idea behind the test is that both spouses have a right to rely upon the prenuptial agreement when all subsequent events transpire as logically anticipated.

The premarital agreement is, after all, a contract with all of its attendant risks and risk bearing. Risk may be defined as uncertainty in regard to cost, loss, or damage. A. Kronman & R. Posner, *The Economics of Contract Law* 26 (1979). A person signing a premarital agreement undertakes all the normal anticipated risks that the agreement may not prove to be a wise one. Only when a future event can be said to have been too uncertain can it be said that the risk assumed is out of proportion to the loss incurred.

Id. at 710–11. Because the parties to the agreement in *Warren* not only foresaw the eventuality that one of the parties would take early retirement but also discussed it when the agreement was being negotiated, the spouse's early retirement was not viewed as an unforeseen changed circumstance that would justify disregarding the agreement.

Courts in jurisdictions that have considered the question have shown no inclination to permit avoidance of marriage agreements at death because of the substantially changed circumstances of one of the spouses, assuming that other requirements for enforceability of the agreement are met. *See infra* §§ 7.122–.131.

6. Statutes of Limitation [§ 7.61]

a. In General [§ 7.62]

The general statute of limitation for actions based on contract requires that the action be commenced within six years after the cause of action accrues. Wis. Stat. § 893.43. Additionally, there are specific statute-of-limitation provisions that apply to some aspects of marital property agreements. *See* Wis. Stat. § 766.58(13).

b. Actions to Enforce Provisions Effective at Death or Dissolution [§ 7.63]

Under section 766.58(13)(a), any statute of limitation applicable to an action to enforce a provision of a marital property agreement that is effective on or after the dissolution of the marriage or the termination of the marriage by death is tolled until dissolution or death, respectively. Chapter 893, dealing generally with statutes of limitation, cross-references to this provision. *See* Wis. Stat. § 893.135. Presumably, actions to enforce provisions in a marital property agreement requiring performance during marriage may be brought within the normal six-year contract statute of limitation.

The 1985 Trailer Bill Original Nontax Note to section 766.58(13) states the reason for the tolling of any applicable statutes of limitation as follows:

[I]n order to avoid the potentially disruptive effect of compelling litigation between spouses during marriage in order to escape the running of any applicable statute of limitations, any applicable limitations period should be tolled during the marriage of the parties to a marital property agreement with regard to provisions of the agreement that are effective upon or after dissolution or termination of the marriage.

Wis. Stat. Ann. § 766.58 Legis. Council Notes—1985 Act 37, §§ 112 to 121 (West 2009). The 1985 Trailer Bill Original Nontax Note to section 766.58(13) also points out that equitable defenses limiting the time for enforcement, such as laches and estoppel, are still available to either party. *Id.* The note includes the observation that the tolling provision is based on section 8 of the Uniform Premarital Agreement Act but is not as broad in scope.

Because actions relating to the enforceability of arrangements for contractual property settlement typically arise shortly following the death of one spouse or the commencement of an action for dissolution, the section 766.58(13)(a) tolling provision in most cases should cause little hardship. Virtually all the Wisconsin cases dealing with the validity and enforceability of pre-Act marriage agreements (discussed in sections 7.119–.147, *infra*) arose either after the death of one of the parties to the agreement or during divorce proceedings involving the parties. *See infra* §§ 7.123–.131, .134–.140. If a difficulty lies in the tolling of the statute of limitation, it is most clearly presented when the marriage terminates

by death, since one of the parties to the marital property agreement is no longer available to be heard in its defense. Obviously, this problem does not exist when the marriage is ended by dissolution unless one of the spouses is incompetent.

c. Actions Commenced After Spouse's Death **[§ 7.64]**

Section 766.58(13)(b) contains a special limitation period for commencement of actions concerning a marital property agreement after a spouse's death. It provides that no such action may be brought later than six months after the inventory is filed in the estate under section 858.01. If an amended inventory is filed, the action may be brought within six months after the filing of the amended inventory if the action relates to information contained in the amended inventory that was omitted in a previous inventory. Wis. Stat. § 766.58(13)(b). The court may extend the six-month period for cause if a motion for extension is made within the original applicable six-month period. Wis. Stat. § 766.58(13)(c).

➤ **Comment.** Section 766.58(13) does not adequately deal with the common situation in which the estate is informally administered under chapter 865 and no inventory is filed. *See* Wis. Stat. § 865.11(2). Nor does it deal with situations in which the estate is summarily settled using one of the procedures in chapter 867.

Sections 766.58(13), 859.01, and 859.02 dovetail to address the situation in which a surviving spouse must file a claim against the deceased spouse's estate to enforce financial provisions in a marital property agreement because the provisions have not been carried out by the decedent. *See infra* ch. 12. As a general proposition, section 859.01 permits the probate court by order to set a deadline for filing a claim against the decedent's estate. The deadline may be no less than three nor more than four months from the date of the order. Wis. Stat. § 859.01. With certain exceptions, all claims against the decedent's estate, whether absolute or contingent, liquidated or unliquidated, are barred unless filed on or before the deadline for filing claims. Wis. Stat. § 859.02(1). Among the few classes of claims that are not subject to the bar of section 859.02(1) are those based on a marital property agreement that are subject to the special time limitations under subsection 766.58(13)(b) or

(c). Wis. Stat. § 859.02(2)(a). Section 859.02(2)(a) eliminates any uncertainty about the interplay between (1) the six-month limitation period in section 766.58(13)(b) and (c) for commencing actions with respect to a marital property agreement and (2) the three-to-four-month period in sections 859.01 and 859.02(1) for filing claims. The Legislative Council Note to section 859.02 indicates that the more generous six-month time period of subsection 766.58(13)(b) or (c) is to apply. *See* Wis. Stat. Ann. § 859.02 Legis. Council Notes—1991 Act 301, § 34 (West 2002).

d. Actions Commenced After Dissolution **[§ 7.65]**

No special period of limitation similar to section 766.58(13)(b) is prescribed for commencing an enforcement action concerning a provision in a marital property agreement when the marriage terminates by dissolution. If the action to enforce a provision in such an agreement falls within the usual statute of limitation governing actions on contracts, section 893.43, it must be commenced within six years after the cause of action accrues. Because of the tolling provision in section 766.58(13)(a), the six-year period may begin running at dissolution, that is, at the date of the judgment of divorce, annulment, or legal separation. Does this mean that a dissatisfied spouse can bring a separate action for enforcement of the marital property agreement provision and thereby collaterally attack a judgment that rejected the provision in the division of the spouses' property? The statute may produce an unintended result in this situation. This would appear to be an anomalous result.

Perhaps all issues relating to the enforceability of a marital property agreement should be required to be litigated in the dissolution proceedings under chapter 767 and should be deemed to be resolved by the judgment of dissolution. Failure to raise the question of enforceability of the marital property agreement provision in the action for dissolution should bar its pursuit in a subsequent separate action based on section 766.58(13)(a). Such a rule would not preclude a former spouse from later seeking to reopen a divorce property division judgment on appropriate equitable grounds. *Compare* Wis. Stat. § 767.59(1c)(b) (providing that portions of judgment with respect to final division of property are not subject to revision or modification), *with Conrad v. Conrad*, 92 Wis. 2d 407, 284 N.W.2d 674 (1979) (holding that divorce judgment may be reopened within one year concerning property division

under subsection 806.07(1)(a) or (c) for reason of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct, or within a “reasonable time” for other reasons justifying relief under section 806.07(1)). *See also Thorpe v. Thorpe*, 123 Wis. 2d 424, 367 N.W.2d 233 (Ct. App. 1985) (holding that postjudgment change in federal law regarding military pensions provided basis for exercise of court’s discretion under section 806.07 in modifying property division). *But see Winkler v. Winkler*, 2005 WI App 100, 282 Wis. 2d 746, 699 N.W.2d 652 (holding that postjudgment change in public employer’s policy permitting former husband to receive enhanced retirement benefits did not warrant reopening property division pursuant to section 806.07).

7. Miscellaneous Considerations [§ 7.66]

a. In General [§ 7.67]

Two other statutory provisions not contained in UMPA bear indirectly on the enforceability of marital property agreements and thus merit comment. *See infra* §§ 7.68–.69.

b. Arbitration [§ 7.68]

Spouses may enter into an enforceable written agreement to arbitrate controversies arising under chapter 766 or under a marital property agreement. Wis. Stat. § 766.58(10). An agreement to this effect is enforceable under the arbitration provisions of chapter 788. *Id.*

There are a number of policy reasons for arbitrating domestic disputes, including disputes arising under marital property agreements. Arbitration is a voluntary contract entered into by parties for the purpose of securing a final disposition of a controversy between them in an expeditious, inexpensive, and perhaps less formal manner than litigation. *DeLorean*, 511 A.2d at 1263. Arbitration reduces the duration and cost of the adjudication process. It enables the parties to choose their own judge and gives them the opportunity to resolve the dispute in a private forum in which the decision will not become a matter of public record, absent a request for judicial review. *Id.*

However, arbitration has significant disadvantages. First, the arbitrator is not bound by the usual rules of evidence and may not be as

knowledgeable about the substantive law at issue as a trial judge. Second, there is limited room for judicial review. *Id.*; *see, e.g.*, Wis. Stat. § 788.10; *Nicolet High Sch. Dist. v. Nicolet Educ. Ass'n*, 118 Wis. 2d 707, 348 N.W.2d 175 (1984). Third, questions may arise as to the interplay between an arbitration clause and a spouse's right to pursue interspousal remedies under section 766.70. Drafting an arbitration clause to affirm or negate specific subject matter areas or remedies may prove both difficult and expensive. These factors may lead a party to conclude that he or she would obtain a better result in a court of law.

c. Recordation [§ 7.69]

Section 766.58(11) provides that a marital property agreement may be recorded with the county register of deeds. No substantive benefits flow from recording; in fact, section 766.56(2)(a) specifically states that recording does not constitute actual or constructive notice to third parties for purposes of credit transactions. Recording may, however, establish the existence and genuineness of a marital property agreement in some circumstances, and possibly the classification of certain assets on the date of the agreement. Recording is also necessary if the agreement or its essential elements are to be made part of a chain of title to real estate. *See supra* § 7.21. Recording an agreement may prove cumbersome; because recording makes the agreement a matter of public record, any subsequent amendment or revocation to the agreement may have to be recorded to clear the public record.

8. Enforceability in Part: Severability or Divisibility [§ 7.70]

One of the issues confronting the drafter of a marital property agreement containing (1) novel provisions, (2) provisions relating to noneconomic matters, *see supra* § 7.38, or (3) provisions intended to be enforceable in the event of the dissolution of the marriage, *see infra* § 7.107, is the desirability of enforcing the remaining portions of the agreement if one or another of the special provisions is found to be impracticable, unenforceable, or invalid. For example, a provision or group of provisions may be so central to the agreement from the perspective of one of the parties that a failure of that provision would cause the party to want the entire agreement to fail. On the other hand, the failure of one or more provisions that the parties do not regard as

being at the heart of their bargain may not adversely affect their desire to see the balance of the agreement enforced. *See* 2 Farnsworth, *supra* § 7.50, § 5.8.

The Wisconsin Supreme Court has listed a number of ways in which the question of divisibility may arise:

(1) as to the sufficiency of a consideration on the one side to support two or more covenants on the other; (2) in connection with the effect of an illegal covenant upon the remaining valid covenants in the contract; (3) in connection with the statute of frauds upon a contract some of whose covenants are within the scope of the statute; (4) in connection with an attempt to [dis]affirm part of a voidable contract and to ratify the rest; (5) in connection with questions of performance, in cases in which certain covenants have been performed substantially and others have not; (6) in connection with the effect of a judgment upon certain covenants as merging the remaining covenants of the contract.

Fuller v. Ringling, 186 Wis. 470, 474, 202 N.W. 183 (1925).

If the concept of divisibility is to be applied, two requirements normally must be met. First, the parties' performances must be capable of being apportioned into corresponding pairs of part performances, and second, it must be appropriate to regard the parts of each pair as agreed equivalents. 2 Farnsworth, *supra* § 7.50, § 5.8, at 81, § 8.13, at 475; Restatement (Second) of Contracts § 240 (1981).

If a part of an agreement offends public policy, the courts may impose two additional requirements: (1) the impropriety must not affect the entire agreement, *see Schara v. Thiede*, 58 Wis. 2d 489, 206 N.W.2d 129 (1973); and (2) the party seeking enforcement must not have engaged in serious misconduct, *see Simenstad v. Hagen*, 22 Wis. 2d 653, 126 N.W.2d 529 (1964). 2 Farnsworth, *supra* § 7.50, § 5.8 at 81–82. Usually, the courts will be more inclined to enforce part of a divisible contract in favor of a party who has already relied on the agreement through preparation or performance. The dilemma facing a court confronted with the issue of whether a contract is divisible, and therefore enforceable in part, is well stated by Farnsworth:

If the party against whom enforcement is sought is the party who desired the inclusion of the [unlawful] term, the court may face a difficult choice between holding the entire agreement unenforceable and holding the agreement enforceable with the exception of the offensive term. Though

refusing to enforce the entire agreement may seem extreme if the offensive part is relatively small, enforcing the agreement without the term against the party who sought its inclusion will deprive that party of part of the expected performance, with no concession in return. However, if this part of the performance is not a material part of the agreed exchange, a court will often enforce the rest of the agreement in favor of a claimant who did not engage in serious misconduct.

Id. at 82; *see also* Restatement (Second) of Contracts § 184 (1981).

The drafting of workable severability clauses in marital property agreements poses considerable difficulty. If a broad severability provision such as that found at paragraph [VIII.][IX.]H. of the sample agreement at § 7.154, *infra*, is used in a marital property agreement containing property settlement provisions that become effective at the dissolution of the marriage, the court's refusal to enforce all or part of those provisions at the time of dissolution may cause one of the parties to conclude that not enforcing the entire agreement would be preferable. On the other hand, the court's refusal to enforce a comparatively minor feature of the agreement may still leave the parties wanting the balance of the agreement enforced. A hybrid approach to severability may be possible under these circumstances. For example, the parties might identify certain provisions in the marital property agreement as being so essential that if any one of them were not enforced, they would prefer to see the entire agreement rendered unenforceable. These provisions might be set out as exceptions to the broad severability language mentioned above.

F. Statutory Property Classification Agreements

[§ 7.71]

1. In General [§ 7.72]

In response to concerns about the need for simple statutory forms to render the Act either inapplicable or fully applicable to spouses' property, the legislature has adopted three statutory marital property agreement forms. Two of these statutory agreements were enacted as part of the 1988 Trailer Bill and are currently available for use. These are the statutory terminable individual property classification agreement in section 766.589 and the statutory terminable marital property classification agreement in section 766.588. *See infra* §§ 7.73–.82, .83–

92. The third kind of statutory agreement, the statutory individual property classification agreement in section 766.587, was a creation of the 1985 Trailer Bill and was effective only between January 1 and December 31, 1986. All such agreements automatically terminated on January 1, 1987, and were not renewable. *See infra* §§ 7.93–.98.

2. Statutory Terminable Individual Property Classification Agreements [§ 7.73]

a. In General [§ 7.74]

Section 766.589 provides for statutory terminable individual property classification agreements (STIPCA's). A STIPCA's operative effect depends on whether the parties complete a financial disclosure form prescribed in the STIPCA form, *see* Wis. Stat. § 766.589(10). If the financial disclosure is completed, a STIPCA applies until ended by the dissolution of the marriage, the death of a spouse, unilateral termination by one spouse, or bilateral termination by both. Wis. Stat. § 766.589(3)(c). If the disclosure is not completed, a STIPCA terminates automatically three years after the date of execution, unless ended earlier by unilateral or bilateral action of the spouses. Wis. Stat. § 766.589(3)(b). The STIPCA form is reproduced at section 7.178, *infra*. Without disclosure, a STIPCA may be a satisfactory device to enable spouses moving into Wisconsin for reasons of employment to avoid the application of Wisconsin's marital property laws for up to three years. With disclosure, a STIPCA may prove to be a relatively simple device for classifying the spouses' property for estate planning and probate purposes when the spouses are both represented by one attorney. Regardless of whether disclosure occurs, a STIPCA may be terminated by the unilateral action of either spouse.

A STIPCA must be identical to the language included in the statutory form. *See* Wis. Stat. § 766.589(2), (10). No variation is permitted. However, the statute explicitly states that section 766.589 is not the exclusive means by which the spouses may reclassify their marital property. Wis. Stat. § 766.589(8). Nonstatutory marital property agreements, declarations of gift, conveyances, consents, and unilateral statements are all alternative methods of reclassifying property. *See* Wis. Stat. § 766.31(10); *see also supra* ch. 2.

b. Property Law Consequences [§ 7.75]

Under section 766.589(1)(b), execution of a STIPCA classifies the spouses' presently owned marital property, and property acquired, reclassified, or created in the future that would otherwise be marital property, as the owner's individual property. For purposes of determining ownership of property classified by a STIPCA, a spouse "owns" property if the property is "held" by that spouse. Wis. Stat. § 766.589(1)(a). See also the discussion of the concept of holding in chapter 4, *supra*. If property classified by a STIPCA is not held by either or both of the spouses, ownership of the property is determined as if the spouses were unmarried when the property was acquired. Wis. Stat. § 766.589(1)(a). The importance of this reclassification arrangement is somewhat diminished, however, because the reclassification does not prevent the deferred marital property election under section 861.02 with respect to the individual property so created. See Wis. Stat. § 766.589(7); see also *infra* § 7.81. Still, the individual property classification under a STIPCA is effective for other purposes: unilateral gifts may be made, and the creation of marital property under the mixing rule or substantial-uncompensated-effort rule of section 766.63 is prevented.

The statute further provides that (1) if, when a STIPCA is executed, property is held as survivorship marital property, the property is classified as the individual property of the owners and is owned as a joint tenancy; and (2) if the property is held in the "and" form or the "or" form described in section 766.60(1) or (2), the property is classified as individual property and is owned as a tenancy in common. Wis. Stat. § 766.589(1)(c)1. If while an agreement is in effect the spouses acquire property as a joint tenancy exclusively between themselves or as survivorship marital property, the property is classified as the owners' individual property and is owned as a joint tenancy. *Id.* If, while an agreement is in effect, the spouses acquire property as tenants in common exclusively between themselves, the spouses' respective ownership interests in the property are classified as the owners' individual property. *Id.* Similarly, if the spouses acquire property held in the "and" form or the "or" form described in section 766.60(1) or (2) while the agreement is in effect, the property is classified as the owners' individual property and is a tenancy in common. Wis. Stat. § 766.589(1)(c)1.

A STIPCA does not affect the incidents of a joint account, as defined in section 705.01(4), under chapter 705. Wis. Stat. § 766.589(1)(c)1. The incident of survivorship is specifically mentioned in the Legislative Council Note to the amendments to this provision in the 1992 Trailer Bill as one of the incidents of a joint account under chapter 705. *See* Wis. Stat. Ann. § 766.589 Legis. Council Notes—1991 Act 301, § 17 (West 2009). Thus, a STIPCA does not destroy the survivorship feature of a chapter 705 joint account. Aside from chapter 705 accounts, to the extent that the incidents of a joint tenancy or a tenancy in common conflict with or differ from the incidents of individual property, the incidents of the tenancy in common or joint tenancy for purposes of a STIPCA, including the incident of survivorship, control. Wis. Stat. § 766.589(1)(c)2.

c. Execution [§ 7.76]

A STIPCA is executed when signed by both spouses and when the signature of each party to the agreement is authenticated or acknowledged. Wis. Stat. § 766.589(2). The requirement of authentication or acknowledgment for a STIPCA differs from that for nonstatutory marital property agreements described in section 766.58. The STIPCA must be in strict conformity with the requirements of the statutory form. Wis. Stat. § 766.589(2); *see* Wis. Stat. § 766.589(10); *see also infra* § 7.178.

d. Effective Date and Effective Period [§ 7.77]

A STIPCA becomes effective when executed or on the determination date (i.e., the date of the spouses' marriage or the establishment by both of them of a domicile in Wisconsin), whichever is later. Wis. Stat. § 766.589(3)(a). If the spouses have not completed the financial disclosure form that appears as Schedule A in the statutory agreement form in section 766.589(10) before or contemporaneously with execution of the agreement, the agreement terminates three years after the date that both spouses sign the agreement unless one of the spouses elects to terminate the agreement earlier under section 766.589(4). Wis. Stat. § 766.589(3)(b). If the spouses have completed the financial disclosure form appearing as Schedule A in the statutory agreement form, the agreement terminates when the terms of the agreement no longer apply after dissolution or the death of a spouse, unless terminated earlier by

one of the spouses under the elective termination provisions of section 766.589(4). Wis. Stat. § 766.589(3)(c). During their marriage, the spouses may enter into only one STIPCA for which disclosure of assets and liabilities is not provided. Wis. Stat. § 766.589(3m).

e. Termination by One Spouse [§ 7.78]

A STIPCA terminates 30 days after a notice of termination is given by one spouse to the other. Wis. Stat. § 766.589(4)(a). An example of the form of a notice of termination is set forth in section 766.589(10). Notice of termination is deemed given to the other spouse on the date that the signed termination is (1) personally delivered to the other spouse, or (2) sent by certified mail to the other spouse's last-known address. Wis. Stat. § 766.589(4)(b).

After notice of termination is given and until the agreement terminates 30 days later, each spouse has the obligation to “act in good faith with respect to the other spouse in matters involving the property of the spouse who is required to act in good faith which is classified as individual property by the agreement.” Wis. Stat. § 766.589(4)(c). However, management and control by a spouse of that property in a manner that limits, diminishes, or fails to produce income from that property does not violate this good faith duty. *Id.*

The statute specifically provides that the unilateral termination right available to each spouse does not affect his or her ability to amend, revoke, or supplement a STIPCA by a separate marital property agreement under section 766.58(4). Wis. Stat. § 766.589(4)(d).

With respect to its effect on third parties, a termination pursuant to section 766.589(4) is treated as a marital property agreement. Wis. Stat. § 766.589(4)(e). Thus, the effect of a termination on creditors' rights would seem to be limited to those creditors who have actual knowledge of the termination or are furnished with a copy of the termination when the obligation to the creditor is incurred. *See* Wis. Stat. §§ 766.55(4m), .56(2)(c).

Termination of a STIPCA does not by itself affect the classification of property acquired before the termination, regardless of whether the termination occurs automatically (as a result of failure to complete the financial disclosure form, the dissolution of the marriage, or the death of

a spouse) or voluntarily (through the unilateral action of one spouse). Wis. Stat. § 766.589(9). Property acquired after the termination is classified as otherwise provided under chapter 766. *Id.*

f. Enforceability [§ 7.79]

If the spouses do not complete the financial disclosure schedule in the statutory agreement form, *see* Wis. Stat. § 766.589(10), the STIPCA terminates three years after the date that both spouses sign the agreement (unless terminated earlier by either spouse), and despite automatic termination, the STIPCA is enforceable without the disclosure of a spouse's property or financial obligations. Wis. Stat. § 766.589(5)(a). However, if the spouses complete the financial disclosure schedule, ordinarily the STIPCA will be enforceable until the terms of the agreement no longer apply after dissolution or the death of a spouse, unless the agreement is terminated earlier by either spouse or is revoked by a subsequent marital property agreement.

Section 766.589(5)(b) contains an additional limiting factor on the enforceability of agreements for which financial disclosure has been completed. If the spouse against whom enforcement is sought proves that the information on the disclosure form did not provide him or her fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations, the maximum duration of the agreement is three years after the date that both spouses signed the agreement. Wis. Stat. § 766.589(5)(b). This provision applies notwithstanding the fact that the spouse against whom enforcement is sought had notice (i.e., actual knowledge or reason to know) of the other spouse's property or financial obligations. *Id.* The enforceability requirements in section 766.58(6)(c)—namely, that a spouse must receive a fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations, or must have notice of the other spouse's property or financial obligations—are specifically rendered inapplicable to STIPCAs when the financial disclosure schedule has been completed. Wis. Stat. § 766.589(5)(c). Because section 766.58(6)(c) does not apply to a STIPCA containing the requisite financial disclosures, the agreement is enforceable against a spouse unless the latter can prove either unconscionability when the agreement was made or involuntary execution. *See supra* §§ 7.41–.47.

Except to the extent that the statute provides different rules, a STIPCA is subject to the provisions of section 766.58, relating to marital property agreements generally. Wis. Stat. § 766.589(1)(b). Because of the general applicability of the section 766.58 provisions, a STIPCA will not be binding on creditors who do not have actual knowledge of the agreement's provisions. *See* Wis. Stat. § 766.55(4m); *see also supra* § 7.10.

g. Effect on Duty of Support During Marriage and at Dissolution of Marriage [§ 7.80]

The statute makes clear that a STIPCA affects neither the duty of support that spouses otherwise owe each other during marriage nor the determination of property division or maintenance in the event of the marriage's dissolution. Wis. Stat. § 766.589(6). Because it falls within the definition of a marital property agreement in section 766.01(12), a STIPCA also may not affect a spouse's duty to support his or her children. *See* Wis. Stat. § 766.58(2) (discussed in section 7.13, *supra*).

h. Effect at Death of Spouse [§ 7.81]

An important feature of a STIPCA is that it does not affect a spouse's right to exercise the deferred marital property election available under section 861.02. *See* Wis. Stat. § 766.589(7). *See also* the discussion of this election in chapter 12, *infra*. Both predetermination date property meeting the definition of deferred marital property under section 851.055 and property acquired during marriage and after the determination date that would have been marital property but for the agreement are subject to the election. Wis. Stat. § 766.589(7).

The deferred marital property election appears to apply regardless of whether the STIPCA is in effect at the time of, or has terminated before, the death of a spouse who is a party. The important point is that after the termination of a STIPCA by operation of law or by the voluntary action of one of the spouses, all or some of the marital property classified by the agreement as individual property may continue to be subject to a deferred marital property election unless and until reclassified by a subsequent marital property agreement, gift, conveyance, or similar instrument. *See* Wis. Stat. § 766.31(10). In this significant regard,

individual property created by a STIPCA differs from other individual property under the Act.

Regarding creditors, the individual property classification created by a STIPCA is unlikely to affect the property available for satisfaction of obligations at a spouse's death under section 859.18 unless the creditor had actual knowledge of the provisions of the agreement in advance. *See supra* § 7.12.

i. Planning Considerations [§ 7.82]

Without disclosure, a STIPCA will enable spouses moving into Wisconsin for reasons of employment to avoid the marital property laws for up to three years. It will work particularly well when the assignment in Wisconsin will be relatively short or when the newly arriving spouses wish to have time during which to arrange their affairs.

With completion of the disclosure schedule, a STIPCA should suffice as a simple device to classify the spouses' property for estate planning and probate purposes.

It should be possible for one attorney to represent both spouses with regard to a STIPCA regardless of any inequality in their relative economic bargaining power. Dual representation does not present a problem because the agreement (1) is unilaterally terminable by the action of either spouse and (2) preserves statutory elections at death that largely permit the surviving spouse to restore the state of affairs that would have prevailed had there been no agreement.

However, if the spouses desire permanent decisions on property dispositions and a waiver of postdeath elections, a nonstatutory marital property agreement under section 766.58 should be used. Spouses entering into a STIPCA should be warned that the agreement does not prevent the deferred marital property election under section 861.02 from applying if either of them dies before a more comprehensive marital property agreement is entered into or before they establish domicile in another state. Exercise of the deferred marital property elective right by the surviving spouse could disrupt the spouses' existing estate plans.

A STIPCA must be identical to the limited language of the statutory form, virtually ruling out any opportunity to classify certain assets as

marital property and others as individual property or to include special provisions relating to debt satisfaction. As a general rule, if the spouses are willing to make a fair and reasonable disclosure of their property and financial obligations to each other, it is desirable to draft a nonstatutory marital property agreement under section 766.58, because the latter is far more flexible and can be crafted to fit the parties' exact circumstances.

Finally, spouses should be aware that although the statute is silent on the subject, a STIPCA may have the effect of amending or nullifying existing marriage agreements. For example, the spouses may have agreed in an earlier marriage agreement to waive all elective rights against each other's property at the death of either spouse. Execution of a STIPCA may have the effect of reviving those rights. *See* Wis. Stat. § 766.589(7). When existing marriage agreements are involved, a custom-drafted nonstatutory marital property agreement under section 766.58 normally will be advisable.

3. Statutory Terminable Marital Property Classification Agreements [§ 7.83]

a. Introduction [§ 7.84]

Section 766.588 provides for statutory terminable marital property classification agreements (STMPCAs). A STMPCA's operative effect depends on whether the parties complete a financial disclosure form prescribed in the statutory agreement form, *see* Wis. Stat. § 766.588(9). If the financial disclosure is completed, a STMPCA applies until ended by the dissolution of the marriage, the death of a spouse, unilateral termination by one spouse, or bilateral termination by both. Wis. Stat. § 766.588(3)(c). If the disclosure is not completed, a STMPCA terminates automatically three years after the date of execution, unless ended earlier by unilateral or bilateral action of the spouses. Wis. Stat. § 766.588(3)(b). The STMPCA form is reproduced at section 7.175, *infra*. Without disclosure, a STMPCA has the effect of classifying all of the spouses' presently owned property, and property acquired, reclassified, or created before the agreement's termination, as marital property. If a STMPCA expires by its terms three years after execution, the provisions of the Act apply to the spouses' property. With disclosure, a STMPCA may prove to be a relatively simple device for classifying all of the spouses' property as marital property for estate

planning and probate purposes. Regardless of whether disclosure occurs, a STMPCA may be terminated by the unilateral action of either spouse.

A STMPCA must be identical to the language included in the statutory form. *See* Wis. Stat. § 766.588(2), (9). No variation is permitted. However, the statute explicitly states that section 766.588 is not the exclusive means by which the spouses may reclassify their property as marital property. Wis. Stat. § 766.588(7). Nonstatutory marital property agreements under section 766.58, declarations of gift, conveyances, consents, and unilateral statements are all alternative methods of reclassifying property. *See* Wis. Stat. § 766.31(10); *see also supra* ch. 2.

b. Property Law Consequences [§ 7.85]

Under section 766.588(1)(a), execution of a STMPCA classifies the spouses' presently owned property and property acquired, reclassified, or created in the future, as marital property. The statute contains some special rules for certain assets. For example, notwithstanding the execution of a STMPCA, a nonemployee spouse's marital property interest in a deferred-employment-benefit plan (or the marital property interest in assets in an IRA that are traceable to the rollover of a deferred-employment-benefit plan) terminates at the nonemployee's spouse's death if he or she predeceases the employee spouse. Wis. Stat. § 766.588(1)(b)1. This provision effectively preserves the special terminable interest marital property rule for the nonemployee spouse's interest in a deferred-employment-benefit plan found in sections 766.31(3) and .62(5). (See the discussion of the terminable interest rule in chapter 2, *supra*.) In addition, the marital property interest of a deceased spouse in a life insurance policy designating the surviving spouse as the owner and insured is limited as provided in the frozen interest rule of section 766.61(7). *See* Wis. Stat. § 766.588(1)(b)2.

The statute further provides that if property is held as survivorship marital property under section 766.60(5)(a) or 766.605 when a STMPCA becomes effective, or if property is held or acquired as survivorship marital property under the foregoing sections while the agreement is in effect, the property remains survivorship marital property as long as it is so held. Wis. Stat. § 766.588(1)(c)1. A joint tenancy that is held exclusively between the spouses when a STMPCA becomes effective or while the agreement is in effect is survivorship marital property. Wis.

Stat. § 766.588(1)(c)2. A tenancy in common that is held exclusively between the spouses when a STMPCA becomes effective or while the agreement is in effect is marital property. Wis. Stat. § 766.588(1)(c)3. With respect to tenancies in common or joint tenancies involving either or both of the spouses and a third party at the time a STMPCA becomes effective or while the agreement is in effect, to the extent that the incidents of a tenancy in common or joint tenancy conflict with or differ from the incidents of marital property, the incidents of the tenancy in common or joint tenancy, including the incident of survivorship, control. Wis. Stat. § 766.588(1)(c)4.

Subsection 766.588(1)(d) clarifies that a STMPCA does not affect the treatment of joint accounts and marital accounts under chapter 705. This provision specifically makes clear that a STMPCA (1) does not defeat the survivorship feature of a joint account under section 705.04(1), and (2) does not affect the ownership of sums remaining on deposit in a marital account, as defined in section 705.01(4m), at the death of a party to the account, regardless of when the agreement became effective or the marital account was established. This provision was added to address the concern that, in the absence of the clarifying language with respect to marital accounts under chapter 705, on the death of a spouse a marital account could possibly be allocated 75% to the surviving spouse and 25% to the decedent spouse's estate, rather than divided equally. This could occur if the STMPCA were deemed to affect the chapter 705 treatment of marital accounts. *See* Wis. Stat. Ann. § 766.588 Legis. Council Notes—1991 Act 301, § 16 (West 2009).

c. Execution [§ 7.86]

A STMPCA is executed when signed by both spouses, and when the signature of each party to the agreement is authenticated or acknowledged. Wis. Stat. § 766.588(2). The requirement of authentication or acknowledgment for a STMPCA differs from that for nonstatutory marital property agreements described in section 766.58. The STMPCA must be in strict conformity with the requirements of the statutory form. Wis. Stat. § 766.588(2); *see* Wis. Stat. § 766.588(9); *see also infra* § 7.175.

d. Effective Date and Effective Period [§ 7.87]

A STMPCA becomes effective when executed or on the determination date (i.e., the date of the spouses' marriage or the establishment by both of them of a domicile in Wisconsin), whichever is later. Wis. Stat. § 766.588(3)(a). If the spouses have not completed the financial disclosure form that appears as Schedule A in the statutory agreement form in section 766.588(9) before or contemporaneously with execution of the agreement, the agreement terminates three years after the date that both spouses sign the agreement unless one of the spouses elects to terminate the agreement earlier under section 766.588(4). Wis. Stat. § 766.589(3)(b). If the spouses have completed the financial disclosure form appearing as Schedule A in the statutory agreement form, the agreement terminates when the terms of the agreement no longer apply after dissolution or the death of a spouse, unless terminated earlier by one of the spouses under the elective termination provisions of section 766.588(4). Wis. Stat. § 766.588(3)(c). During their marriage, the spouses may enter into only one STMPCA for which disclosure of assets and liabilities is not provided. Wis. Stat. § 766.588(3m).

e. Termination by One Spouse [§ 7.88]

A STMPCA terminates 30 days after a notice of termination is given by one spouse to the other. Wis. Stat. § 766.588(4)(a). An example of a notice-of-termination form is set forth in section 766.588(9). Notice of termination is deemed given to the other spouse on the date that the signed termination is (1) personally delivered to the other spouse or (2) sent by certified mail to the other spouse's last-known address. Wis. Stat. § 766.588(4)(b).

The statute specifically provides that the unilateral termination right available to each spouse does not affect his or her ability to amend, revoke, or supplement a STMPCA by a separate marital property agreement under section 766.58(4). Wis. Stat. § 766.588(4)(c).

With respect to its effect on third parties, a termination pursuant to section 766.588(4) is treated as a marital property agreement. Wis. Stat. § 766.588(4)(d). Thus, the effect of a termination on creditors' rights would seem to be limited to those creditors who have actual knowledge of the termination or are furnished with a copy of the termination when

the obligation to the creditor is incurred. *See* Wis. Stat. §§ 766.55(4m), .56(2)(c).

Termination of a STMPCA does not by itself affect the classification of property acquired before the termination, regardless of whether the termination occurs automatically (as a result of failure to complete the financial disclosure form, the dissolution of the marriage, or the death of a spouse) or voluntarily (through the unilateral action of one spouse). Wis. Stat. § 766.588(8). Property acquired after the termination is classified as otherwise provided under chapter 766. *Id.*

f. Enforceability [§ 7.89]

If the spouses do not complete the financial disclosure schedule in the statutory agreement form, *see* Wis. Stat. § 766.588(9), the STMPCA terminates three years after the date that both spouses sign the agreement (unless terminated earlier by either spouse), and the agreement is enforceable without disclosure of a spouse's property or financial obligations. Wis. Stat. § 766.588(5)(a). However, if the spouses complete the financial disclosure schedule, ordinarily the STMPCA will be enforceable until the terms of the agreement no longer apply after dissolution or the death of a spouse, unless the agreement is terminated earlier by either spouse or is revoked by a subsequent marital property agreement.

Section 766.588(5)(b) contains an additional limiting factor on the enforceability of agreements when financial disclosure has been completed. If the spouse against whom enforcement is sought proves that the information on the disclosure form did not provide him or her fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations, the maximum duration of the agreement is three years after the date that both spouses signed the agreement. Wis. Stat. § 766.588(5)(b). This provision applies notwithstanding the fact that the spouse against whom enforcement is sought had notice (i.e., actual knowledge or reason to know) of the other spouse's property or financial obligations. *Id.* Because of this special statutory provision, the enforceability requirements in section 766.58(6)(c)—namely, that a spouse must receive a fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations, or must have notice of the other spouse's property or financial obligations—are specifically rendered inapplicable to

STMPCAs when the financial disclosure schedule has been completed. Wis. Stat. § 766.588(5)(c). Because section 766.58(6)(c) does not apply to a STMPCA containing the requisite financial disclosures, the agreement is enforceable against a spouse unless the latter can prove either unconscionability when the agreement was made or involuntary execution. *See supra* §§ 7.42, .47.

Except to the extent that the statute provides different rules, a STMPCA is subject to the provisions of section 766.58, relating to marital property agreements generally. Wis. Stat. § 766.588(1)(a). Because of the general applicability of the section 766.58 provisions, a STMPCA will not be binding on creditors who do not have actual knowledge of the provisions of the agreement. *See* Wis. Stat. § 766.55(4m); *see also supra* § 7.10. However, because the universe of assets available to creditors would generally be enlarged, perhaps considerably, by execution of a STMPCA, it is unlikely that creditors would make use of this provision to have such an agreement declared nonbinding.

g. Effect on Duty of Support During Marriage and at Dissolution of Marriage [§ 7.90]

The statute makes clear that a STMPCA affects neither the duty of support that spouses otherwise owe each other during marriage nor the determination of property division or maintenance in the event of the marriage's dissolution. Wis. Stat. § 766.588(6). Because it falls within the definition of a marital property agreement in section 766.01(12), a STMPCA also may not affect a spouse's duty to support his or her children. *See* Wis. Stat. § 766.58(2) (discussed in section 7.13, *supra*).

h. Effect at Death of Spouse [§ 7.91]

In contrast to the STIPCA under section 766.589, *see supra* § 7.73, there are no statutory provisions dealing with the effect of a STMPCA at death. That is because the effect of the agreement is to classify as marital property all of the spouses' property owned at the time of the agreement and subsequently acquired. Termination of the agreement does not alter these classifications or restore the status quo ante. With the exception of (1) the interest of a nonemployee spouse in a deferred-employment-benefit plan and (2) the interest of the estate of a nonowner,

noninsured spouse in a life insurance policy, *see* Wis. Stat. § 766.588(1)(b), all of the spouses' assets will be owned as marital property at the death of the first to die, and the usual rules applicable to marital property will apply. The administration of an estate containing marital property is discussed in chapter 12, *infra*. Because all of the spouses' property is classified as marital property, the election of deferred marital property under section 861.02 is unnecessary.

i. Planning Considerations [§ 7.92]

Without disclosure, a STMPCA has the effect of reclassifying as marital property all of the spouses' predetermination date property and individual property owned when the agreement is executed, and all such property acquired before the termination of the agreement. Termination, whether through lapse of time or the voluntary action of one of the spouses, does not alter these reclassifications. Thus, use of this statutory form agreement poses definite risks when one or both spouses wish to preserve certain of their assets as individual or predetermination date property.

With completion of the disclosure schedule, a STMPCA should suffice as a simple device to classify all of the spouses' property as marital for estate planning and probate purposes. Again, the major drawback appears to be the inability to carve out specific assets from the agreement's all-encompassing marital property classification.

A STMPCA must be identical to the limited language of the statutory form, virtually ruling out any opportunity to classify certain assets as individual property or to insert special management and control provisions for specific marital property assets. As a general rule, if the spouses are willing to make a fair and reasonable disclosure of their property and financial obligations to each other, it is desirable to draft a nonstatutory marital property agreement under section 766.58, because the latter is far more flexible and can be crafted to fit the parties' exact circumstances.

Finally, spouses should be aware that, although the statute is silent on the subject, a STMPCA may have the effect of amending or nullifying existing marriage agreements. For example, the spouses may have agreed in an earlier marriage agreement that the property owned by each of them would remain their separate and solely owned property.

Execution of a STMPCA will effectively nullify those arrangements. When existing marriage agreements are involved, use of a custom-drafted nonstatutory marital property agreement under section 766.58 normally is advisable.

4. Statutory Individual Property Classification Agreements [§ 7.93]

a. In General [§ 7.94]

The statutory individual property classification agreement (SIPCA) was adopted as section 766.587 by the 1985 Trailer Bill. This statutory marital property agreement was of limited duration and could be entered into without disclosure by either spouse. The SIPCA was designed to prevent the accrual of marital property for up to one year immediately after the Act's effective date to give spouses the opportunity to explore more permanent arrangements for their property. The form of the SIPCA was prescribed by statute. *See* Wis. Stat. § 766.587(7).

b. Property Law Consequences [§ 7.95]

The SIPCA classified all of the spouses' property, including property owned when the agreement was executed and property acquired after execution but before the agreement terminated, as the owner's individual property. Wis. Stat. § 766.587(1)(a). Ownership of the spouses' property was determined as if it were December 31, 1985. *Id.* Presumably, this provision was intended to define ownership on the basis of the pre-Act common law and statutory rules of title and possession, including the statutory rules regarding the characteristics and creation of joint tenancies and tenancies in common, sections 700.17 and 700.19, because the statutory classification for individual property did not exist on December 31, 1985. The statute further provides that if, while the agreement was in effect, the spouses acquired property as a joint tenancy exclusively between themselves or as survivorship marital property, the property was classified as the owners' individual property and was owned in joint tenancy. Wis. Stat. § 766.587(1)(b). Similarly, if the spouses acquired property and held it in the "and" form or the "or" form described in section 766.60(1) or (2) while the agreement was in effect,

the property was classified as the owners' individual property and was a tenancy in common. *Id.*

The SIPCA classified as individual property both predetermination date property and marital property acquired after the determination date. The importance of this feature was significantly diminished, however, because the reclassification did not prevent the election of deferred marital property under section 861.02 with respect to the individual property so created. Wis. Stat. § 766.587(6). The individual property classification under a SIPCA nonetheless was effective for other purposes: unilateral gifts could be made, and the creation of marital property under the mixing rule or substantial uncompensated effort rule of section 766.63 was prevented. The termination of such agreements by operation of law on January 1, 1987, did not affect the classification of assets acquired before the termination. Wis. Stat. § 766.587(3)(b). Subject to tracing, such assets remained a special kind of individual property subject to the deferred marital property election. Assets acquired after termination that are not traceable to this special individual property are classified as otherwise provided under chapter 766.

The statute contains a specific acknowledgment that it was not the exclusive means by which spouses might classify their property as the owner's individual property before January 1, 1987. *See* Wis. Stat. § 766.587(8). This provision indirectly recognizes that individual property could also result from nonstatutory marital property agreements under section 766.58, gifts, unilateral statements, or consents, as provided in section 766.31(10). Accordingly, section 766.587(8) should not be read as having limited the ability of spouses entering into a SIPCA to reclassify their property to any other form of ownership before or after January 1, 1987.

In a bankruptcy case, a SIPCA was held to provide a sufficient classification basis to trace the nondebtor spouse's individual property, thus precluding the bankruptcy trustee from reaching that property for inclusion in the bankruptcy estate of the debtor spouse. *Ludwig v. Geise (In re Geise)*, 132 B.R. 908 (Bankr. E.D. Wis. 1991).

c. Execution and Effective Period [§ 7.96]

A SIPCA was executed when signed by both spouses. Wis. Stat. § 766.587(2). Persons intending to marry each other could execute a

SIPCA as if married, but the agreement became effective only upon their marriage. Wis. Stat. § 766.587(1)(a). A SIPCA could be executed before, on, or after January 1, 1986, and terminated absolutely on January 1, 1987. Wis. Stat. § 766.587(3).

d. Enforceability [§ 7.97]

No financial disclosures were required in conjunction with the execution of a SIPCA. The agreement was enforceable without the disclosure of one spouse's property or financial obligations to the other. Wis. Stat. § 766.587(4).

e. Planning Considerations [§ 7.98]

All SIPCAs terminated absolutely on January 1, 1987. The termination of the agreement by operation of law did not affect the classification of assets acquired before the termination. Because all or part of the individual property created by a SIPCA remains subject to the deferred marital property election under section 861.02 unless and until the property is reclassified, it is desirable for spouses who entered into such agreements to reclassify the individual property so created as "permanent" individual property or as property of some other classification by a subsequent marital property agreement.

G. Will Substitute Agreements [§ 7.99]

1. In General [§ 7.100]

The provision authorizing will substitute agreements, section 766.58(3)(f), derives from a similar statutory provision in the state of Washington. *See* Wash. Rev. Code § 26.16.120 (West, WESTLAW current with amendments received through January 15, 2010). The Wisconsin enabling provision permits a marital property agreement to transfer existing property and future acquisitions (whether marital property, individual property, predetermination date property, or other) at death without probate by a nontestamentary disposition to a designated person, trust, or other entity. Will substitute provisions may stand alone in a separate agreement or may be included in a marital property agreement containing other provisions.

The basic Wisconsin provision is taken from UMPA section 10(c)(6). The UMPA section 10 comment indicates that the provision is “substantially similar” to that in section 26.16.120 of the Revised Code of Washington, which has been in effect in Washington since 1881. The comment states that this provision “is intended to be used on an omnibus basis with respect to all property, or on a more limited basis with respect to a specified asset or group of assets. It constitutes a statutory authorization for a disposition other than one under the Statute of Wills.” UMPA § 10 cmt. The comment also observes that the provision has roots in the original Uniform Probate Code section 6-201 (now section 6-101), which specifically validated the transfer of assets pursuant to a variety of nonprobate arrangements that did not comply with the formalities required of a will. Under the current version of the Uniform Probate Code, such arrangements include provisions in “an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature.” Unif. Probate Code § 6-101. It is of interest that Wisconsin has enacted similar provisions in sections 705.10–.15.

Other states have adopted similar provisions. The concepts of the Washington statute and the Uniform Probate Code provision are both part of Idaho statutory law. *See* Idaho Code § 15-6-201 to 15-6-312 (West, WESTLAW current through (2010) Chs. 1-359 and HJR’s 4, 5 and 7 that are effective on or before April 12, 2010). In 1989, Texas adopted statutory provisions permitting spouses to enter into written community property survivorship agreements. These agreements appear to be much more modest in scope than those permitted in Washington or Idaho. Tex. Prob. Code §§ 451-462 (West, WESTLAW current through the end of the 2009 Regular and First Called Sessions of the 81st Legislature). (The Texas legislature repealed the Texas Probate Code and replaced it with the Texas Estates Code, effective January 1, 2014.)

A key characteristic of will substitute agreements noted by the UMPA section 10 comment is that they cannot be changed during the spouses’ lifetime without mutual consent—and that may be impossible to obtain. It may be possible, however, to draft a will substitute marital property agreement to permit later unilateral withdrawal or reclassification of property by one spouse. Such a feature would add flexibility to will substitute agreements. *See infra* § 7.117.

Section 766.58(3)(f) provides that will substitute provisions (i.e., provisions in a marital property agreement making nontestamentary dispositions of property to the surviving spouse or third parties) are revoked at dissolution of the marriage as provided in section 767.375(1)(a). The latter provision states that, unless the judgment specifically provides otherwise, a judgment of annulment, divorce, or legal separation revokes a will substitute provision providing that, on the death of either spouse, any of either or both spouses' property, including after-acquired property, passes without probate to a designated person, trust, or other entity by nontestamentary disposition. Additionally, under section 767.375(1)(b), a judgment that terminates a marriage also revokes marital property agreement provisions that require either or both spouses to make a particular property disposition in a will or other governing instrument as defined in section 854.01(2). (The latter section includes, among other things, deeds, trust instruments, contracts, insurance or annuity policies, retirement plans, beneficiary designations, instruments of nonprobate transfer under chapter 705, and exercises of a power of appointment.) Dissolution of the spouses' marriage effectively terminates marital property agreement provisions calling for one spouse to make certain transfers to or financial arrangements for the other spouse in the event of the first spouse's death, unless the judgment of annulment, divorce, or legal separation specifically keeps such provisions alive.

The 1985 Trailer Bill added significant additional language to section 766.58(3)(f) not found in UMPA section 10(c)(6). This language allows a surviving spouse to amend a marital property agreement unilaterally with regard to certain property if the agreement provides for the nontestamentary disposition of the property without probate at the surviving spouse's death. The amendment can be made at any time after the first spouse's death but only with regard to property to be disposed of at the second spouse's death. Amendment is not permitted (1) if the agreement expressly provides otherwise, and (2) with respect to property held in a trust specifically established under the marital property agreement. The 1985 Trailer Bill Original Nontax Note to section 766.58(3)(f) indicates that the surviving spouse's right to amend a will substitute agreement unilaterally is warranted to avoid unintended hardship arising from changed circumstances when the surviving spouse outlives the deceased spouse for a substantial time. *See* Wis. Stat. Ann. § 766.58 Legis. Council Notes—1985 Act 37, §§ 112–121 (West 2009). Note that section 766.58(3)(f) does not apply to a will substitute agreement that by its terms requires the surviving spouse to *will* his or

her property to a third person, because the disposition at the second death would be testamentary rather than nontestamentary in nature. There does not appear to be a reason for this distinction.

The unilateral amendment feature presents several practical concerns. For example, most spouses who enter into a marital property agreement making explicit provision for third-party beneficiaries after both spouses' deaths want the certainty of having the arrangement irrevocable, at least as to their existing assets at the first death. Indeed, they may expressly prohibit amendment by the survivor. If they do not, however, neither the statute nor the 1985 Legislative Council Notes give any particulars on the extent of the right of unilateral amendment. It is likely, for example, that the unilateral amendment feature contemplates an unlimited right to invade and consume the property subject to the agreement, but it is not clear that the feature includes the right to transfer such property during lifetime or at death to persons other than the third-party beneficiaries originally designated in the will substitute agreement. It is also uncertain whether invasion under the unilateral amendment feature is limited by an ascertainable standard such as the "health, education, support, or maintenance" standard described in I.R.C. § 2041(b)(1)(A), which would avoid treatment of the right to amend as a taxable general power of appointment in the hands of the surviving spouse. Finally, it is unclear whether the statutory reference to "a trust expressly established under the marital property agreement" includes trusts created independently of the agreement that are designated, by express reference in the terms of the agreement, to receive the property at the death of the first spouse to die.

These major unknowns cause concern in the drafting of will substitute agreements that make any disposition in favor of third parties and that are designed to take effect at the second spouse's death. Furthermore, any effort to draft limitations on the right to invade, consume, or appropriate property—all of which are encompassed within the statutory term "amend"—may have gift tax consequences for the survivor after the first spouse's death. *See infra* ch. 9.

If third parties are named as beneficiaries of a will substitute agreement pursuant to section 766.58(3)(f), and if the agreement expressly precludes spousal amendment, it is likely that the agreement will be directly enforceable by the third-party beneficiaries, because the agreement functions much like a deed or conveyance. For a general discussion of somewhat similar third-party beneficiary contracts to make joint, mutual, and reciprocal wills, see *Chayka v. Santini (In re Estate of*

Chayka), 47 Wis. 2d 102, 176 N.W.2d 561 (1970), and *Tilg v. Department of Revenue (In re Estate of Jacobs)*, 92 Wis. 2d 266, 284 N.W.2d 638 (1979). One uncertainty in this type of arrangement is whether the surviving spouse's interest will be likened to a legal life estate or to a trust providing an income interest to the surviving spouse for life, with a remainder passing to the third-party beneficiaries.

Unamendable will substitute agreements naming third parties as beneficiaries at the second death may create even greater difficulties in situations in which the surviving spouse subsequently remarries. It seems reasonably clear that the will substitute agreement will apply to gains from and substitutions for the assets acquired during the first marriage. It is much less clear whether it will apply to the surviving spouse's marital property interest in income and assets acquired during the subsequent marriage or prevent the survivor's new spouse from acquiring a marital property interest in the survivor's earnings or income from property—including the property subject to the will substitute agreement. In addition, it is not clear whether the surviving spouse can enter into a marital property agreement (whether opt-in or opt-out) with his or her new spouse if the agreement will diminish the surviving spouse's assets in any respect.

2. Implementation Following Death [§ 7.101]

Under section 766.58(3m), chapter 854 applies to transfers at death under a marital property agreement. This would include nonprobate, nontestamentary dispositions pursuant to a will substitute agreement described in section 766.58(3)(f). Section 705.10 also governs a variety of nonprobate transfers at death, including those under a will substitute marital property agreement. *See* Wis. Stat. § 705.10(1). Section 705.10(3) provides for applicability of chapter 854 to transfers under this statute. Chapter 854 contains various general rules governing transfers at death but does not contain procedural provisions for effectuating or confirming various nonprobate transfers at death. These provisions are found in sections 867.046(1m), (2), (2m), (3), and 865.201.

Section 867.046 provides simple summary procedures for confirmation of a property interest passing by nontestamentary disposition under a will substitute agreement described in section 766.58(3)(f). The procedures are described in sections 12.172–173, *infra*. The summary confirmation may be either judicial or

administrative. The judicial procedure, which may be invoked by the beneficiary of a will substitute agreement, results in the issuance of a certificate under the seal of the court reciting the fact of death of the decedent, the transfer of the decedent's interest in the property pursuant to the will substitute agreement, the petitioner's interest in the property, and any other facts essential to a determination of the rights of persons interested. Wis. Stat. § 867.046(1m). Alternatively, the beneficiary of a will substitute agreement may use an administrative procedure with the register of deeds to obtain evidence of the termination of the decedent's interest in real property, a vendor's interest in a land contract, an interest in a savings or checking account, an interest in a security, a mortgagee's interest in a mortgage, or an interest in property passing by nonprobate transfer under section 705.10(1) (which includes a marital property agreement), and resulting confirmation of the petitioner's interest in the property. Wis. Stat. § 867.046(2); *see also* Wis. Stat. § 705.10(4).

The protection of payors and other third parties involved in nonprobate transfers of various kinds, including transfers pursuant to a will substitute agreement, is dealt with by section 854.23(1) and (2). As defined in section 854.23(1), a governing instrument includes both a judicial certificate under section 867.046(1m) and an administrative confirmation under section 867.046(2). Insofar as it affects transfers accomplished by will substitute agreement, protection against liability in section 854.23(2) is limited to cases in which a distribution is made to a beneficiary designated in a certificate under section 867.046(1m) or a confirmation under section 867.046(2) who in fact is not entitled to the property and the distribution is made before the payor or other third party receives written notice of a claimed lack of entitlement under chapter 854.

The creation of section 705.10(4) and the amendment of sections 867.046(2) and 854.23(1) in 2006 were intended to reverse or modify key elements of the holding of the Wisconsin Supreme Court in *Maciolek v. City of Milwaukee Employes' Retirement System Annuity & Pension Board*, 2006 WI 10, 288 Wis. 2d 62, 709 N.W.2d 360, *aff'g* 2005 WI App 74, 280 Wis. 2d 585, 695 N.W.2d 875. *See* 2005 Wis. Act 216, §§ 35, 164, 245–47. In *Maciolek*, a stakeholder—in this case the annuity and pension board—was able to require a surviving spouse-beneficiary to use a summary confirmation procedure under section 867.046(1m) or (2) as a condition of releasing funds in its possession directly to the beneficiary.

The drafting committee note to section 705.20(4) (now renumbered section 705.10) states that “[n]o confirmation is required for the non-probate transfer to be valid, but confirmation may be obtained via the informal procedures of §§ 867.046(1m) or (2).” Wis. Stat. § 705.20(4) Committee Note—2005 Wis. Act 216, § 35. At the same time, 2005 Wisconsin Act 216, section 246, broadened the administrative confirmation provisions in section 867.046(2) to include any interest in property passing by nonprobate transfer under section 705.20(1) (renumbered as 705.10(1)), and also broadened the list of persons who might avail themselves of administrative confirmation to include any person having an interest in such property, including a beneficiary under a marital property agreement. This avoids the problem illustrated in *Maciolek*, in which the beneficiary under the marital property agreement was forced into the judicial confirmation proceeding under section 867.046(1m) because the property interest involved was not one of those specifically listed in the former version of section 867.046(2).

In conclusion, it appears that transfers pursuant to a will substitute marital property agreement are self-actuating and valid without any judicial or administrative confirmation. To the extent that a beneficiary under a will substitute marital property agreement wishes to have a confirmation under these statutory provisions, the beneficiary may do so. The protection for third party payors or stakeholders who transfer property pursuant to a will substitute provision in a marital property agreement to a person who in fact is not entitled to the property under provisions of chapter 854, and before the payor or stakeholder receives written notice of the claimed lack of entitlement, is to rely on the nonliability provisions of section 854.23(2).

3. Planning Considerations [§ 7.102]

a. Advantages [§ 7.103]

A will substitute agreement may prove useful in effectuating a simple “all to the survivor” estate plan for spouses, particularly an older couple, whose estates are small and involve no complex assets or planning considerations. It also is useful when spouses have created a joint revocable trust and transferred substantially all their assets to the trust before the death of the first spouse. Under these circumstances, a will substitute agreement transferring any remaining assets that might otherwise require probate to the trust appears to be a simple and effective

way to avoid probate. Because the will substitute agreement avoids the necessity for probate proceedings, whether formal or informal administration, some savings in time and administrative costs may be achieved. Only a summary proceeding under section 867.046 is required to confirm the transfer of assets pursuant to a will substitute agreement. This proceeding may be either judicial or administrative in nature, at the applicant's option.

To the extent that the will substitute agreement classifies the couple's assets as marital property or survivorship marital property, both spouses' marital property interests will receive a full adjustment in basis at the death of the first spouse to die.

Generally, will substitute agreements containing dispositive provisions for third parties on the surviving spouse's death are more desirable for older couples, because with younger couples there is a much greater likelihood of remarriage if one of the spouses dies. The difficulties of will substitute agreements—particularly those prohibiting or severely restricting withdrawal of assets or amendment—if the surviving spouse remarries are discussed in section 7.104, *infra*.

b. Disadvantages [§ 7.104]

It is likely that the Wisconsin courts will look to Washington and perhaps Idaho precedents in dealing with will substitute agreements. The experience in those states suggests that a number of planning cautions should be observed in drafting such agreements. Many of these cautions apply to the drafting of marital property agreements generally.

1. A will substitute agreement providing that interests in property are created in third parties following the surviving spouse's death raises questions about the nature and attributes of the surviving spouse's estate. *See supra* § 7.100. The surviving spouse's rights to invade or consume the property should be spelled out with specificity to avoid disputes and possible litigation between the spouse and the subsequent beneficiaries. In addition, it is not clear whether the property interest passing to the surviving spouse under a will substitute agreement of this sort qualifies for the federal estate tax marital deduction under the qualified terminable interest property rules, or if the surviving spouse will be deemed to possess broad

powers to invade and consume the property under the general-power-of-appointment rules.

2. Difficulties may be created if the will substitute agreement does not grant the surviving spouse the power to amend the agreement or withdraw property, and the survivor remarries following the first spouse's death. Several categories of property are of particular concern if this occurs: (1) investment earnings (income and gains) on assets comprising the combined estate from the previous marriage; (2) earnings and accumulations of property from the surviving spouse's efforts or labor after the first spouse's death; (3) assets acquired by reason of the surviving spouse's subsequent marriage (i.e., marital property interests in income, earnings, and acquisitions during the subsequent marriage); and (4) assets acquired by the surviving spouse through gift or inheritance after the first spouse's death. It is reasonably clear that the will substitute agreement from the previous marriage should apply to the investment earnings and gains on assets accumulated during the course of that marriage, and perhaps to earnings and accumulations resulting from the survivor's labor or efforts after the first spouse's death. However, the effect of the will substitute agreement on the other categories of assets is unknown. Nor is it clear whether the survivor and his or her new spouse can resolve these problems by executing a marital property agreement. The vested rights of the third party beneficiaries must be taken into account, and the will substitute agreement raises the same problems as does a contract to make a joint, mutual, and reciprocal will. *See supra* § 7.100. If the survivor and his or her new spouse do not have a marital property agreement, an array of new problems will arise upon the survivor's death if the survivor dies before the new spouse. At this juncture, it is likely that the third-party beneficiaries will be pitted against the new spouse. A contest may ensue over (1) the deceased spouse's interest in marital property acquired during the later marriage; (2) whether all or only half the earnings of the now-deceased survivor during the course of the later marriage are subject to the agreement; and (3) the rights of family-purpose creditors to assert claims against the now-deceased survivor with respect to obligations incurred by the new spouse. This catalog of potential problems argues strongly against using will substitute agreements that simultaneously create vested third-party property rights and limit the surviving spouse's ability to withdraw or consume assets or to amend the agreement, particularly when there is a substantial likelihood that the surviving spouse will remarry.

3. A will substitute agreement generally may be revoked only by mutual consent in a subsequently executed marital property agreement, although it may be possible to draft the agreement to permit unilateral withdrawal or amendment. *See, e.g., infra* § 7.117. Absent mutual action by written agreement, a will substitute agreement is irrevocable and indestructible. Typical methods of revoking a will, such as cancellation or physical destruction, are not effective for will substitute agreements.
4. Because a spouse's subsequent incompetence may make it impossible to amend or revoke a will substitute agreement, spouses should enter into the agreement with the full understanding that it may be binding on them forever, regardless of any changes in their circumstances. Section 54.20(2) provides that a guardian appointed for a married person may execute a marital agreement with that person's spouse, subject to the court's approval. The statutory authorization presumably extends to an amendment or revocation of such an agreement. The court's willingness to permit such actions by the guardian may, however, rest upon whether any direct or indirect benefit derives for the incompetent spouse's estate or the natural objects of his or her bounty. *See* Wis. Stat. Ann. § 880.173 Legis. Council Notes—1985 Act 37, § 184 (West 1991). (Section 880.173 has since been repealed and recreated as section 54.20(2)(h).) To avoid these problems, the spouses may wish to consider executing durable powers of attorney to each other that contain specific authority to execute amendments to their will substitute agreement.
5. The typical will substitute agreement is all-encompassing in the sense of transferring both probate and nonprobate property. If the spouses erroneously believe the agreement applies only to probate assets, the agreement's dispositive (and perhaps classification) provisions may conflict with other existing nontestamentary dispositions of those assets by one or both spouses. Ordinarily, the will substitute agreement controls. If, on the other hand, the will substitute agreement is limited by its terms solely to property that otherwise would be subject to administration (i.e., probate assets), the agreement would be open to avoidance by use of nonprobate dispositions.
6. Later execution of an inconsistent will or beneficiary designation by either spouse is ineffective to dispose of any property within the

ambit of a will substitute agreement unless the surviving spouse chooses not to enforce the agreement after the first spouse's death. In addition, the acquiescence itself may have attendant gift tax implications. Execution of a will or a beneficiary designation is a unilateral act, and amendment or revocation of a will substitute agreement requires mutual action by written agreement. Mutual consent to disposition by subsequent will or beneficiary designation would seemingly require either a provision in the original agreement or a subsequent marital property agreement signed by both spouses. Thus, the simple and casually executed will substitute agreement entered into early in marriage and then forgotten about may create serious concerns for later estate planning. It is desirable for estate planners to inquire of both spouses about the existence of prior marital property agreements. *See infra* item 9.

7. If the will substitute agreement purports to dispose of future acquisitions of property, regardless of classification, the parties should give careful consideration to what they might acquire in the future by gift, inheritance, investment success, or earnings. Once the will substitute agreement has been executed, the acquiring spouse normally cannot unilaterally nullify the classification or disposition set forth in the agreement except by gift, if gifts are permitted under the agreement's terms.
8. If the will substitute agreement purports to classify individual property or predetermination date property as marital property (whether when the agreement is executed or at some later date), inherited property or gifts may lose their character and thus not be excludable from a property division under section 767.61 in the event of the dissolution of the marriage. *See, e.g., Bonnell v. Bonnell*, 117 Wis. 2d 241, 344 N.W.2d 123 (1984). Moreover, reclassification may expand the universe of assets available to satisfy creditors.
9. During the course of any estate planning, it may be desirable for the spouses to revoke any outstanding will substitute agreements. Revocation may be accomplished by executing a simple but sweeping marital property agreement to that effect. *See infra* § 7.166. If the spouses are entering into a comprehensive marital property agreement as part of their planning, they may include similar language revoking all prior marital property agreements, including will substitute agreements.

10. Although avoidance of probate through use of a will substitute agreement may save some estate administration costs, these savings must be weighed against the fact that there will be no probate estate for the first spouse to die. A probate estate offers a number of advantages. First, because the probate estate functions as a separate taxpayer, income can be split between the estate and the surviving spouse during the period of administration. Second, having a probate estate may provide some protection against creditors' claims by virtue of the applicability of the statutes in chapter 859 limiting the time for the filing of claims. These provisions appear to provide potentially greater protection for heirs and beneficiaries than the procedures available to creditors under section 859.18 in situations in which a will substitute agreement is used. *See infra* ch. 12. Third, probate provides a mechanism for classifying property, which may be important to determine which assets are marital property and thus qualify for a full basis adjustment. Fourth, it is normally simpler for the personal representative of an estate to transfer assets than for the surviving spouse operating under a will substitute agreement, if only because transfer agents are familiar with the procedures for dealing with transfers by personal representatives.
11. The all-to-the-survivor disposition that often occurs in a will substitute agreement may fail to maximize federal death tax savings by not making use of an applicable exclusion amount (formerly *credit shelter gift*) that escapes taxation at the surviving spouse's death. To obtain the maximum benefit from the federal estate tax unified credits in both spouses' estates, sufficient property has to pass at the first spouse's death in a manner that avoids taxation in the surviving spouse's estate. One example is a family trust that provides the surviving spouse with a discretionary income interest for life, with remainder interests to the children. Such a trust fully uses the unified credit in the estate of the first spouse to die and avoids taxation at the second spouse's death on an amount equal to the value at that time of the assets transferred to the trust.
12. If the spouses separate, a will substitute agreement continues in full force until the court enters a judgment of annulment, divorce, or legal separation, unless a marital property agreement is executed earlier to amend or revoke it.

A sample will substitute agreement is set forth at section 7.163, *infra*.

4. The Washington Experience [§ 7.105]

As discussed in section 7.100, *supra*, section 766.58(3)(f) is based on UMPA section 10, which in turn is derived from section 26.16.120 of the Revised Code of Washington. Accordingly, Washington court decisions concerning statutory community property agreements under the latter statute may be helpful in considering the scope of the Wisconsin provision. The Washington statute permits special statutory agreements by which the spouses may jointly contract “concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either.” Agreements entered into pursuant to this statute are referred to in Washington as *statutory community property agreements*. As special contracts, they are not subject to the laws relating to probate and estate administration and prevail against the deceased spouse’s will. *In re Estate of Brown*, 185 P.2d 125 (Wash. 1947); *McKnight v. McDonald*, 74 P. 1060 (Wash. 1904). Unless rescinded, a recorded statutory community property agreement operates as a conveyance by the deceased spouse to the survivor. *Seeley v. Godfrey (In re Estate of Wittman)*, 365 P.2d 17, 19 (Wash. 1961).

Because they vest immediate ownership of community property in the survivor when the first spouse dies, statutory community property agreements provide a simple nonprobate mechanism for disposing of community property. However, the language of the statute does not require disposition to the surviving spouse; presumably third parties may be beneficiaries as well. *See* Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. L. Rev. 13, 97 (1986).

It has been recognized in Washington that both spouses in a couple may convert separate property to community property and dispose of the property so converted by execution of a statutory community property agreement. *Neeley v. Lockton*, 389 P.2d 909, 912 (Wash. 1964); *Volz v. Zang*, 194 P. 409 (Wash. 1920). By its terms, a statutory community property agreement may also govern the classification of community or separate property acquired after the date of execution, including the conversion of separate property to community property at death. *Brown*, 185 P.2d 125. Such an agreement may cover all or only part of the parties’ property, *see* Wash. Rev. Code. § 26.16.120 (West, WESTLAW current with amendments received through January 15, 2010), provided that what is covered is adequately described. A legal description of real

estate is not required. *Verbeek v. Verbeek*, 467 P.2d 178 (Wash. Ct. App. 1970).

Despite the requirement that a statutory community property agreement can be altered or amended only in the same manner as it was executed, the Washington statute is silent on the issue of revocation or rescission. This has led the Washington Supreme Court to hold that an oral agreement may be effective to rescind a statutory community property agreement when evidence shows that there was a meeting of the minds of the parties to do so. *Seeley*, 365 P.2d 17 (finding no rescission). Conduct manifesting an intention to abandon an agreement also suffices if one party's conduct is inconsistent with the continued existence of the agreement and the other knows and acquiesces in that conduct. *Lyman v. Lyman*, 503 P.2d 1127, 1130–31 (Wash. Ct. App. 1972), *aff'd*, 512 P.2d 1093 (Wash. 1973). The Washington Supreme Court has ruled that legal separation, coupled with an oral agreement to keep separate any acquisitions of property following the separation, has the practical consequence of making the agreement inapplicable to property acquired after the separation. *In re Estate of Janssen*, 351 P.2d 510 (Wash. 1960).

By the same token, the courts in Washington have held that a number of other actions or eventualities do not suffice to revoke a statutory community property agreement. For example, they have held that the subsequent mental incompetency of either of the spouses is not sufficient to avoid the agreement's terms. *Brown's Estate*, 185 P.2d at 129. The filing of a divorce action, by itself, does not serve to abrogate a statutory community property agreement or manifest an intent to abandon the agreement. *Lyman*, 503 P.2d at 1131–32.

Washington courts have held that the mere making of a subsequent inconsistent will or codicil by one of the spouses is insufficient to constitute a revocation or abandonment of a statutory community property agreement. *See Lyman*, 503 P.2d at 1132; *Seeley*, 365 P.2d 17.

In *Neeley v. Lockton*, 389 P.2d 909 (Wash. 1964), the Washington Supreme Court made clear that the provisions of a statutory community property agreement are superior to any conflicting beneficiary designation on life insurance or retirement plan benefits that are subject to the agreement's terms. The court stated that Washington's community property law will control over inconsistent contracts. According to the court, the statutory community property agreement is a vital element of Washington's community property law and furthers the policy of

providing a simple and certain method of disposing of the community property upon the death of either spouse. *Id.* at 912. Of note is the fact that the beneficiary designation in *Neeley* predated the community property agreement. *Neeley* was followed by the court in *Harris v. Harris*, 804 P.2d 1277 (Wash. Ct. App. 1991), which held that a community property agreement controls over a prior beneficiary designation for a retirement annuity. A divorce decree had awarded the retirement annuity to the employee-husband. However, the husband failed to change the beneficiary designation that named his former wife as beneficiary. Subsequently, the husband remarried and entered into a statutory community property agreement with his second wife. The court held that the statutory community property agreement converted the retirement annuity into community property and provided for the immediate transfer of the husband's community property interest at death to the second wife despite the inconsistent beneficiary designation.

In view of the lack of recognition given to subsequent conflicting wills and codicils and the strong language in *Neeley*, it is unlikely that the Washington courts will permit subsequent conflicting beneficiary designation changes with respect to life insurance policies or retirement plan benefits to prevail over the contrary provisions of an earlier statutory community property agreement. In fact, the Washington courts have refused to permit a subsequent conveyance by one spouse to his children that was inconsistent with a previously executed statutory community property agreement. *Bosone v. Bosone*, 768 P.2d 1022 (Wash. Ct. App. 1989).

A caveat is needed here with regard to the import of the Washington cases discussed above with respect to prior or subsequent conflicting beneficiary designations for retirement benefits under ERISA-qualified plans. As a result of the U.S. Supreme Court decision in *Boggs v. Boggs*, 520 U.S. 833 (1997), it appears that provisions of state community property law no longer will control over conflicting attributes and requirements of federal law governing ERISA-qualified retirement plans. (See also section 9.64, *infra*, for a detailed discussion of the impact of *Boggs* on qualified retirement plans.) Thus, to the extent that beneficiary provisions are mandated by ERISA, as amended by the Retirement Equity Act of 1984 (REA), they may not be overridden by a Washington community property agreement. *See generally* ERISA, 29 U.S.C. §§ 1001–1461; REA, Pub. L. No. 98-397, 98 Stat. 1426.

In a few cases, however, the subsequent inconsistent conduct of one or both of the spouses, viewed in the context of surrounding circumstances, did evince an intention to abandon the statutory community property agreement or to waive its benefits. See *Estate of Wahl v. Sharp (In re Estate of Wahl)*, 644 P.2d 1215 (Wash. Ct. App. 1982), *aff'd*, 664 P.2d 1250 (Wash. 1983) (holding that execution of inconsistent codicils on same date as statutory community property agreement raised question of fact as to spouses' intent). In *Norris v. Norris*, 622 P.2d 816 (Wash. 1980), the spouses first executed reciprocal wills and later executed an inconsistent statutory community property agreement without the benefit of legal advice. Following the wife's death, the husband became the personal representative and rejected the agreement for tax reasons. The court held that because the husband had accepted benefits under the will, he was deemed to have waived the agreement.

The Washington Court of Appeals held that the transfer of real estate from one spouse to the other, with the recital that it was to be the transferee's sole and separate property, constituted a partial revocation of a statutory community property agreement, at least with respect to the real estate conveyed. *In re Estate of Ford*, 639 P.2d 848, 850 (Wash. Ct. App. 1982). The court inferred a mutual intent to modify the agreement from one spouse's execution of the deed and the other spouse's acceptance of that deed. *Id.*

The question posed in *Higgins v. Stafford*, 866 P.2d 31 (Wash. 1994), was whether a community property agreement was rescinded or abandoned when the parties, 10 years after executing the agreement, executed mutual wills and a comprehensive agreement regarding the disposition of their community property upon the deaths of each of them. The court held that as long as a mutual intent to abandon or rescind a prior community property agreement is adequately established, mutual wills may control over a prior community property agreement, whereas unilateral acts by one spouse alone inconsistent with the community property agreement are not enough. The court concluded that the will agreement and mutual wills were squarely in conflict with the earlier community property agreement and that the spouses intended the will agreement and mutual wills to control the disposition of their property. Accordingly, the community property agreement was deemed rescinded.

Dissolution of a marriage does not automatically terminate the spouses' statutory community property agreement under the Washington

statute. Washington has a statutory provision providing for “just and equitable” disposition of community and separate property on dissolution. Wash. Rev. Code Ann. § 26.09.080 (West, WESTLAW current with amendments received through January 15, 2010). Presumably, however, a court decree dissolving the marriage can provide for cancellation of a statutory community property agreement. *See Lyman*, 503 P.2d at 1131–32.

5. Comparison of Washington and Wisconsin Statutes [§ 7.106]

Unlike the Washington statute, section 766.58(3)(f) applies to “any of either or both spouses’ property, including after-acquired property,” and not just to assets classified as marital property. The difference is that the Washington statutory community property agreement requires the specific reclassification of separate property to community property, either when the agreement is entered into or subsequently, to make the agreement operate on the property. *See Volz v. Zang*, 194 P. 409 (Wash. 1920). No such reclassification is required under the Wisconsin statute. Further, the Washington statute does not specify who or what may be the transferee under a disposition by agreement, although one leading analyst of Washington’s community property laws believes that dispositions other than to the surviving spouse are permissible. *See Cross, supra* § 7.105, at 97. Section 766.58(3)(f) specifically states that the dispositive provisions may be “to a designated person, trust or other entity.” Finally, the Washington statute does not contain language granting a surviving spouse the right of unilateral amendment when the agreement purports to dispose of property at the surviving spouse’s death.

In Washington, a will substitute agreement may be abandoned or revoked by oral understanding if the parties’ actions are consistent with the oral understanding. *See supra* § 7.105. The Wisconsin statute, section 766.58(4), specifically requires revocation by another marital property agreement. It is not known whether the Wisconsin courts will apply the doctrines of contractual abandonment or part performance to avoid serious inequity when the parties attempt a nonwritten revocation; the decision in *Brandt v. Brandt*, 145 Wis. 2d 394, 427 N.W.2d 126 (Ct. App. 1988), a divorce case, suggests that they may. In *Brandt*, the court viewed repeated failures to observe a marriage agreement, or to mention it or take it into account in the course of subsequent financial and estate planning, as an abandonment of the agreement. *Id.* at 415–16.

Washington's statute is silent on how dissolution of the marriage affects a will substitute agreement. The Wisconsin statutes provide that a judgment of dissolution revokes both a will substitute provision in a marital property agreement and other marital property agreement provisions requiring one spouse to make certain transfers to or financial arrangements for the other spouse in the event of the first spouse's death, unless the judgment provides otherwise. *See* Wis. Stat. §§ 766.58(3)(f), 767.375(1) (discussed in sections 7.23 and 7.100, *supra*). As noted in section 7.104, *supra*, and section 7.114, *infra*, a will substitute agreement reclassifying existing or future individual property assets received by inheritance or gift as marital property may cause the reclassified assets to be included in the property division under section 767.61 in the event of dissolution.

Just as the Washington statute protects creditors' rights, so do sections 766.55(4m) and 859.18(6) with respect to marital property agreements (including will substitute agreements). Section 766.58 does not, however, preclude creditors' rights from being enhanced. For example, a marital property agreement providing for immediate conversion of after-acquired individual property into marital property would likely make that property available for satisfaction of a judgment rendered against the other spouse for an obligation incurred in the interest of the marriage or the family. *See, e.g., Merriman v. Curl*, 509 P.2d 765 (Wash. Ct. App. 1973).

H. Effect of Marital Property Agreements at Dissolution of Marriage [§ 7.107]

Two 1986 decisions of the Wisconsin Supreme Court, *Button*, 131 Wis. 2d 84, and *Schumacher*, 131 Wis. 2d 332, set the standards for enforceability of marriage agreements under section 767.61(3)(L) (formerly numbered section 767.255(3)(L) and (11)), the statutory provision relating to property divisions at dissolution. Neither of these decisions involved marital property agreements as defined in the Act. Because the requirements for validity and enforceability of marital property agreements under sections 766.58, .585, .588, and .589 differ somewhat from the requirements for validity and enforceability of marriage agreements entered into before the effective date of the Act, *see infra* §§ 7.122–.131, .133–.140, further modification in the law may occur.

The Wisconsin Supreme Court's first consideration of the effect of a post-1985 marital property agreement in a divorce action occurred in *Steinmann v. Steinmann*, 2008 WI 43, 309 Wis. 2d 29, 748 N.W.2d 145. This case did not involve the validity or enforceability of the marital property agreement (both of which were conceded), but rather the implications of classification, tracing, and change of character of assets for the property division. In *Steinmann*, the husband and the wife had entered into what was denominated a limited marital property classification agreement following their marriage in 1994. The agreement classified various assets and income into categories of "marital property," "survivorship marital property," "individual property of [husband]" and "individual property of [wife]" and provided that property acquired with individual property, in exchange for individual property, or with the proceeds of individual property remained individual property. The marital property agreement was silent as to maintenance obligations in the event of dissolution of the marriage, but specified that it would be binding on the question of property division. The agreement provided that it could be modified or waived "by written instrument duly subscribed and acknowledged by the parties." *Id.* ¶¶ 5–6.

During the marriage, a large litigation settlement payable jointly to the husband, the wife, and the wife's solely owned business was deposited into the wife's individual property bank account. The funds were then used to acquire a number of significant assets titled in the joint names of the spouses. In the divorce action, the wife contended that the circuit court should apply tracing principles to funds that had been deposited in the individual property bank account, while the husband contended that transmutation principles should be applied to determine that the funds had been reclassified into jointly held marital property that was divisible in the divorce action.

The Wisconsin Supreme Court declined to attempt to harmonize the marital property classification principles of chapter 766 with the equitable property division principles of chapter 767, stating as follows:

[M]arital property classification, governed by ch. 766, is generally a separate inquiry from equitable property distribution, governed by ch. 767. *See Lloyd v. Lloyd*, 170 Wis. 2d 240, 258 & n.6, 487 N.W.2d 647 (Ct. App. 1992). Unfortunately, the parties' marital property classification and divisibility arguments overlap, blurring the distinction between the two issues and chapters. Blurring the distinction even more is the face of the Agreement itself, which is titled under ch. 766 and primarily addresses property classification, but which also states that it is binding on ch. 767 property

division determinations. The interrelationship between the two statutory chapters in such a context has not been explicitly addressed by the parties. *We therefore do not resolve in this case the exact nature of the relationship between chs. 766 and 767 in cases such as this one in which ch. 767 equitable property distribution determinations include consideration of ch. 766 marital property agreements, and in which marital property classification might be relevant to division. Rather, we focus on the tracing and transmutation arguments as presented by the parties.* (Emphasis added.)

Id. ¶ 28.

The court went on to reject the wife’s tracing argument in favor of holding that the acquisition of several valuable real-property assets in joint tenancy effectuated a transmutation of what might otherwise have been individual property funds into divisible marital property for purposes of section 767.61(2). The court noted that “when separate property [i.e., individual property] presumed to be indivisible is transmuted through a joint tenancy, it is effectively transferred to marital property, and tracing does not cause the property to revert back to its original separate property identity.” *Id.* ¶ 35. In reaching its conclusion, the court discussed *Trattles v. Trattles*, 126 Wis. 2d 219, 376 N.W.2d 379 (Ct. App. 1985); *Brandt v. Brandt*, 145 Wis. 2d 394, 427 N.W.2d 126 (Ct. App. 1988); *Fowler v. Fowler*, 158 Wis. 2d 508, 463 N.W.2d 370 (Ct. App. 1990); and *Derr v. Derr*, 2005 WI App 63, 280 Wis. 2d 681, 696 N.W.2d 170. The court also noted that it did not limit its holding in *Bonnell v. Bonnell*, 117 Wis. 2d 241, 246–47, 344 N.W.2d 123 (1984) only to gifted or inherited property, indicating that the “decision spoke in broader terms about joint tenancies being valid transmutations of separate property [i.e., individual property], *whatever* the prior ownership interests of each party.” *Steinmann*, 2008 WI 43, ¶ 37, 309 Wis. 2d 29 (citation omitted). The court also noted that there was no compelling policy reason for rendering transmutation or donative-intent principles inapplicable to property initially classified as individual property under a marital property agreement. *Id.* ¶ 38.

Finally, the court observed that section 766.31 explicitly allows property classified as individual property under a marital property agreement (as well as gifts, inheritances, and other forms of individual property) to be reclassified as marital property by gift, deed, or other conveyance, thus specifically sanctioning the type of reclassification from which the wife claimed her property was exempt. *Id.* ¶ 43 n.16. Accordingly, the transmutation/reclassification/donative intent evidenced

by the spouses' acquisition of various real estate assets in joint tenancy was held to trump the application of tracing principles in effectuating a property division in the divorce. *Id.* ¶¶ 42–52.

It should be noted that the only other appellate case involving enforceability of a post-effective-date marital property agreement at dissolution is an unpublished decision, *Weissgerber v. Weissgerber*, No. 03-0093, 2004 WL 1534191 (Wis. Ct. App. July 8, 2004) (unpublished opinion not citable per section 809.23(3)), in which the court's discussion revolved exclusively around the requirements of section 767.61(3)(L) (formerly 767.255(3L)), *Button*, and *Schumacher*, with no mention made of the enforceability standards set forth in section 766.58(6).

One important issue that may require attention is whether the section 767.61(3)(L) “equitableness” requirement with respect to the enforceability of marriage agreements in the event of dissolution should be harmonized with the section 766.58(6) requirements for enforceability of a marital property agreement. The enforceability standards in section 766.58(6) focus on the time immediately preceding and at the making of the agreement. The section 767.61(3)(L) equitableness test may have a different focus. In *Button*, 131 Wis. 2d 84, the supreme court held that the substantive fairness portion of the equitableness test would be determined at the time of execution of the agreement, and also at the time of dissolution, if circumstances significantly changed after the execution of the agreement in a manner not reasonably foreseen or foreseeable by the parties. Thus, equitableness in the context of an action for dissolution may be determined at the time of the divorce, as well as at the time when the agreement was made. This results in a dual standard for enforceability of marital property agreements—that is, the standard set forth in section 766.58(6) applies during the marriage or at death and the standard arising by judicial interpretation of section 767.61(3)(L) applies at the dissolution of the marriage. The language of section 766.58(6) does not itself confine the enforceability standards for marital property agreements to the ongoing marriage or the death of a spouse, thus giving rise to the need for clarification of its relationship to section 767.61(3)(L). For a more complete discussion of the enforceability standards that apply at divorce to agreements entered into before the Act became effective, see sections 7.133–.140, *infra*.

It is also worthy of note that section 767.56(8), relating to the determination of maintenance in dissolution proceedings, requires only

that the family court “consider” spousal support arrangements contained in a marriage agreement. Thus, the court is free to reject those arrangements if it chooses. *See infra* ch. 11.

I. Planning Considerations with Respect to Marital Property Agreements [§ 7.108]

1. In General [§ 7.109]

The requirements for a valid and enforceable marital property agreement are discussed in sections 7.15–.70, *supra*. To summarize, a valid marital property agreement must be

1. A document signed by both spouses, but only by both spouses and no third parties;
2. Not unconscionable when made;
3. Executed voluntarily;
4. Accompanied either by fair and reasonable disclosure under the circumstances of each spouse’s property and financial obligations, or, alternatively, by actual knowledge or reason to know of the other spouse’s property or financial obligations before execution of the agreement; and
5. Equitable as to both parties if it is to be enforceable as a property settlement agreement in the event of the dissolution of the marriage, *see infra* §§ 7.133–.140 (discussion of equitableness in context of pre-Act marriage agreements).

For additional resources concerning the drafting of marital property agreements, see, for example, Leonard L. Loeb et al., *System Book for Family Law*, ch. 14G (State Bar of Wisconsin CLE Books 6th ed. 2007 & Supp.), and Mark J. Bradley et al., *Eckhardt’s Workbook for Wisconsin Estate Planners* ch. 9 (State Bar of Wisconsin CLE Books 5th ed. 2008). Sections 7.110–.118, *infra*, discuss various considerations relating to planning and drafting marital property agreements. Sample forms of various kinds of marital property agreements are found in sections 7.148–.178, *infra*.

2. Marital Property Agreements to Adopt System of Property Ownership Based on Title or to Classify All or Most Assets as Individual Property **[§ 7.110]**

a. Advantages and Disadvantages [§ 7.111]

Either before or after the determination date, spouses or persons intending to marry may wish to execute a marital property agreement either to adopt a system of property ownership based on title or to classify all or most assets as individual property. The broad contractual freedom extended by sections 766.17(1) and 766.58(3) clearly countenances this. A number of reasons might exist for such an agreement. The spouses might wish to

1. Limit (to the extent possible) future creditors' ability to reach the assets or income of one spouse to satisfy obligations incurred by the other spouse in the interest of the marriage or the family after the determination date;
2. Provide certainty as to the classification of their property when one of the spouses dies and thus avoid the need for tracing, the presumptions in favor of marital property, and the deferred marital property election statutes;
3. Avoid the need for extensive revision of their current estate plans;
4. Ensure that the disposition of specific assets to certain beneficiaries at death will occur as intended;
5. Maintain wealth existing at the time of remarriage for children of a prior marriage;
6. Ensure that adequate management arrangements for certain assets will continue after the death of a spouse presently having title to those assets;
7. Maximize the use of the titled spouse's estate as a separate taxpayer to the extent that there are benefits to be derived from doing so;

8. Preserve maximum postmortem tax planning opportunities for the estate of the spouse with more property through the availability of elections (such as the qualified terminable interest property (QTIP) election) and disclaimers;
9. Make gifts of assets that otherwise might be subject to recovery under section 766.70 because they would have been marital property or would have had a marital property component; or
10. Take advantage of a combination of these factors.

There are also disadvantages that might result from executing an agreement to maintain a system of property ownership based on title or to classify all or most assets as individual property. These include

1. Losing the opportunity for the full adjustment in basis that is available for both spouses' interests in marital property upon the death of one of them, *see infra* ch. 9;
2. Giving up rights or remedies relating to the management and control of assets or income held or acquired by the other spouse that would have been marital property but for the agreement;
3. Losing access to credit that otherwise might have been available to a spouse through classification of assets (particularly the other spouse's income) as marital property;
4. Giving up any protections of the good-faith duty imposed on the other spouse with respect to matters involving assets that otherwise would have been marital property;
5. Giving up the right to will one-half the value of any assets titled in the other spouse's name that otherwise would have been marital property to persons of the deceased spouse's choice;
6. Giving up various interspousal remedies available concerning property that otherwise would have been marital property, including the right to recover unilateral gifts of such property exceeding \$1,000 (or larger reasonable amount) in a given year as provided in section 766.53; and

7. Possibly losing for the less-proprieted spouse any elective right against the other spouse's estate if the other spouse dies first and leaves his or her property to third parties, unless the agreement contains specific financial provisions for the less-proprieted spouse.

b. Drafting Approaches [§ 7.112]

There are several different approaches to drafting an agreement to continue a system of property ownership based on title or to otherwise opt out of the Act to some significant degree. *See supra* § 7.14 (certain statutory limitations on opting out). Each approach has advantages and disadvantages. The primary methods are the following:

1. Enter into a section 766.589 STIPCA with disclosure. These agreements and their legal consequences are discussed in detail in sections 7.73–82, *supra*; the form is reproduced at section 7.178, *infra*. The STIPCA reclassifies marital property, whether presently existing or acquired in the future, as the owner's individual property. Ownership is determined on the basis of how the property is held. *See supra* ch. 4 (discussion of principles of holding property). If property classified by a STIPCA is not held by either or both of the spouses, ownership is determined as if the spouse were unmarried when the property was acquired. Additional rules are provided for marital property assets held by both spouses. Although execution of a STIPCA is relatively simple, the agreement is inflexible and not subject to variation to fit the spouses' individual circumstances. Moreover, it is terminable by the unilateral action of one of the spouses and applies the deferred marital property election under section 861.02 not only to all deferred marital property but also to all individual property acquired during the marriage and after the determination date that would have been marital property but for the agreement. Wis. Stat. § 766.589(7); *see supra* § 7.82 (more detailed discussion of planning limitations of STIPCAs).
2. Adopt the common law and statutory property ownership rules in effect on December 31, 1985. This was the classification method used in the now-defunct statutory individual property classification agreement in section 766.587, discussed in sections 7.93–.98, *supra*. Property owned by married persons would continue to be owned either solely, as a tenancy in common, or as a joint tenancy with right of survivorship, all determined under the rules of ownership that applied immediately before the Act. Such an agreement has the

advantages of relative simplicity and working with a defined and ascertainable body of law. Its disadvantage is that the body of law is fixed and static and will not be developing in response to changing conditions. In time, the property law system in effect on December 31, 1985, for married persons may be forgotten by nearly everyone. Although an agreement of this sort could be as simple or as complex as the drafter cares to make it, one issue that almost certainly must be dealt with is whether the prior spousal elective rights found in sections 861.03–13 (1983–84) are to apply. The agreement should specifically state whether these spousal elective rights are included as part of the property ownership rules on December 31, 1985, because the statutes from which they derive have been repealed.

3. Classify the spouses' property as their individual property based on rules of title, acquisition, or possession spelled out in the agreement. The thrust of the agreement is that property titled in one spouse's name, acquired with consideration furnished by one spouse, or possessed exclusively by one spouse, is that spouse's individual property. Property titled or acquired in both spouses' names might be classified as joint tenancy with right of survivorship, as tenancy in common, as survivorship marital property, or as marital property, depending on the spouses' desires. An agreement styled in this manner has the advantage of using as its primary form of ownership a property classification created and defined by the Act, namely, individual property. Thus, its attributes should continue to be reasonably well understood with the passage of time. The drawbacks are that if the attributes of individual property are significantly changed by subsequent legislation or court decision, the expectations of one or both parties might be adversely affected. Similarly, if both spouses move to a non-community property state, property of a classification not recognized under the laws of the new domiciliary jurisdiction might continue to be created under the agreement's terms unless provisions are included in the agreement to address this problem. Finally, an agreement of this sort must necessarily address the issue of what dispositions of individual property will be made at death in favor of the surviving spouse to replace the statutory elective share and support provisions that presumably are negated by the agreement.
4. Classify the spouses' property as their common law solely owned property as if they were unmarried persons, based on rules of title, acquisition, or possession that are spelled out in the agreement. In

short, property titled in one spouse's name, acquired with consideration furnished by one spouse, or possessed exclusively by one spouse, is that spouse's solely owned property. Property owned by unmarried persons will of course continue to be common law solely owned property governed by an evolving mixture of common law and statutory rules. Applying this evolving body of law by agreement to the assets of married persons affords an advantage to this fourth method not enjoyed by the second method discussed above, which uses a static property law system fixed in time and content. One disadvantage of the fourth method is that it relies on a legal fiction (i.e., it treats the parties as unmarried persons when in fact they are or are about to be married), which some contracting spouses may dislike. Second, the method creates and uses a property law classification not described in the Act (although that clearly seems permissible under the broad contractual freedom extended to spouses by section 766.17(1)). *See supra* § 7.6. Third, because a spouse treated as an unmarried person has no rights against the other spouse's estate, the agreement should either contain an adequate financial provision for the surviving spouse or contractually set up a mechanism for spousal elective rights at death.

A sample agreement to adopt a system of property ownership based on classification of most or all assets as individual property (method 3 above) is set forth in section 7.154, *infra*. The inclusion of an agreement employing this particular approach does not imply that the authors prefer that approach over the others.

A spouse who owns (or will own) the most significant assets in the marriage or who generates the most significant income may be tempted to rely on full disclosure and voluntary execution alone to support an opt-out marital property agreement that makes no provision or only a minimal provision for his or her spouse at the termination of the marriage by death. This ignores the first of the section 766.58(6) requirements for enforceability, namely, that the agreement must not be unconscionable when made. The concept of unconscionability is broad and vague, *see supra* § 7.42, and at this juncture there are no Wisconsin precedents defining it in the context of marital property agreements. The mere fact of economic one-sidedness does not alone establish unconscionability. If, however, a great disparity in economic wealth exists between the parties, an agreement that makes no financial provision for a spouse at the termination of the marriage could possibly give the appearance of overreaching. That in turn might subject the agreement to closer-than-

usual scrutiny. If a court determined that there had been overreaching or oppression, it might refuse to enforce the agreement on grounds of unconscionability. *See supra* § 7.42.

3. Marital Property Agreements to Classify All or Most Assets as Marital Property [§ 7.113]

a. Advantages and Disadvantages [§ 7.114]

Married couples (and couples intending to marry) may elect to enter into marital property agreements classifying all or substantially all of their assets as marital property, in order to bring them fully within the provisions of the Act. This may be predicated on a desire to

1. Bring property-sharing principles into their marriage for philosophical reasons, both as to assets acquired before the determination date and those subsequently acquired;
2. Provide certainty as to the classification of their property when one of the spouses dies;
3. Equalize their estates for tax-planning reasons;
4. Obtain a full basis adjustment for their marital property assets on the death of the first spouse to die, *see infra* § 9.24;
5. Provide greater access to credit for the spouse with fewer assets;
6. Equalize the assets available to each spouse for testamentary disposition; or
7. Take advantage of a combination of these factors.

In preparing an agreement that classifies all assets as marital property, several possibly adverse consequences should be kept in mind:

1. If one or both of the spouses have (or expect to receive) significant property by way of inheritances or gifts, the reclassification of all such property as marital property may cause it to be included in a property division in the event of the dissolution of the marriage. In

other words, when reclassified by agreement under section 766.31(10), the property may lose its character as a gift from a third party or transfer by reason of the death of another for purposes of the exclusion under section 767.61(2). *See, e.g., Bonnell v. Bonnell*, 117 Wis. 2d 241, 344 N.W.2d 123 (1984).

2. Classification of all property as marital property increases the pool of assets available to creditors for family-purpose obligations incurred by either spouse. *See supra* chs. 5, 6.
3. In making unilateral gifts of property that formerly was individual property or predetermination date property but now is classified as marital property, each spouse is limited to the \$1,000 amount (or a larger reasonable amount) in a given year as provided in section 766.53 if the other spouse does not consent.
4. The spouse who formerly had the larger estate partially gives up the right to dispose of assets by will and may lose some access to credit.
5. If one of the spouses has significantly more property than the other, entering into an agreement classifying most or all of the spouses' existing assets as marital property often will result in an immediate gift from the spouse with more property to the spouse with less property. *See Rev. Rul. 77-359*, 1977-2 C.B. 24. An outright gift of this sort from one spouse to the other ordinarily will cause no adverse federal gift tax consequences because of the availability of the gift tax marital deduction. *See I.R.C. § 2523*. However, if the less-propertied donee spouse is not a United States citizen, the marital deduction is disallowed, and gift amounts in excess of a specified amount will be subject to tax.

b. Drafting Approaches [§ 7.115]

There are several different approaches to preparing an agreement to classify all or most of the spouses' assets as marital property. Each has advantages and disadvantages. The primary methods are the following:

1. Enter into a section 766.588 STMPCA with disclosure. These agreements and their legal consequences are discussed in detail in sections 7.83–.92, *supra*. The STMPCA classifies all presently owned property of the spouses, and all property acquired,

reclassified, or created in the future, as marital property without regard to whether such property otherwise would have been marital property under the provisions of the Act. Although execution of a STMPCA is a relatively simple proposition, the agreement has the twin deficiencies of inflexibility (it is not subject to any variance) and uncertainty (it is unilaterally terminable by either spouse). For a more detailed discussion of the planning limitations of STMPCA's, see section 7.92, *supra*.

2. Create a custom-drafted marital property agreement classifying most or all of the spouses' property as marital property. Custom-drafted agreements have obvious attractions. However, in preparing such an agreement, the drafter must be cognizant of the need to define the desired attributes of "marital property" as that classification is applied to various assets. This results from the fact that Wisconsin does not have a "pure" system of community (i.e., marital) property. The basic rule set forth in section 766.31(3) is that each spouse owns a present undivided one-half interest in each item of marital property. This one-half interest may be disposed of at death. Nonetheless, the exceptions and variations to the general rule commence almost immediately after it is stated. For example, the second clause of section 766.31(3) creates a terminable interest rule for the nonemployee spouse's marital property interest in a deferred employment benefit plan or rollover IRA. *See also* Wis. Stat. § 766.62(5). If the nonemployee spouse dies first, his or her marital property interest simply terminates and cannot be disposed of by will or otherwise. Sections 861.01(3m) and 766.31(7m) contain a comparable rule for recoveries for loss of future income arising from a personal injury when the noninjured spouse dies first. Further, a deceased spouse's marital property rights in a life insurance policy owned by and insuring the surviving spouse may be limited by section 766.61(7). *See supra* § 2.95. With respect to homestead real estate, section 766.605 provides that a homestead acquired after the determination date in both spouses' names is survivorship marital property that passes automatically to the survivor at death if no intent to the contrary is expressed on the instrument of transfer or in a marital property agreement. Finally, the marital property portion of life insurance policies and proceeds and deferred employment benefits is determined in accordance with special time-based apportionment rules contained in sections 766.61 and 766.62, respectively. These special rules and exceptions affect a spouse's right either to dispose of his or her undivided one-half interest at

death or to change the ownership fraction to something other than equal one-half interests. All of these rules are clearly part and parcel of marital property under the Act, but they may not all be desired or desirable in an opt-in marital property agreement.

An agreement defining marital property as a present undivided one-half interest in each asset owned by the spouses would create a relatively simple and universal marital property system. However, it would not be identical to marital property as found in chapter 766. In entering into an agreement to classify all or most of their property as marital property, the spouses may pick and choose among the Act's special rules: they may wish to follow the pure undivided one-half interest rule instead of the special apportionment rules otherwise applicable to each spouse's life insurance policies and deferred employment benefits; they may wish to negate the terminable interest marital property rule that applies under the Act to the nonemployee spouse's interest in a deferred-employment-benefit plan; they may wish to negate the survivorship feature that otherwise applies to their marital property personal residence; or they may wish to allow an insurance policy on the surviving spouse's life to be treated as "regular" marital property, rather than as subject to the frozen interest rule of section 766.61(7), to permit the deceased spouse's interest to pass by will to others.

To summarize, the drafter should ascertain which—if any—of the special rules of chapter 766 the spouses wish to apply to the marital property regime they are creating by contract. The spouses can spell out their intent either in the agreement's definition of marital property or in specific provisions addressing each special rule. Arguably, a bare reference to classifying assets "as marital property" or "as marital property under chapter 766 of the Wisconsin Statutes" creates ambiguities as to whether all, some, or none of the special rules are to be applied, although section 766.58(7) makes it clear that the terminable interest rule of section 766.62(5) and the frozen interest rule of section 766.61(7) will apply unless specifically negated. A number of drafting options are set forth in the sample marital property agreement to classify all or most of the spouses' assets as marital property. *See infra* § 7.151.

4. Limited Marital Property Agreements with Respect to Specific Assets or Liabilities [§ 7.116]

A review of the comments to UMPA sections 3 and 10 reveals that limited marital property agreements are contemplated by the Act. The UMPA section 10 comment presupposes that a marital property agreement usually will be a postmarital agreement and that “the approach in this Act [UMPA] toward marital property agreements is that there may, and usually will, be many of them made at numerous times during a marriage.” A limited marital property agreement is one executed by the spouses (or by persons intending to marry) for limited purposes such as determining the ownership rights to certain defined assets, establishing responsibility for certain defined liabilities, or dealing with other selected economic issues in their marriage.

Amendments to section 766.58(6) by the 1985 Trailer Bill support the view that more relaxed financial-disclosure standards may be applied to limited marital property agreements under the Act. Section 766.58(6)(c) originally required “fair and reasonable disclosure” as a condition of enforceability. The 1985 Trailer Bill substituted the more lenient standard of “fair and reasonable disclosure, *under the circumstances*” (emphasis added). This change suggests that when relatively small property rights or economic incidents are involved, the courts may determine that no disclosure is necessary. *See* Wis. Stat. Ann. § 766.58 Legis. Council Notes—1985 Act 37, §§ 112–121 (West 2009).

The state of Washington has held that “property status agreements,” much like Wisconsin’s limited marital property agreements, are enforceable in a divorce proceeding, even though originally prepared for estate planning purposes. *See Hadley v. Hadley*, 565 P.2d 790, 793 (Wash. 1977). It is not clear whether this approach will be followed in Wisconsin. In *Levy v. Levy*, 130 Wis. 2d 523, 388 N.W.2d 170 (1986), the Wisconsin Supreme Court held that a comprehensive pre-Act marriage agreement, which by its terms was to apply in the event of death but was silent on the question of divorce, could not be relied on by the circuit court under section 767.255(11) (now section 767.61(3)(L)) in arriving at a divorce property division. The better drafting practice is to carefully spell out the intended applicability of a limited marital property agreement, rather than to leave the issue to the vicissitudes of judicial determination.

Chapter 10, *infra*, discusses the issues involved in using limited marital property agreements to reclassify (1) a nongrantor spouse's interest in property used to pay premiums on life insurance policies held by an irrevocable life insurance trust to which employment-related or other life insurance policies have been assigned, or (2) the ownership interest or proceeds of the policies themselves without regard to the classification of the property used to pay the premiums.

A sample limited marital property agreement is set forth in section 7.157, *infra*.

5. Marital Property Agreements Permitting Reclassification by Unilateral Action of One Spouse [§ 7.117]

Marital property agreements that permit either spouse, acting alone, to cause a change in classification of property may be a useful estate planning device. For example, such an agreement might provide that the spouses' property is individual property based on a classification mechanism spelled out in the agreement, but that either spouse may by written notice to the other cause future property acquisitions to be classified as they otherwise would be under the Act; property acquired before notice of the change was received would remain classified under the agreement's terms in much the same fashion as under the statutory terminable property classification agreements in sections 766.588 and 766.589. Alternatively, the agreement might allow the notice to operate retroactively, in effect causing any property classifications under the agreement to fall away completely, thereby reclassifying all property as if there had been no agreement. In addition, after the death of one of the spouses, either type of agreement might (1) grant the survivor a limited time in which to change property classifications to those the property would have had under the Act, or (2) provide the survivor with certain elective rights against the deceased spouse's estate similar to those he or she would have had under the Act.

Agreements permitting unilateral reclassification of property are attractive to drafters, particularly in the case of stable marriages in which there is a considerable disparity in the spouses' relative wealth or earnings potential but neither spouse is likely to exercise the right to change classifications. Such agreements may permit a single attorney to

represent both spouses with less risk of running afoul of the ethical concerns discussed in chapter 14, *infra*. Incorporating provisions for unilateral reclassification may also eliminate the need for detailed financial disclosures and avoid a confrontational atmosphere in developing a marital property agreement that permits the spouses' existing estate planning objectives to remain intact.

It is beyond the scope of this discussion to suggest the exact form or content of such agreements. Drafters should, however, be aware of several practical considerations. First, the drafter must overcome the section 766.58(4) requirement that a marital property agreement can be amended or revoked only by a later marital property agreement—which requires execution by both spouses. Wis. Stat. § 766.58(1), (4); *see supra* § 7.23. This obstacle could be overcome by structuring the agreement so that the unilateral action of one spouse constitutes an action pursuant to and in effectuation of the agreement, rather than an amendment or revocation. Basically, the spouses would agree that either of them, acting alone, could take certain actions. That would be the essence of the agreement itself. The Act grants spouses great contractual freedom to vary its provisions. Wis. Stat. § 766.17. It should even be possible for the spouses to contractually agree that either of them may take actions tantamount to amendment or revocation because subsections 766.58(1) and (4) are not among the designated statutory provisions that cannot be varied by a marital property agreement. *See supra* §§ 7.7–.14, .22–.24.

The drafter of an agreement permitting one spouse to unilaterally change property classifications must also be careful that the agreement has sufficient substance so that it is not subject to attack as being illusory. *See* 1 Farnsworth, *supra* § 7.50, § 2.13; *see also* Restatement (Second) of Contracts § 77 cmt. a, § 2 cmt. e (1981). This objective might be accomplished by including provisions at variance with the Act that are sufficient to provide substance. In this regard, it is important to remember that the Act specifically states that marital property agreements do not require consideration to be enforceable. Wis. Stat. § 766.58(1); *see supra* § 7.20.

Finally, careful consideration should be given to the practical and theoretical problems associated with the retroactive reclassification of property by the action of one spouse. What are the tax consequences, if any, of the right of one spouse to unilaterally classify or reclassify property? What effect will such agreements have on obligations to

creditors who have actual knowledge of the agreement or are provided with a copy? Notwithstanding these uncertainties, it can be expected that creative planners will find uses for agreements that permit the unilateral actions of one spouse to affect the classification of property.

A sample of a marital property agreement permitting reclassification by the unilateral action of one spouse is set forth in section 7.160, *infra*.

6. Desirability of Retitling Assets Reclassified by Marital Property Agreement [§ 7.118]

One consideration ancillary to the preparation of a marital property agreement is whether it is necessary or desirable to execute new documents of title for assets reclassified by the agreement. Section 766.31(10), which specifically permits the spouses to reclassify their property by marital property agreement, seems clear authority for the proposition that the agreement alone suffices to determine the ownership of assets.

A marital property agreement may also provide for survivorship, either as a right of management and control under section 766.58(3)(b) or as a right to dispose of any property of either or both of the spouses upon death under section 766.58(3)(c). The survivorship feature in a marital property agreement should similarly control at the death of one of the spouses even though documents of title to assets held by either or both of the spouses are not changed.

If a marital property agreement reclassifies assets, or adds a survivorship feature to certain assets, execution of new documents of title may be a matter of convenience, particularly when the title is a matter of public record and there is reason to have the public record reflect the realities of ownership or the form of holding. Retitling assets also may simplify the personal representative's task following the death of one of the spouses.

Joint bank accounts under chapter 705 and joint brokerage account agreements present some difficult problems. *See infra* ch. 10. Even though a marital property agreement classifies the assets held in such accounts as marital property without a right of survivorship, it is likely that survivorship provisions in the account agreement will effectively control disposition of the assets in the account at death as between the

financial institution or brokerage and the person designated as survivor. In the case of joint bank accounts, the result is governed by section 705.04(1), which states that sums remaining on deposit at the death of a party to a joint account belong to the survivor as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. Normally there will be no such evidence available for joint accounts already in existence at the time the marital property agreement is executed, but the agreement itself may constitute such evidence for joint accounts created after the execution of the agreement.

In the case of joint brokerage accounts, the survivorship feature is a matter of contract and may be regarded as a nonprobate transfer on death under sections 705.10 or 705.21–.31, with the survivorship feature given priority over any conflicting treatment in a marital property agreement. In any event, the treatment and disposition of joint bank accounts and joint brokerage accounts should be specifically addressed in the spouses' marital property agreement. *See, e.g.*, part A. of Article I of the marital property agreement form at section 7.151, *infra*. If it is inconsistent with the purposes of their marital property agreement (or would create undesired results under their estate plan), the spouses should be counseled to change existing accounts into a form of co-ownership without survivorship and to avoid establishing financial institution or brokerage accounts with a survivorship feature in the future.

IV. Marriage Agreements Not Governed by the Act **[§ 7.119]**

A. In General [§ 7.120]

Marriage agreements not governed by the Act fall into three major categories:

1. Marriage agreements executed before the Act's adoption on April 4, 1984;
2. Marriage agreements executed between the Act's adoption on April 4, 1984, and the Act's effective date of January 1, 1986, that the spouses did not intend to treat as anticipatory marital property agreements, *see supra* § 7.26; and

3. Marriage agreements executed by nonresidents either before or after the Act's effective date on January 1, 1986, but before the spouses' determination date occurs through establishment of their domicile in Wisconsin.

➤ **Note.** Attorneys often refer to marriage agreements in each of these three categories as “predetermination date marriage agreements.” Under the Act, the determination date is the last to occur of the following: (1) marriage; (2) the date both spouses are domiciled in Wisconsin; or (3) January 1, 1986. Wis. Stat. § 766.01(5). Thus, the universe of predetermination date marriage agreements is a broad one, encompassing not only these three types of agreements, but also marital property agreements executed by persons intending to marry, *see supra* § 7.25, and anticipatory marital property agreements executed by spouses or unmarried persons who subsequently marry each other, *see supra* § 7.26. In other words, the term predetermination date marriage agreement can refer to certain types of marital property agreements under the Act as well as to certain types of marriage agreements not governed by the Act. Because the discussion in sections 7.121–147, *infra*, pertains exclusively to marriage agreements not governed by the Act, the term predetermination date marriage agreement is not used to refer to these agreements.

Marriage agreements in the first two categories above are hereinafter referred to as “pre-Act marriage agreements”; they are discussed in sections 7.121–146, *infra*. Marriage agreements in the third category are discussed in section 7.147, *infra*, and should be distinguished from anticipatory marital property agreements executed by nonresident spouses or spouses-to-be before establishing their domicile in Wisconsin, *see supra* § 7.26.

B. Saving Provisions Under the Act [§ 7.121]

The Act contains several saving provisions designed to avoid the impairment of marriage agreements entered into before the determination date and not intended to be governed by the Act. The first is found in section 766.58(12)(a), which provides that chapter 766 does not affect any provision in a “document” that (1) is signed before the determination date by spouses or by unmarried persons who subsequently marry each other, (2) affects the property of either of them, and (3) is enforceable by

either of them without reference to chapter 766, unless the spouses provide otherwise in a marital property agreement made after the determination date. The term *document* is broad and is clearly intended to cover marriage agreements as well as other types of contracts between the spouses. Section 766.58(12)(a) is based on UMPA section 10(j). The comment to UMPA section 10 indicates that this provision is designed to avoid retroactivity and the resulting impairment of contractual obligations: “Thus a predetermination date agreement dealing with subject matter such as that in [UMPA] will simply continue to stand on such authority as it had without [UMPA], and [UMPA] neither helps nor hinders that agreement.” UMPA § 10 cmt.

The second saving provision, section 766.58(12)(b), builds on the first. It was added by the 1985 Trailer Bill for the specific purpose of recognizing the enforceability after the determination date of provisions in marriage agreements executed before the determination date, which provisions are intended to negate, apply, or modify any right or obligation that might accrue under the Act or under any other community property system. Section 766.58(12)(b) indicates that the provision (or amendment to a provision) is enforceable after the determination date if the document of which it is part was otherwise enforceable when executed.

The statute provides a choice of enforceability standards for marriage agreements (or amendments to such agreements) executed after April 4, 1984 (the date 1983 Wisconsin Act 186 was signed by the governor), and before the determination date. The party seeking to enforce the provision (or amendment) is entitled to enforcement if the underlying document either (1) met the legal standards for enforceability applicable when it was executed or (2) would have met the enforceability standards applicable under section 766.58 had it been executed after the determination date. *See* Wis. Stat. Ann. § 766.58 Legis. Council Comm. Supplemental Notes Relating to 1985 Act 37 (West 2009). Thus, the standards of the Act can be used to judge the enforceability of some marriage agreements (or amendments to agreements) entered into after the Act was signed into law but before the spouses’ determination date. This provision also appears to apply to marriage agreements executed by nonresident spouses before they become domiciled in Wisconsin. *See infra* § 7.147. Adopting a dual test for enforceability permits the party seeking enforcement to satisfy whichever standard of enforceability is easier.

During the years when the legislature was debating adoption of a system of marital property based on community property, couples were entering into marriage agreements designed to negate or modify the applicability of community property generally or of marital property based on community property concepts in particular. The section 766.58(12)(b) saving provision probably was included in the 1985 Trailer Bill in recognition of this fact. Pursuant to section 766.58(12)(b), provisions of that type are enforceable if the agreement of which they are part is also enforceable.

A final provision, section 766.58(12)(c), states that the saving provisions of section 766.58(12) do not affect anticipatory marital property agreements executed under section 766.585, *see supra* § 7.26.

To summarize, section 766.58(12) provides that a marriage agreement entered into before the determination date by spouses or unmarried persons who subsequently married each other, and not modified after the determination date by a marital property agreement governed by chapter 766, continues to be judged under pre-Act common law and statutory standards. Further, any provision or amendment to a provision in such a marriage agreement, which provision or amendment is intended to negate, apply, or modify rights or obligations acquired under the Act or under a community property system, continues to be enforceable after the determination date; enforceability is contingent, however, on whether the provision or amendment either was enforceable when the agreement was executed or would be enforceable under the Act. Because of these saving provisions, an understanding of the requirements of prior law is necessary in assessing the enforceability of such agreements under the Act.

C. Requirements for Pre-Act Marriage Agreements Intended to Be Enforceable at Death [§ 7.122]

1. In General [§ 7.123]

Wisconsin has a relatively well-developed body of pre-Act law dealing with premarital and postmarital agreements. A valid marriage agreement enforceable at the death of one of the spouses under pre-Act law must meet all the following substantive and procedural requirements:

1. It must be in writing and signed by the party sought to be bound.
2. It must either make reasonable provision for a party who is giving up substantial rights or, alternatively, involve full and fair disclosure by both parties.
3. It must provide sufficient consideration to support the agreement, which requirement will usually be satisfied if one of the alternative conditions in item 2, above, is met.
4. It must be free from any taint of overreaching or fraud.

It should be noted that the first requirement is based on either section 241.02 (1983–84) or section 861.07(1) (1983–84); the second, third, and fourth requirements derive from court decisions involving the enforceability of marriage agreements at death.

No reported Wisconsin decision has been found in which a premarital or postmarital marriage agreement was held invalid under pre-Act law following the death of one of the spouses. In fact, the supreme court repeatedly stated that it regarded such agreements with favor. *See Koeffler v. Koeffler*, 215 Wis. 115, 123, 254 N.W. 363 (1934); *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 373, 150 N.W. 516 (1915); *Oesau v. Estate of Oesau*, 157 Wis. 255, 259, 147 N.W. 62 (1914).

If the agreement is also to be enforceable as a property settlement agreement in the event of the parties' divorce, it must be in writing and must be equitable as to both parties. These latter requirements are statutory. *See* Wis. Stat. § 767.61(3)(L); *see also infra* §§ 7.133–140.

2. Statute of Frauds [§ 7.124]

A marriage agreement that is to be enforceable at death under pre-Act law must be in writing. Section 241.02(1) is the Wisconsin counterpart of the original English statute of frauds. The statute provides that certain agreements are void (not merely voidable or unenforceable) unless the agreement, or some note or memorandum expressing the consideration, is reduced to writing and signed by the party to be charged. Under section 241.02(1)(c), agreements made upon consideration of marriage, except mutual promises to marry, are subject to the statute's provisions.

The Act made section 241.02(1) inapplicable to marital property agreements complying with chapter 766. *See* Wis. Stat. § 241.02(2). The net effect of the statutory change is to substitute the section 766.58(1) requirements governing marital property agreements for the requirements of section 241.02(1)(c). *See supra* §§ 7.17–.21. The section 766.58(1) requirements apply to all marital property agreements entered into after the determination date, to marital property agreements executed before marriage, *see supra* § 7.25, and to anticipatory marital property agreements under section 766.585, *see supra* § 7.26. They also may apply to marriage agreements entered into between the enactment of the Act and the determination date. *See supra* § 7.121.

In addition to the general statute of frauds contained in section 241.02(1)(c), the statutes formerly provided that the surviving spouse's right to elect against the decedent's will could be barred by the terms of a written agreement signed by both spouses. *See* Wis. Stat. § 861.07(1) (1983–84). Such an agreement might be entered into before or after marriage. This provision was repealed as of the Act's effective date (January 1, 1986), along with the other statutory provisions relating to spousal elective rights. However, for pre-Act marriage agreements, former section 861.07(1) effectively requires that marriage agreements intended to apply at death be reduced to a signed writing.

3. Doctrine of Partial or Full Performance [§ 7.125]

Assuming that a pre-Act marriage agreement is not reduced to writing, does the equitable doctrine of partial or full performance operate to take it out of the statute of frauds? The doctrine of partial or full performance evolved to cover situations in which an oral contract subject to the statute of frauds was partially or wholly performed. The policy behind the doctrine is to avoid an injustice by enforcing a contract when the parties' conduct evidences substantial reliance on the contract's existence. One Wisconsin decision, *Rowell v. Barber*, 142 Wis. 304, 125 N.W. 937 (1910), has considered this question. Although the Wisconsin Supreme Court referred to the well-recognized doctrine that a contract void under the statute of frauds is enforceable if fully executed, it held that no full performance of the agreement was at issue. The oral premarital agreement, being void by the statute's express provision, was not made valid by the subsequent execution of a postmarital agreement incorporating its terms. (This part of the holding can be best understood in light of the then prevailing judicial attitude that postmarital

agreements were invalid either as a matter of public policy or for want of consideration.) In addition, the court held that neither the act of marriage nor the husband's furnishing of support and maintenance was sufficient part performance to take the agreement out of the statute of frauds. Further, the court noted that no property was transferred during the spouses' lifetime pursuant to the agreement. *Id.* at 316–17.

This holding is generally consistent with the majority view on what constitutes sufficient performance to render an oral premarital agreement enforceable. See R.D. Hursh, Annotation, *What Constitutes Past Performance Sufficient to Take Agreement in Consideration of Marriage out of Statute of Frauds*, 30 A.L.R.2d 1419 (1953). The test is stringently applied and is ordinarily reserved for situations in which the conduct of the spouse seeking to establish the marriage agreement cannot be explained in the absence of the existence of a contract. See *Rossiter v. Rossiter*, 666 P.2d 617 (Haw. Ct. App. 1983). In practice, the test may be virtually impossible to meet. See 2 Lindey & Parley, *supra* § 7.21, § 110.64[2]. For a more contemporary treatment of this issue, see *Hall v. Hall*, 271 Cal. Rptr. 773 (Ct. App. 1990) (finding oral agreement enforceable), discussed *supra* § 7.27.

4. Reasonable Provision for Spouse Versus Adequate Disclosure [§ 7.126]

The Wisconsin Supreme Court historically employed a two-pronged test in examining pre-Act premarital and postmarital property settlement agreements intended to be enforceable at death. Either reasonable provision must have been made for a spouse who surrendered significant rights or the spouses must have fully and fairly disclosed their net worths to each other. See *Madison Bank & Trust v. Beat (In re Estate of Beat)*, 25 Wis. 2d 315, 321, 130 N.W.2d 739 (1964); *Knippel v. Marshall & Ilsley Bank (In re Estate of Knippel)*, 7 Wis. 2d 335, 345–46, 96 N.W.2d 514 (1959); *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 383, 150 N.W. 516 (1915).

Although the court has stopped short of requiring full and fair disclosure as an absolute condition for a valid pre-Act marriage agreement enforceable at death, it has noted that such a broad rule might be applicable in situations in which one of the spouses was young or inexperienced. See *Koeffler v. Koeffler*, 215 Wis. 115, 127, 254 N.W. 363 (1934). Moreover, the equitableness test of section 767.61(3)(L),

which applies if the agreement is to be enforceable at dissolution, requires fair and reasonable disclosure. *See Button v. Button*, 131 Wis. 2d 84, 388 N.W.2d 546 (1986); *infra* §§ 7.133–140. Consequently, attorneys drafting comprehensive marriage agreements before the effective date of the Act normally recommended full disclosure of assets and liabilities by both parties, as well as a reasonable provision for the spouse having the significantly smaller estate.

A number of authorities have pointed out that because the purpose of disclosure is to prevent overreaching, whenever a party waiving valuable rights under a marriage agreement has independent knowledge of the general nature of the property and income of his or her spouse or intended spouse, the knowledge serves as a substitute for disclosure. The spouse with independent knowledge cannot later repudiate the agreement even though the provision made is disproportionate to the value of the rights given up. *See* 2 Lindey & Parley, *supra* § 7.21, §§ 110.68[5], 120.56[2]; *see also Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962); *Cox v. West (In re Estate of West)*, 402 P.2d 117 (Kan. 1965); *Hartz v. Hartz*, 234 A.2d 865, 870–71 (Md. 1967); *In re Marriage of Coward*, 582 P.2d 834 (Or. Ct. App. 1978). This concept has found its way into the Act. *See* Wis. Stat. § 766.58(6)(c)2. In the context of pre-Act marriage agreements enforceable at dissolution, the Wisconsin Supreme Court has held that independent knowledge serves as a substitute for disclosure. *Button*, 131 Wis. 2d at 95. However, a general or imputed knowledge will not suffice. *Schumacher v. Schumacher*, 131 Wis. 2d 332, 338, 388 N.W.2d 912 (1986).

Some of the difficulties created by arguably inadequate provisions or a failure to disclose are illustrated by *Estate of Campbell v. Chaney*, 169 Wis. 2d 399, 485 N.W.2d 421 (Ct. App. 1992). In early 1985, the husband's attorneys drafted a premarital agreement. The agreement contained no financial disclosures and was apparently unaccompanied by any disclosure of financial information by the parties. The husband's estate at the time was in the \$6–8 million range, and the premarital agreement provided the wife-to-be with a fixed payment of \$500,000 in the event of the husband's death.

At the suggestion of one of the husband's attorneys, before signing the agreement, the wife-to-be consulted with an independent attorney, who recommended that she not sign it, because (1) it would be inequitable, (2) there was insufficient financial disclosure, and (3) he needed more time to review the agreement. Despite this

recommendation, the wife-to-be signed the agreement before the marriage.

Following the husband's death, the wife challenged the agreement on grounds of duress, undue influence, breach of contract, misrepresentation, inadequate provision, and inadequate financial disclosure. The personal representative of the estate ultimately reached a \$1 million settlement with the wife and then commenced a negligence action against the husband's attorneys. The court held that to establish that the defendant attorneys were negligent, the estate would have to first prove that they breached the standard of professional care in drafting the premarital agreement. If a document is attacked in litigation, but the attorneys were not negligent in preparing it, they cannot be held liable. *Id.* at 409. Secondly, the estate would have to establish causation, i.e., that the attorneys' negligence caused "weakness" in the premarital agreement and that the weakness caused the litigation by and with the widow. *Id.* To recover the difference between the settlement and the payment required to be made to the widow under the premarital agreement, the husband's estate needed to prove that the weakness of the agreement caused its decision to settle, and that no other causal factors were at work. *Id.* at 409–10. In addition, the husband's estate needed to show that the settlement was reasonable and made in good faith. *Id.* at 410.

However, the court went on to say that an attorney's negligence does not strictly depend on whether the premarital agreement can be enforced:

If an attorney drafts a prenuptial agreement without attaching a financial statement, the fact-finder could conclude that the attorney failed to use reasonable care, that is, that the attorney was negligent. It is immaterial that the agreement might later be enforced after a finding that the widow already knew the financial information. The fact-finder could still find that the attorney failed to exercise reasonable care in drafting the agreement. If that failure caused the estate to settle a claim that a proper agreement would have made meritless, then the attorney may be held liable.

Id.

➤ **Comment.** The failure to attach a financial statement to a premarital agreement is not necessarily evidence of negligence. There is no authority that physical attachment of financial disclosures was ever a requirement for enforceability of premarital property

settlement agreements before the effective date of the Act. Clearly physical attachment is not required under the Act. To avoid enforcement, section 766.58(6)(c) requires that the spouse against whom enforcement is sought prove that *before execution* he or she did not receive fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations, and did not have notice (i.e., actual knowledge) of the other spouse's property or financial obligations. *See supra* § 7.48. Thus, the appearance in Wisconsin jurisprudence of a purported requirement of attaching financial statements to pre-Act marriage agreements (as opposed to providing fair and reasonable financial disclosures) is troubling, because it appears to be much narrower than the requirements that had evolved under pre-Act case law or those under the specific provisions of section 766.58(6)(c).

The question of the reasonableness of a provision for a spouse usually arises only if there was a failure to make full disclosure and the affected spouse did not have independent knowledge. *See Knippel*, 7 Wis. 2d at 345–46. Some of the factors cited by Lindey & Parley, *supra* § 7.21, for determining the fairness and reasonableness of a provision are the following:

1. The parties' circumstances when the agreement was made;
2. The parties' ages;
3. The parties' stations in life and standards of living;
4. The parties' assets and income;
5. The parties' vocations and employment;
6. The parties' health;
7. The parties' family relationships (specifically, whether they have any children); and
8. The parties' conduct after the marriage (shedding light on whether the parties understood the terms of the agreement).

2 Lindey & Parley, *supra* § 7.21, § 110.66[1].

It has been held that the reasonableness of a provision for a spouse is to be weighed at the time of the agreement's execution. *See Spector v. Spector*, 531 P.2d 176, 185 (Ariz. Ct. App. 1975); *Del Vecchio*, 143 So. 2d at 19–20; *In re Kaufmann's Estate*, 171 A.2d 48 (Pa. 1961).

In cases involving the termination of the marriage by death, a marriage agreement will not be substantively reviewed at the time of death, even when the circumstances of one of the spouses materially changed for the better, if the agreement was fair and the parties understood its intent at the time of execution. *See Bibelhausen*, 159 Wis. at 372, 378.

5. Adequate Consideration [§ 7.127]

Virtually all adjudicated Wisconsin cases dealing with pre-Act marriage agreements enforceable at death have involved nondisclosure. In addition, many have involved what appeared to be unreasonable provisions for a spouse who gave up significant rights. The absence of independent counsel for the less-propertied spouse has been another common thread. The Wisconsin Supreme Court has therefore often found it necessary to examine the adequacy of the consideration and the overall fairness of the agreement.

The court has not adopted a formal framework for determining the adequacy of consideration in pre-Act marriage agreements, observing that a small amount may be enough if agreed on by the parties. *See Nickolay v. Nickolay's Estate*, 249 Wis. 571, 575, 25 N.W.2d 451 (1946); *Bibelhausen*, 159 Wis. at 376–77. The court has said that manifestly unfair and unreasonable consideration is tantamount to fraud. *Bibelhausen*, 159 Wis. at 383–84. It should be noted that cases like *Estate of Nickolay* and *Bibelhausen* arose at a time when property settlement provisions applicable at divorce were not permitted, and marriage agreements for the most part were confined to property arrangements at death. However, it would be inaccurate to infer from this fact that only property arrangements applicable at death should be looked to in determining the adequacy of consideration. In fact, the provisions of the marriage agreement as a whole must be evaluated.

The test for adequacy of consideration in premarital agreements has differed historically from the test in postmarital agreements. In the former, it has been stated that “marriage itself, under some circumstances

at least, is a sufficient consideration to support the contract.” *Bibelhausen*, 159 Wis. at 383. Cases from other jurisdictions confirm this view. See *Barnhill v. Barnhill*, 386 So. 2d 749, 751 (Ala. Civ. App. 1980); *Eule v. Eule*, 320 N.E.2d 506, 509 (Ill. App. Ct. 1974); *Friedlander v. Friedlander*, 494 P.2d 208, 212 (Wash. 1972) (stating that marriage is consideration of highest value to support premarital agreement). Accordingly, if a premarital agreement recites the mutual promises to marry and the marriage is subsequently performed, there will be valid consideration for the agreement. *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978).

In the postmarital context, the mutual release of rights in each other’s solely owned property has been deemed sufficient consideration to support the agreement. *Beat*, 25 Wis. 2d at 325–26; *Nickolay*, 249 Wis. at 574–75.

Section 861.07(1) (1983–84) permitted a written agreement signed by the spouses to bar the surviving spouse’s right to elect against the decedent’s will. The comment to Wisconsin Statutes Annotated section 861.07(1) (West 1971) indicates that consideration for such an agreement would be necessary “to prevent overreaching by a dominant spouse.” Although this statutory provision was repealed by the Act, it states the applicable rule for pre-Act marriage agreements that seek to bar spousal elective rights.

The foregoing cases support the conclusion that a written premarital agreement, executed before the effective date of the Act and accompanied by full disclosures of net worth by both parties, stands on the sufficiency of the parties’ mutual promises to marry even if no special financial provision is made for either party. A written postmarital agreement, again accompanied by full disclosures, stands on the consideration of the mutual releases of the parties’ rights in each other’s property. In either case, the agreement might still fail if procured by misrepresentation, undue influence, duress, or fraud. Absent those, its validity should be recognized at the time of death of one of the parties. See sections 7.133–.140, *infra*, regarding the considerations that apply if enforcement of the agreement is sought when a marriage dissolves.

6. Fairness [§ 7.128]

Judicial scrutiny of pre-Act marriage agreements that are contested following a spouse's death ordinarily has concluded with an examination for "fairness." At its heart, this is an examination for unconscionability, overreaching, and fraud at the time the agreement was entered into. In Wisconsin, the fairness test has been lumped together with a review of the adequacy of consideration. See *Bibelhausen*, 159 Wis. at 383–84. As discussed in sections 7.41–.46, *supra*, the requirement that a marriage agreement not be unconscionable when made is also very much a part of the enforceability provisions for marital property agreements under the Act.

The *Bibelhausen* case indicated that in applying the fairness test, the circumstances surrounding the execution of the marriage agreement would be reviewed, but if the provisions were fair, the circumstances that existed when one of the parties died would not. *Id.* at 384–86. This is in contrast to the Wisconsin cases dealing with the substantive fairness of an agreement at divorce, discussed in sections 7.135–.140, *infra*. Other courts have also held that changed circumstances at death will not be considered in enforcing a marriage agreement at death. See, e.g., *Martin v. Farber*, 510 A.2d 608, 610 (Md. Ct. Spec. App. 1986); *In re Estate of Youngblood v. Youngblood*, 457 S.W. 2d 750, 756 (Mo. 1970). See also the more detailed treatment of this subject in June Miller Weisberger, *Spousal Property Agreements: An Evolving Concept in Wisconsin and Elsewhere*, 5 Wis. Women's L.J. 43, 61–62 (1990).

Courts in other jurisdictions have held, in reviewing the validity of a premarital agreement, that it is not absolutely necessary for a spouse giving up significant rights to be represented by independent counsel, particularly when that spouse was reasonably knowledgeable and understood the agreement or was aware of his or her right to independent counsel but chose not to obtain counsel. See *Newman v. Newman*, 653 P.2d 728, 733 (Colo. 1982); *Pniewski v. Przybysz*, 183 N.E.2d 437 (Ohio Ct. App. 1962); *McFerron v. Trask*, 472 P.2d 847, 849–50 (Or. Ct. App. 1970); *In re Marriage of Cohn*, 569 P.2d 79 (Wash. Ct. App. 1977); see also *Frey v. Frey*, 471 A.2d 705, 711 (Md. 1984) (emphasizing importance of independent legal advice in evaluating whether agreement was voluntarily and understandingly made); *Braddock v. Braddock*, 542 P.2d 1060, 1062–63 (Nev. 1975) (applying Ohio law to agreement executed there and holding that agreement was not void for lack of independent counsel, provided that it was voluntarily and

understandingly made). *But see Counts v. Benker (In re Estate of Benker)*, 331 N.W.2d 193 (Mich. 1982) (failure to have independent counsel along with failure to discuss or disclose assets vitiated agreement).

In none of the Wisconsin Supreme Court cases involving the enforceability of a pre-Act marriage agreement at death is there any evidence that the person in the inferior bargaining position was independently represented by counsel when the marriage agreement was entered into, nor is there any intimation in those cases that such representation is either a legal requirement or an ethical duty. However, the very fact that the aggrieved spouse in these contested Wisconsin marriage agreement cases was *not* independently represented by counsel should serve as a warning.

In sum, a pre-Act marriage agreement should not be regarded as prima facie unfair merely because a spouse or a person intending to marry agreed that he or she would receive no financial provision, particularly if that person received full and fair disclosure, had adequate time to consider the agreement, and had the advice of independent counsel. With respect to ethical considerations, see chapter 14, *infra*.

7. Construction and Enforceability [§ 7.129]

Marriage agreements are governed by the same rules of construction that apply to other contracts. The basic purpose is to effect the intent of the parties. If an agreement is clear and unambiguous, neither construction nor resort to parol evidence is necessary. *See Luedtke v. Luedtke*, 65 Wis. 2d 387, 392–93, 222 N.W.2d 643 (1974); *First Nat'l Bank v. Harris (In re Estate of Harris)*, 7 Wis. 2d 417, 420–21, 96 N.W.2d 718 (1959); *Oesau v. Estate of Oesau*, 157 Wis. 255, 261–62, 147 N.W. 62 (1914).

The burden of impeaching a pre-Act marriage agreement that is enforceable at death falls on the party asserting the invalidity. *Oesau*, 157 Wis. at 259. A presumption of fraud arises once that party demonstrates that there was neither a full and fair disclosure of the spouses' net worth nor an obviously reasonable and adequate provision for a spouse surrendering significant rights under the terms of the agreement. *See Beat*, 25 Wis. 2d at 321; *Knippel*, 7 Wis. 2d 335 at 345–46. The party defending the agreement's validity then has the burden of

introducing evidence to rebut the presumption. A general discussion of the burden of proof is found in 2 Lindey & Parley, *supra* § 7.21, § 110.71.

8. Modification and Rescission [§ 7.130]

Marriage agreements, like other contracts, may be modified or revoked by the mutual consent of the parties, provided that the intent to do so is clear and proven by a preponderance of the evidence. *See Dalgarn v. Leonard*, 87 N.E.2d 728 (Ohio Prob. Ct. 1948), *aff'd*, 90 N.E.2d 159 (Ohio Ct. App. 1949). No Wisconsin decisions have been found on oral modification or revocation of marriage agreements; presumably, modification or revocation must be accomplished in writing. Oral rescissions are to be avoided. *See, e.g., Masterson v. Masterson*, 139 S.W.2d 30 (Ark. 1940) (holding that alleged oral rescission not accompanied by physical destruction of agreement was ineffective).

9. Conflict of Laws [§ 7.131]

For a discussion of the application of conflict-of-laws principles to marriage agreements, see chapter 13, *infra*.

D. Subject Matter of Pre-Act Marriage Agreements [§ 7.132]

The subject matter of pre-Act marriage agreements intended to be enforceable at death could include the identification, variance, or relinquishment of rights and interests that the spouses or intended spouses would otherwise acquire in each other's property and estates by reason of the marriage. For example, the spouses could release their distributive shares in each other's estates; the wife could bar her dower and the husband his curtesy; or they could surrender their respective rights of election to take against each other's estates. Either of them could transfer money or property or both to the other, either before the marriage or afterward.

Nearly all reported Wisconsin cases dealing with pre-Act property settlement agreements have involved a wife giving up either dower rights or statutory elective rights in lieu of dower. *See Beat*, 25 Wis. 2d 315;

Koeffler v. Koeffler, 215 Wis. 115, 254 N.W. 363 (1934); *Bibelhausen*, 159 Wis. 365. In some cases, both spouses have given up such rights. See *Beat*, 25 Wis. 2d 315; *Nickolay*, 249 Wis. 571; *Oesau*, 157 Wis. 255.

See sections 7.133–140, *infra*, for a discussion of Wisconsin cases involving pre-Act marriage agreements containing provisions intended to be enforceable in the event of dissolution of the marriage.

A pre-Act marriage agreement can apply to property acquired after its execution. See *Cortte v. Tolzman (In re Estate of Cortte)*, 230 Wis. 103, 107, 283 N.W. 336 (1939). A release of all rights that arise by law in a spouse's estate has been held sufficient to bar statutory allowances. See *Deller v. Deller*, 141 Wis. 255, 124 N.W. 278 (1910). By way of contrast, in *Beat*, 25 Wis. 2d at 330–31, the court held that an agreement containing mutual releases of rights to the spouses' property owned "at the time of their marriage" was to be distinguished from one containing a release of the deceased spouse's estate (including subsequently acquired property). While the latter would bar the surviving spouse from claiming a widow's allowance as in *Deller*, the former did not. One must assume that the decedent spouse in *Beat* in fact owned additional, subsequently acquired property at death sufficient to support the allowance.

The Wisconsin Supreme Court has also held that execution of a will making a more generous provision for a spouse than required by the marriage agreement neither bars the spouse from accepting the testamentary provision nor invalidates the agreement. *Jones v. First Nat'l Bank & Trust Co. (In re Will of Paulson)*, 254 Wis. 258, 36 N.W.2d 95 (1949); see also *Greiling v. Genz (In re Will of Greiling)*, 264 Wis. 146, 59 N.W.2d 241 (1953).

Several community property jurisdictions have held that community property interests can be prospectively abrogated or reclassified by marriage agreement. See *Spector v. Spector*, 531 P.2d 176 (Ariz. Ct. App. 1975); *Sarpy v. Sarpy*, 323 So. 2d 851 (La. Ct. App. 1975); *Huff v. Huff*, 554 S.W.2d 841 (Tex. Civ. App. 1977). These holdings are consistent with the broad contractual freedom under section 766.17(1) to vary the Act's property law system. See *supra* § 7.6.

E. Requirements for Pre-Act Marriage Agreements Intended to Be Enforceable at Dissolution of Marriage [§ 7.133]

1. In General [§ 7.134]

Historically, the courts in Wisconsin and elsewhere held that provisions in marriage agreements that tended to limit a spouse's liability with respect to support, maintenance, or property settlement arrangements in the event of separation or divorce were void as being contrary to public policy. See *Kunde v. Kunde*, 52 Wis. 2d 559, 191 N.W.2d 41 (1971); *Caldwell v. Caldwell*, 5 Wis. 2d 146, 92 N.W.2d 356 (1958); *Fricke v. Fricke*, 257 Wis. 124, 42 N.W.2d 500 (1950). The basic rationale of these cases seems to have been that such agreements contributed to separation or divorce or represented an intrusion on the state's interest in seeing that divorced spouses are provided with sufficient support to avoid becoming wards of the state.

Commencing with the landmark decision in *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970), *appeal after remand*, 257 So. 2d 530 (Fla. 1972), a more modern approach to the issue began to emerge through case law and legislation. This approach is to consider on a case-by-case basis the provisions in a marriage agreement relating to support, maintenance, and property settlement in the event of separation or divorce and to uphold them if the provisions are fair and reasonable. See *Dawley v. Dawley*, 551 P.2d 323 (Cal. 1976); *Valid v. Valid*, 286 N.E.2d 42 (Ill. App. Ct. 1972); *Freeman v. Freeman*, 565 P.2d 365 (Okla. 1977); *Unander v. Unander*, 506 P.2d 719 (Or. 1973).

Wisconsin adopted this approach by statute, accomplishing the change as part of the 1977 Divorce Reform Act, 1977 Wis. Laws ch. 105. Section 767.61(3)(L) (formerly section 767.255(3)(L) and 767.255(11)) states that any written agreement made by the spouses before or during marriage concerning any arrangement for property distribution will have a binding effect on the court in a divorce property division unless the agreement's terms are found to be inequitable as to either party. The court is to presume that an agreement is equitable as to both parties. The statute does not define *inequitable* or *equitable*.

In addition, section 767.56(8) states that agreements made before or during marriage concerning any arrangement for financial support are

entitled to consideration by the court in awarding maintenance to a spouse. In contrast to provisions relating to property division, provisions for financial support are not binding on the court.

Because the Wisconsin Marital Property Act did not change these provisions of chapter 767, both pre-Act marriage agreements (discussed generally in section 7.120, *supra*) and marital property agreements under the Act that purport to govern property divisions in the event of dissolution of the marriage will be reviewed for equitableness by the court at the time the marriage is terminated by divorce, legal separation, or annulment.

2. Test for Equitableness Under Button [§ 7.135]

a. In General [§ 7.136]

In *Button*, 131 Wis. 2d 84, the Wisconsin Supreme Court laid down specific standards for determining equitableness in pre-Act marriage agreements that are to be enforceable in the event of dissolution. The test established in *Button* does not relate precisely to either (1) the Wisconsin common-law standards adopted for pre-Act marriage agreements intended to be enforceable at death or (2) the statutory enforceability standards established for marital property agreements under the Act by section 766.58(6). Under *Button*, an agreement is inequitable under section 767.61(3)(L) (formerly subsections 767.255(3)(L) and (11)) if it fails to satisfy any one of the following three requirements:

1. Each spouse must make fair and reasonable disclosure to the other of his or her financial status.
2. Each spouse must enter into the agreement voluntarily and freely.
3. The substantive terms of the agreement dividing the property upon divorce must be fair to each spouse.

Id. at 89. The first two requirements, collectively referred to as *fairness in procurement*, are assessed at the time of the execution of the agreement. The third requirement, namely, the *substantive fairness* of the agreement, is assessed as of the execution of the agreement and, if

circumstances change significantly after execution of the agreement, also at the time of divorce. *Id.*

The court in *Button* began its discussion of the meaning of equitableness under the precursor to section 767.61(3)(L) by recognizing that the statute reflects two competing public-policy concerns. The first is freedom of contract. The legislature has recognized that premarital and postmarital agreements dividing property permit spouses or persons about to marry to “structure their financial affairs to suit their needs and values and to achieve certainty.” *Id.* at 94. The court pointed out that certainty encourages marriages and also is conducive to marital tranquility by protecting the parties’ financial expectations. The court then turned to the countervailing policy objective inherent in the statute: namely, the state’s interest in the legal status of marriage. A major component of that interest is the protection of both spouses’ financial interests in the event of dissolution. The circuit court in a divorce action must therefore carefully scrutinize an agreement between the spouses that deals with their financial affairs at dissolution.

b. Fairness in Procurement [§ 7.137]

In connection with fairness in procurement, the court in *Button* stated that “[t]he public interest requires that a financial agreement between spouses or prospective spouses be executed under conditions of candor and fairness.” *Id.* at 95. Fair and reasonable disclosure of financial status is a significant aspect of this obligation and requires each party to disclose his or her assets, liabilities, and debts. The court specifically noted that independent knowledge of the other spouse’s financial status serves as a substitute for disclosure. *Id.*

In *Schumacher v. Schumacher*, 131 Wis. 2d 332, 388 N.W.2d 912 (1986), the Wisconsin Supreme Court applied the standards enunciated in *Button* to test the validity of a premarital agreement to control property division in a divorce action. The court held as a matter of law that the agreement was inequitable under section 767.255(11) (now section 767.61(3)(L)) because the parties did not fairly and reasonably disclose their assets to each other and did not have independent knowledge of each other’s financial status. It appeared that at the time of execution of their premarital agreement, the spouses did not exchange lists of their assets and liabilities, and that neither of them had a complete picture of the other’s financial condition. *Id.* at 340. In examining whether

sufficient independent knowledge existed to constitute a substitute for a fair and reasonable disclosure, the court observed that independent knowledge is not a general or imputed knowledge of the other party's assets and their value. At the same time, the requirement for fair and reasonable disclosure or independent knowledge is not so technical that de minimis failures to disclose will invalidate an agreement. *Id.* at 338. The court left open the question whether the parties to a pre-Act marriage agreement might waive disclosure without vitiating the agreement. *Id.*

Fairness in procurement also rests on a second key condition in addition to fair and reasonable disclosure, namely, that the agreement must be entered into voluntarily and freely. The relevant inquiry here is whether or not each spouse had “a meaningful choice.” The *Button* court cited four factors that a circuit court should consider in determining whether a party had a meaningful choice in executing a marriage agreement: “whether each party was represented by independent counsel, whether each party had adequate time to review the agreement, whether the parties understood the terms of the agreement and their effect, and whether the parties understood their financial rights in the absence of an agreement.” *Button*, 131 Wis. 2d at 95–96.

c. Substantive Fairness [§ 7.138]

The *Button* court noted that the requirement of substantive fairness is an amorphous concept and one that must be determined on a case-by-case basis. The supreme court directed circuit courts to be mindful of the two principal legislative concerns reflected in the precursor to section 767.61(3)(L), namely, the parties' freedom to contract and the state's interest in protecting the parties' financial interests at dissolution. The court specifically noted that to meet the requirement of substantive fairness, the property arrangements in an agreement need not be equal between the parties or approximate the property division a circuit court might make under section 767.61 because to establish such a test would destroy the parties' meaningful right to contract. On the other hand, the agreement should “in some manner appropriate to circumstances of the parties take into account that each spouse contributes to the prosperity of the marriage by his or her efforts.” *Id.* at 96–97.

The court then discussed the then existing and reasonably foreseeable circumstances that the parties should consider in framing the agreement:

The parties should consider that the duration of the marriage is unknown and that they wish the agreement to govern their financial arrangements whether the marriage lasts a short time or for many years. The parties should consider such factors as the objectives of the parties in executing an agreement, the economic circumstances of the parties, the property brought to the marriage by each party, each spouse's family relationships and obligations to persons other than to the spouse, the earning capacity of each person, the anticipated contribution by one party to the education, training or increased earning power of the other, the future needs of the respective spouses, the age and physical and emotional health of the parties, and the expected contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

Id. at 97. The court did not discuss what would constitute adequate proof that the spouses had reflected on these matters in framing an agreement, thus emphasizing the importance of including appropriate factual recitations in the agreement's text.

The court concluded that a circuit court should look at the question of substantive fairness at the time the agreement was made to give effect to the parties' freedom to contract, noting that the parties at that time know their property and other relevant circumstances, are able to make reasonable predictions about the future, and should be able to draft a fair agreement if they take all the enumerated factors into account. *Id.* at 97–98. However, the court imposed a very significant qualification on the substantive fairness requirement. If there are significantly changed circumstances after the execution of an agreement that were not reasonably foreseeable when it was drafted, the circuit court should assess substantive fairness at the time of divorce as well as at the time of execution. This is done to determine whether, as a result of the significantly changed circumstances, “the agreement as applied at divorce no longer comports with the reasonable expectations of the parties.” *Id.* at 98–99.

➤ **Note.** Significantly changed circumstances may also be an element of the common-law defense of impracticability of performance, discussed in section 7.60, *supra*. This common-law defense appears to be available when enforcement of a marital property agreement is sought under section 766.58(6).

Finally, the court in *Button* noted that a determination of inequity under section 767.255(11) (now section 767.61(3)(L)) requires the circuit court to exercise its discretion:

A discretionary determination must be made on the basis of the facts and the applicable law. A discretionary determination must be the product of a rational mental process by which the facts of record and the law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination.

Id. at 99.

3. Tension Between Enforceability Standards Under Chapters 766 and 767 [§ 7.139]

The Wisconsin Supreme Court's opinion in *Button* did not acknowledge the existence of the statutory standard for enforceability of marital property agreements in chapter 766, although the test for equity that it devised contains several of the same elements. Section 766.58(6) requires that the agreement be voluntarily entered into, that it be conscionable when made, and that it be accompanied by either fair and reasonable disclosure under the circumstances or notice of the other spouse's financial circumstances. The major difference between the two standards is the presence of the "significantly changed circumstances" qualification in the test for substantive fairness under the *Button* court's interpretation of the statute now found at section 767.61(3)(L). This qualification is not part of the statutory requirements for enforceability under section 766.58(6) and leads to tension between the two statutes. However, the failure to adopt this amendment may be viewed as expressing the legislature's intent not to disturb the equitable powers of the divorce court as much as its intent to apply differing standards for enforceability at death and at divorce. Clearly, the Wisconsin Supreme Court may construe "equity" for purposes of section 767.61(3)(L) to embody the precise elements of the statutory test for enforceability of marital property agreements in section 766.58(6) if it determines that this would be appropriate.

The "significantly changed circumstances" qualification seems unnecessary in applying section 766.61(3)(L) to marital property agreements entered into pursuant to the Act. If enforcement of a property-division provision in a marital property agreement that is valid

and enforceable when made would leave a spouse in a needy condition, the circuit court clearly has the power to avoid injustice by awarding maintenance. *See* Wis. Stat. § 767.56. This is true despite any provision in the agreement to the contrary, since such provisions are merely entitled to consideration by the court. *See* Wis. Stat. § 767.56(8).

There is some support for the proposition that the legislature intended that a different standard for enforceability of marital property agreements prevail at dissolution of the marriage than prevails during the marriage or at death. During the debate and floor action in the Assembly on Senate Substitute Amendment 1 to the 1983 Assembly Bill 200 (the bill that became 1983 Wisconsin Act 186), an amendment was offered that would have changed the language of section 767.255(11) (now section 767.61(3)(L)) to provide that a valid marital property agreement under chapter 766 was unconditionally binding on the divorce court, whereas other written agreements concerning any arrangements for property distribution were binding on the court only if the agreement's terms were equitable as to both parties. This amendment, Assembly Amendment 6 to Senate Substitute Amendment 1 to 1983 Assembly Bill 200, was tabled by the Assembly by a vote of 53 to 44, after the Assembly refused to reject it.

4. Post-Button Decisions on Enforceability of Pre-Act Marriage Agreements at Dissolution [§ 7.140]

In the wake of *Button*, the Wisconsin courts have had occasion to consider the reasonable foreseeability of a subsequent significant change in circumstances as they consider the enforcement of marriage agreements at divorce. In *Warren v. Warren*, 147 Wis. 2d 704, 433 N.W.2d 295 (Ct. App. 1988), the Wisconsin Court of Appeals applied the principles enunciated in *Button* to uphold a premarital agreement when it was shown that an event not specifically covered by the agreement's terms, namely, the early retirement of one of the spouses, had been discussed during the negotiations. With reference to the foreseeability test, the court stated

The idea behind the test is that both spouses have a right to rely upon the prenuptial agreement when all subsequent events transpire as logically anticipated.

The premarital agreement is, after all, a contract with all of its attendant risks and risk bearing. Risk may be defined as uncertainty in regard to cost, loss, or damage. A. Kronman & R. Posner, *The Economics of Contract Law* 26 (1979). A person signing a premarital agreement undertakes all the normal anticipated risks that the agreement may not prove to be a wise one. Only when a future event can be said to have been too uncertain can it be said that the risk assumed is out of proportion to the loss incurred.

Id. at 710–11. Because the parties to the agreement in *Warren* not only foresaw the eventuality that one of the parties would take early retirement but also discussed it when the agreement was being negotiated, the spouse's early retirement was not viewed as an unforeseen changed circumstance that would justify disregarding the agreement.

The Wisconsin Court of Appeals has also been faced with the question whether the virtual abandonment of a postmarital agreement by the spouses constituted a significantly changed circumstance that warranted disregarding the agreement at divorce. In *Brandt v. Brandt*, 145 Wis. 2d 394, 427 N.W.2d 126 (Ct. App. 1988), the court answered in the affirmative, holding that the parties' disregard of a postmarital agreement would render its enforcement unfair at the parties' divorce. The agreement, entered into shortly after the spouses' marriage in 1952, provided that each spouse would maintain his or her separate estate. The agreement appears to have been executed to preserve the wife's expected inheritance from her family. The parties never discussed the marriage agreement during their estate planning or investment planning activities over the years, and the wife never attempted to maintain her inherited assets in such a way that they could be sufficiently identified and valued. On the contrary, the parties extensively commingled their assets over a long period to such an extent that it was impossible to trace the inherited property. The *Brandt* case establishes an important proposition with regard to the enforcement of marriage agreements at the time of dissolution: if the parties effectively disregard and abandon an agreement by their conduct, the abandonment will be viewed by the court as tantamount to a written waiver or revocation. *See also Krejci v. Krejci*, 2003 WI App 160, 266 Wis. 2d 284, 667 N.W.2d 780 (holding, on similar facts, that because of commingling of assets and consequent disregard of a premarital agreement it would be inequitable to enforce agreement at divorce).

In *Greenwald v. Greenwald*, 154 Wis. 2d 767, 454 N.W.2d 34 (Ct. App. 1990), both the procedural and the substantive fairness of a premarital agreement were challenged. *Greenwald* stands for the propositions that (1) a party's actual knowledge of the other party's financial condition is a satisfactory substitute for the procedural requirement of fair and reasonable disclosure of financial status, and (2) by itself, the fact of the parties' unequal bargaining position does not affect either the procedural requirement of voluntariness or the substantive requirement that the agreement be fair at the time of its execution. In addition, the *Greenwald* court held that the absence of separate counsel did not vitiate the spouses' premarital agreement.

Issues of procedural and substantive fairness in a premarital agreement were raised again in *Gardner v. Gardner*, 190 Wis. 2d 216, 527 N.W.2d 701 (Ct. App. 1994). The wife in a divorce action contended that the premarital agreement was procedurally unfair because the husband had failed to fairly disclose the actual value of his major asset, stock in a closely held business. She also contended that she had had "no choice" but to sign the agreement when the final version was presented to her three days before the wedding. The court concluded that the requirements of procedural fairness had been met. The husband had disclosed the value of his closely held stock, noting that (1) it was valued at book value and (2) its market value might be substantially higher. The wife's attorney, who had a background in accounting, had explained the difference between the two values to the wife but had made a professional judgment not to seek an independent appraisal. (He also advised the wife that the agreement overall was not in her best interest and that she should not sign it.) With respect to the timing of the agreement, discussions about it had begun in June 1985, and the wife and her attorney had received a draft in early August 1985. The wife had successfully negotiated changes in the agreement, to the extent of doubling her payout in the event of divorce. The court held that the husband's insistence that the agreement be signed before the couple's wedding in October 1985 was not coercive, in view of the fact that the wife was free not to proceed with the wedding if she found the agreement objectionable. The wife also attacked the substantive fairness of the agreement, arguing that the husband was awarded a disproportionate amount of property under the agreement's terms. It was clear from their financial disclosures at the time when the agreement was being negotiated that the husband had substantially greater assets than the wife. Citing *Greenwald*, 154 Wis. 2d at 787, the court pointed out that a premarital agreement is not unfair at divorce merely because the

application of the agreement results in a property division that is not equal between the parties. *Gardner*, 190 Wis. 2d at 234–35.

In a Wisconsin Supreme Court case involving a pre-Act marriage agreement, *Levy v. Levy*, 130 Wis. 2d 523, 388 N.W.2d 170 (1986), the court held that if the agreement by its terms applied only at termination of the marriage by the death of one of the spouses and was silent on the subject of property division or maintenance in the event of divorce, the agreement could not be relied on by the circuit court in arriving at a property division upon dissolution under section 767.255(11) (now section 767.61(3)(L)). It appears that the agreement in *Levy* was entered into before the 1977 Divorce Reform Act, at a time when the law did not permit contractual provisions for property division at divorce. In reaching its decision, the court accepted the view that a failure to specifically mention divorce in the agreement is fatal to acceptance of the agreement as binding for property-division purposes.

A nearly opposite result was reached in *Webb v. Webb*, 148 Wis. 2d 455, 434 N.W.2d 856 (Ct. App. 1988). In that case, the parties entered into a premarital agreement in October 1977 and subsequently married. The agreement recited that the parties desired to provide for their own children and/or grandchildren without regard to spouses' property rights as determined by Wisconsin law. The recitals couched the waiver of property rights not only in terms of each party's status as a surviving spouse, but also as husband and wife, respectively. In addition to this general language, the agreement specifically waived claims and rights in the other's estate that either party might acquire at death by reason of the contemplated marriage.

Although the agreement did not specifically state that it was to apply in the event of divorce, its language was drafted broadly enough to support that conclusion. The court was able to distinguish this case from *Levy* because there was evidence in the record that the parties intended the agreement to apply in the event of divorce. The drafter of the agreement testified that it was intended to apply both at death and at divorce. The *Levy* and *Webb* decisions illustrate the advisability of stating whether a marriage agreement either is or is not to apply to a property division in the event of dissolution.

F. Effectiveness of Pre-Act Marriage Agreements in Modifying Property Rights Arising Under the Act [§ 7.141]

The saving provisions of section 766.58(12) regarding pre-Act marriage agreements are discussed in section 7.121, *supra*. The extent to which specific language used in pre-Act marriage agreements suffices to prevent the accrual of marital property after the determination date remains to be seen, assuming, of course, that the agreements are otherwise valid and enforceable under pre-Act law.

For example, the following questions are all likely to be raised in any construction of a pre-Act marriage agreement:

1. Is the agreement sufficient to bar the marital property interest that automatically arises under section 766.31(4) in the income from property titled in the name of one of the spouses or in the earned income of a spouse or in life insurance contracts and deferred employment benefits under the special rules in sections 766.61 and .62?
2. Does the agreement prevent deferred marital property elective rights under section 861.02 from being exercised with respect to property owned at death by a deceased spouse when it can be demonstrated that the property was acquired during the marriage and before the determination date and would have been marital property if the Act had been in effect?
3. Does the agreement avoid the operation of the mixed-property reclassification rule in section 766.63(1) if marital property assets become commingled with predetermination date property titled in the name of one of the spouses?
4. Does the agreement prevent the workings of the labor-appreciation rule in section 766.63(2) concerning increases in the value of a spouse's nonmarital property that result from his or her substantial undercompensated efforts?
5. Is mutual relinquishment of community property rights in general sufficient to reclassify or bar any or all of the above?

A number of these issues were presented in *In re Estate of Schaum*, No. 93-2858, 1995 WL 78251 (Wis. Ct. App. Feb. 28, 1995) (unpublished opinion not citable per section 809.23(3)). This case involved a pre-Act postmarital agreement in which the wife waived “all of her marital property rights” pursuant to former section 861.07(1) (1981–82) in return for certain testamentary provisions for her benefit upon the husband’s death. The issue before the court was whether this waiver was sufficient to bar the wife’s later claim to marital property and elective rights under the Act following the husband’s death in 1988. In an earlier appeal in the same case, *In re Estate of Schaum*, No. 91-0600 (Wis. Ct. App. Sept. 27, 1991) (unpublished opinion not citable per section 809.23(3)), the court held that the wife’s waiver of rights under former section 861.07(1) (1981–82) extended to the deferred marital property and augmented marital property estate elections under former sections 861.02 and 861.03, respectively, even though those elections were not in existence when the agreement was signed. The *Schaum* decisions are interesting, given the fact that the postmarital agreement was entered into in 1981 and waived rights under a statute (Wis. Stat. § 861.07(1) (1981–82)) that was repealed by the Act, effective January 1, 1986. The agreement used the term “marital property rights” without referring to rights arising under marital property legislation then under consideration in Wisconsin or under a system of community property ownership. Although the decisions contain no penetrating analysis and were not published, they represent at least one instance in which a Wisconsin appellate court was willing to construe a broad waiver of property rights in a pre-Act marriage agreement to reach both the accrual of marital property under the Act and the deferred marital property election created by it.

As the courts consider the construction of pre-Act marriage agreements in the future, it is desirable that a commonsense approach prevail. Many of these agreements were prepared to create separate property marriages at a time when there was no inkling that Wisconsin would one day adopt a system of community property. Even in agreements referring to relinquishment of community property rights, the language was often inadequate. Ownership under the Act (or under a community property system, for that matter) may exist apart from title. Therefore, references to relinquishment of rights by one spouse in property “owned” by the other must be read to refer to property “titled in” or “held by” the other to discover the desired intent. The spouses’ intent either to own their property as if they had never married or to relinquish all rights in the other’s property that accrue by virtue of

marriage permeates most pre-Act marriage agreements. Accordingly, the courts should honor that intent despite weaknesses in the phraseology actually used.

Consider some illustrative cases:

➤ *Example 1.* The spouses have a marriage agreement stating simply that they mutually relinquish their respective rights to an elective share and allowances under chapter 861 and that at death the property of each of them shall be subject to disposition free from any claim of the other. Assume that the spouses married in 1980 and that at the time of their marriage the wife has assets valued at \$200,000. These have increased in value to \$400,000 by January 1, 1986, and are valued at \$800,000 when the wife dies in 2006. The wife's will leaves \$100,000 to her husband and the balance to her children by a prior marriage. Further assume that most of the post-1985 increase in the value of the wife's assets results from uncompensated efforts and that mixing with nonmarital assets has occurred to the extent that tracing is difficult or impossible.

A significant question is whether the agreement nullifies the new property law classifications that commenced on January 1, 1986, or even the accrual of community property generally. Under the Act, marital property ownership interests may be accumulating from day to day in the assets held by each of the spouses. Although it is evident that the wife's intent is to leave only \$100,000 of her estate to her husband and the balance (\$700,000) to her children, that plan may be significantly disrupted if the husband petitions the probate court under section 857.01 for an order determining that up to one-half the assets titled in his wife's name represent his interest in marital property—a result that clearly might follow if the agreement is construed not to bar the accrual of marital property rights.

Despite these apparent problems, the agreement is still entitled to be construed in accordance with the parties' overall intent. When that intent is not clearly reflected in the agreement's language, it may be determined by resort to extrinsic evidence.

Before the death of either spouse, it would have been preferable to amend or redraft the agreement in Example 1 to clarify its effect. (Note that amendment may be difficult or impossible if one spouse is incompetent or unwilling to execute an amendment.) If the parties'

intent was to maintain their property in a manner consistent with the pre-Act common law rules of ownership so that the property titled in each spouse's name would pass in accordance with his or her existing will, then the parties should have taken appropriate steps to modify the agreement to negate the accrual of marital property. *See infra* § 7.154 (sample agreement).

Although the agreement in Example 1 may bar the deferred marital property election in section 861.02, it is less certain that the agreement will bar all spousal allowances granted under chapter 861, particularly the special allowance for support of a spouse under section 861.35.

➤ **Example 2.** The spouses have a marriage agreement stating that neither of them shall have or acquire any right, title, or interest in the other's real or personal property, and that each of them shall own all real and personal property that he or she now owns, or hereafter acquires, in his or her sole name, free from all rights or claims of the other, including any or all homestead, curtesy, dower, or elective rights in lieu thereof; spousal allowances; rights in intestacy; community property rights; or other statutory or common law rights, inchoate or otherwise. The agreement provides that each party shall have the absolute right during his or her lifetime to manage, control, dispose of, and otherwise deal with property in his or her name, now owned or hereafter acquired, without the other party's consent.

This agreement should be sufficient to avoid the accrual of marital property because it contemplates that property in either spouse's sole name, whenever acquired, is free of any "community property rights." Virtually all the key features of marital property contained in the Act and UMPA are derived from the laws of one or more of the eight community property states, and the legislature itself has declared in section 766.001(2) that marital property is a form of community property. Thus, the rule contained in section 766.31(4) classifying income on a spouse's property as marital property is analogous to similar rules of law in Louisiana, Texas, and Idaho; the concept of deferred marital property elections at death contained in sections 851.055 and 861.02 derives from former or current statutes in California and Idaho; the presumptions on mixed property are common to virtually all community property states; and so forth. *See supra* chs. 2, 3. By referring to ownership of property then owned or thereafter acquired in their sole names free of community property rights, the parties have evinced an intention to live separate in property. This intention should be respected by the courts, whether in

Wisconsin or some other community property jurisdiction. The specific language of section 766.58(12)(b) purports to make enforceable “a provision . . . intended to negate . . . any right . . . acquired under . . . a community property system.” If otherwise enforceable, the agreement should be construed to include marital property rights within the generic description of community property to prevent the accrual of marital property interests in either spouse’s assets or income. Accordingly, the agreement in Example 2 should not require revision.

➤ *Example 3.* The spouses have a marriage agreement providing that each party’s property interests, whether now owned or hereafter acquired, shall remain his or her separate and solely owned property, subject to his or her individual management and control, as if each were unmarried. Each party agrees that if he or she is the survivor, he or she will make no claim as surviving spouse to any part of the other’s estate, expressly relinquishing all claims of inheritance, dower, homestead, curtesy, or statutory right; spouse’s elective share; allowance; or privilege of a surviving spouse in or to the other’s property. The parties further agree that they will execute or join as a party in any deed or instrument that may be required by the other, or the other’s legal or personal representatives, for the purpose of divesting or preventing the accrual of any claims or rights waived and relinquished under the agreement.

This agreement evinces an intent to live separate in property, because it uses the words “as if each were unmarried.” It would be appropriate for the courts to effectuate that overall intent by holding that the agreement prevents the accrual of marital property interests in assets held in either spouse’s name. Even earned income can be considered handled indirectly by virtue of the spouses’ method of dealing with the assets into which it is converted. Here the reference to ownership, management, and control of property as if each spouse were unmarried should suffice to support such a construction.

Even if the language of Example 3 were viewed as inconclusive on the question of the spouses’ intent to give up community or marital property rights, the final sentence might provide a key to obtaining either a reformation of the agreement or a declaratory judgment to avoid the future accrual of marital property interests, if the parties could be shown to have intended to use pre-Act property rules in their marriage.

Without question, Example 3 presents a more difficult case than Example 2, because an intent to bar the accrual of marital property or community property must be inferred both from the document as a whole and from the specific reference to the relinquishment of all claims of “statutory right.” Although marital property rights under the Act are statutory in nature, the technical difficulty is that a spouse may not be making a *claim against* the other’s property in violation of the agreement even though *title* is held by the other. The marital property interests may be the spouse’s as a matter of right regardless of title. For example, the marital property interest in earned income and income generated by property arises at the same instant as the right to the income. This is not a *claim against* earnings and income that belong in their entirety to the other spouse, but rather a *property right in* the other spouse’s income that exists *ab initio*.

Another issue inherent in Example 3 is the effect of the language on postdeath allowances. Because allowances are specifically waived by the agreement, they should be barred to the extent that public policy permits.

Finally, Example 3 raises questions as to whether the agreement’s language absolves the spouses of the mutual obligation of support under sections 765.001(2) and 49.90(1m), assuming that the agreement in the example is otherwise silent on the subject of support. Because section 948.22(2) makes it a felony for any person intentionally to fail to provide spousal support that the person knows or reasonably should know he or she is obligated to provide, it is unlikely that the agreement could, as a matter of public policy, be construed to avoid spousal responsibilities of mutual support.

➤ **Example 4.** The marriage agreement contains provisions similar to those in Example 2 or Example 3, except that it also has the following language:

The parties have entered into this agreement in specific contemplation of the fact that Wisconsin has considered and may adopt a property law system based on community property. The parties intend and agree that such a law will have no effect with respect to their property, and that the property that they own or acquire and that would be classified as solely owned property under present Wisconsin law will continue to be treated in the same fashion. The parties further agree that their respective earned income, ordinary income from their separate investments, and increases

in the value of their separate property, however caused, will continue to be treated as separate property, and that neither of them shall assert any community property rights or quasi-community property elective rights to the other's assets or income.

The language in the agreement in Example 4 is clearly intended to take the spouses out of the Act. The courts should construe the agreement in a manner that accomplishes that intent, assuming that the agreement is otherwise enforceable. *See* Wis. Stat. § 766.58(12)(b); *see also supra* § 7.121.

➤ **Example 5.** The marriage agreement contains provisions similar to those in Example 3 and, in addition, obligates the spouse with the significantly larger estate to make a specific financial provision for the less-propertied spouse by will or revocable trust. Years after the Act's effective date, property that would be classified as marital property and as individual property under the provisions of the Act has become commingled with the spouses' predetermination date property in such a manner that the assets are essentially untraceable. The spouse with the larger estate then dies, leaving a will or revocable trust containing the required provision for the other spouse.

If the agreement's language were not interpreted to effectuate the spouses' apparent intent to live separate in property, this situation could produce a result of considerable unfairness. The less-propertied spouse might be entitled to one half of the spouses' entire combined estate because the commingled and untraceable assets are entirely reclassified as marital property by section 766.63(1). In addition, the less-propertied spouse would receive the specific financial provision that the deceased spouse was required to provide by will or revocable trust. The nonspousal beneficiaries of the decedent's estate might receive little or nothing. It is possible that the surviving spouse would be put to an equitable election under these circumstances. *See infra* ch.12.

G. Planning Considerations with Respect to Pre-Act Marriage Agreements [§ 7.142]

1. In General [§ 7.143]

The procedural and substantive requirements for marriage agreements intended to be enforceable at death or at dissolution under pre-Act law

have been discussed in sections 7.122–.140, *supra*. (For a discussion of the categories and attributes of pre-Act marriage agreements, see section 7.120, *supra*.) To recapitulate, a valid pre-Act marriage agreement must meet all the following requirements:

1. It must be in writing and signed by the party sought to be bound.
2. It must either make reasonable provision for a party who is giving up substantial rights or involve full and fair disclosure by both parties.
3. It must provide sufficient consideration to support the agreement. This requirement will usually be satisfied if one of the alternative conditions in item 2, above, is met.
4. It must be free from any taint of overreaching or fraud.
5. It must be equitable as to both parties, if it is to be enforceable as a property settlement agreement in the event of the dissolution of the parties' marriage.

The section 766.58(12) saving provisions for pre-Act marriage agreements, discussed at section 7.121, *supra*, provide that chapter 766 does not affect an otherwise enforceable document signed before the determination date unless the spouses provide otherwise in a marital property agreement made after the determination date. This section also confirms that provisions in such a document intended to negate, apply, or modify rights or obligations arising under the Act are enforceable after the determination date. Thus, provisions either to prospectively adopt or to prospectively abrogate marital property rights under the Act should be effective.

2. Marriage Agreements to Continue Common Law System of Property Ownership [§ 7.144]

Before their determination date, spouses may wish to execute an agreement to prospectively abrogate marital property rights under the Act and to continue a common law system of property ownership. The advantages and disadvantages of doing so are discussed in detail in sections 7.110–.112, *supra*.

The courts have imposed no legal impediment to contractually altering or releasing future spousal property rights—at least with respect to those arising under the pre-Act property law system. See, for example, *Beat*, 25 Wis. 2d 315, and *Nickolay*, 249 Wis. 571, both of which involved the spouses’ mutual surrender of possible future rights to make elections against one another’s estates. In view of the specific statutory authorization of section 766.58(12)(b), there is no policy reason why contractual modification or negation of future spousal property rights under the property law system created by the Act should not also be fully recognized, at least so long as the rights of existing creditors, future creditors without notice, or other third parties acting in reliance on the status quo remain unaffected. This is supported by the Act’s recognition of maximum contractual freedom to vary the Act’s effect. See Wis. Stat. §§ 766.17, .58; UMPA § 3 cmt. (discussed in section 7.6, *supra*).

➤ **Example.** Assume that before the effective date of the Act, a married couple domiciled in Wisconsin enters into a marriage agreement to perpetuate the common law system of property ownership after their determination date (i.e., January 1, 1986). A primary reason they desire an agreement of this sort is so that their current estate plan can continue to be effective without significant modification after the determination date. In effect, they desire to nullify the Act’s application to them. Their agreement is drafted to maintain the common law system of property ownership once the Act becomes effective, and they mutually relinquish any deferred marital property elective rights they may have or acquire. Further assume that the husband generates all the earned income in the family and holds title to most, if not all, of the significant investment assets. The wife has few assets in her sole name and no significant expectancies. They waive disclosure of their assets and net worth in the agreement. Because one of the agreement’s primary purposes is to preserve the existing estate plan without the need for significant alterations, they intend to make no additional changes in their estate planning documents (i.e., wills and revocable trusts).

Assuming execution before 1986, the validity of the agreement will be judged under pre-Act law. (Even if the agreement were executed after April 4, 1984, the Act’s standards for enforceability probably could not be met because of the wife’s waiver of disclosure and assumed lack of actual knowledge.) Thus, a significant factor in the example is the wife’s waiver of disclosure coupled with the possible lack of a reasonable

provision for, or consideration flowing to, her. In the absence of the agreement, after the determination date the wife would have a 50% ownership interest in the husband's earned income, the income from nonmarital property investments (in the absence of a unilateral statement), and the marital property portion of life insurance and deferred employment benefits. She would also have elective deferred marital property rights in certain property owned by the husband at the time of death, namely, property that was acquired during marriage, before the determination date, and that would have been marital property if the Act had been in effect throughout the marriage.

These are very substantial rights. Yet the agreement recited in the example makes no provision for the spouse in recognition that these property interests are given up. Moreover, because of the repeal of the spousal-elective-share provisions under prior law and the relinquishment of elective deferred marital property rights in the agreement, the wife would have virtually no protection if the husband subsequently decided to eliminate her entirely from his estate plan (although the contract might be unenforceable in the absence of some reasonable provision for the wife). The absence of any binding and adequate provision for the wife would make the agreement suspect under pre-Act law. *See supra* §§ 7.126, .127.

A fairly simple device might have been employed to salvage the agreement in the example. Assuming that the husband was unwilling to make disclosure but that the provisions for the wife in the husband's estate plan were reasonable in amount and nature, the husband and the wife might have agreed contractually that he was to maintain for her substantially equivalent provisions to those in his preexisting (or contemporaneously executed) will, revocable trust, or both. Their agreement might also have stipulated that he would not revoke, modify, or reduce those provisions without her consent. Alternatively, and again assuming the husband was unwilling to fully disclose, he might have agreed to make some reasonable specific financial provision for the wife at his death. In either case, it would have been desirable to include provisions for the wife, accompanied by the husband's agreement that he would not unreasonably deplete his probate or nonprobate estate through gifts or otherwise in such a manner as to make him unable to perform his obligations to the wife.

The agreement thus would become one providing for the wife by will or revocable trust. If the provision were adequate, the contract would be

valid and enforceable consideration for the wife's relinquishment of future marital property rights. See *Sipple v. Zimmerman*, 39 Wis. 2d 481, 493–94, 159 N.W.2d 706 (1968) (indicating that promise to make testamentary disposition in exchange for promise to make lifetime disposition may be enforced if consideration for mutual promises is adequate).

The facts in the example raise another question: if the agreement preserves the common law system of solely owned property for this marriage, makes no financial provision for the wife, and does not specifically waive the spouses' rights to elect against each other's wills, would the spousal-elective-share provisions contained in sections 861.03–.13 (1983–84) survive and be applicable? There is no definitive answer to this question, but if the spouses' intent to maintain the pre-Act property law system were sufficiently clear from the agreement, a court might find the elective share provisions applicable to avoid an inequitable result. Or the spouses might simply have agreed that the former statutory spousal elections would be available to the wife if the husband failed to make certain agreed-upon financial provisions for her.

Still another question is whether a marriage agreement executed before the determination date and designed to preserve the common law system of ownership can render inapplicable those statutory provisions that cannot be modified by a marital property agreement executed after the Act becomes effective. In particular, can the spouses choose not to be governed by section 766.15 (good faith duty between spouses), section 766.55(4m) (nonbinding effect of marital property agreement on creditors without actual knowledge), section 766.57(3) (nonbinding effect of marital property agreement on bona fide purchaser from spouse having management and control rights), section 859.18(6) (nonbinding effect of marital property agreement on property available for satisfaction of obligations at death of spouse), and section 766.58(2) (right of child to support)? If the pre-Act marriage agreement expressly refers to those statutory provisions, it is at least arguable that the savings provisions of section 766.58(12), *see supra* § 7.121, would allow the nullification of the statutory provisions. However, because many of the statutory provisions described above either are rooted in fundamental concepts of fairness or are designed to prevent fraud, the Wisconsin Supreme Court may, as a matter of public policy, adopt similar rules as a matter of common law if confronted with the appropriate case arising under pre-Act law.

3. Marriage Agreements to Classify All or Most Assets as Marital Property [§ 7.145]

Some married couples may desire to enter into marriage agreements, before their determination date, to prospectively classify all their property as marital property. Some of the benefits and drawbacks of such classification are discussed in section 7.114, *supra*.

Just as spouses can make the Act prospectively inapplicable to them, they can also provide that all or most of their assets will be classified as marital property, and that other features of the Act will apply to their marriage, when the Act becomes effective as to them. *See* Wis. Stat. §§ 766.58(12)(b), .585. There are two ways to accomplish this objective. The first is for the spouses to enter into an anticipatory marital property agreement of the sort authorized by section 766.585(1). By law, no part of an anticipatory marital property agreement can apply before the determination date, and its enforceability is determined using the standards of section 766.58. *See supra* § 7.26. The second method is to insert provisions prospectively classifying property as marital property in a pre-Act marriage agreement, portions of which are intended to apply before the determination date. By virtue of section 766.585(3), an agreement of this sort is governed not by section 766.585 but rather by the saving provisions of section 766.58(12). *See supra* § 7.121. Those provisions require that the agreement be enforceable under the standards of law applicable when the agreement was executed.

The agreement should not be permitted to affect adversely the rights of creditors or third persons who have relied to their detriment on the continuation of the law applicable at the time of execution and the existing manner in which the spouses own their property. *See, e.g.*, Wis. Stat. § 766.55(2)(c), (4m).

4. Limited Marriage Agreements with Respect to Specific Assets or Liabilities [§§ 7.146]

The Wisconsin cases involving pre-Act marriage agreements have invariably dealt with sweeping releases of property rights at death by one and sometimes both spouses. As a result, virtually no precedent exists regarding what is likely to become an increasingly important form of marriage agreement under the Act—the limited agreement.

It can be argued that the full requirements for a valid and enforceable pre-Act marriage agreement should not be applied to a limited marriage agreement. If the assets, liabilities, or issues are not substantial in relation to the spouses' overall economic situation and no significant property rights are surrendered, it can be maintained (assuming there is no full disclosure) that the reasonable-provision test for marriage agreements generally should not apply. It is also questionable whether full disclosure should be required for pre-Act limited marriage agreements; rather, the parties should be permitted to make mutual waivers of disclosure. Additionally, in dealing with limited marriage agreements, the parties' mutual promises and intent in entering into the agreement should be sufficient consideration to support it. Absent a showing of misrepresentation, undue influence, duress, or fraud, the limited marriage agreement should be recognized as valid.

Liberalizing the legal requirements for pre-Act limited marriage agreements tends to advance the strong public policy favoring agreements between spouses, *see supra* § 7.123, and in no way deprives the courts of the ability to protect the weaker spouse's interests when large economic issues are at stake. On the contrary, if the asset or liability that is the subject of the limited marriage agreement is a substantial element in the spouses' overall economic picture, the reasonable provision/full disclosure and adequate consideration requirements of pre-Act law will probably be applied to the agreement. *See supra* §§ 7.126, .127.

One situation in which pre-Act limited marriage agreements can play an important role is when one or both spouses have created an irrevocable life insurance trust to which employment-related or other life insurance policies have been assigned. In such cases, a limited marriage agreement executed before the Act's effective date, reclassifying the nongrantor spouse's interest in property used to pay premiums on the policies (or in the ownership interest or proceeds of the policies themselves), might avoid a number of difficult property classification and tax questions that could otherwise arise under the Act. *See infra* ch. 10.

H. Marriage Agreements Executed by Nonresidents Before Their Determination Date [§ 7.147]

As time passes, fewer and fewer pre-Act Wisconsin marriage agreements are likely to come before the courts for interpretation. By the same token, the proportion of marriage agreements executed by nonresidents who subsequently move to Wisconsin is likely to increase. Thus, although the examples and discussion in sections 7.141 and 7.144–.146, *supra*, are couched in terms of spouses domiciled in Wisconsin before January 1, 1986, they apply equally to nonresident spouses who execute a marriage agreement either before or after January 1, 1986, and subsequently establish their domicile here. The major difference, of course, is that the applicable law for purposes of determining the enforceability of the agreement will be that of the jurisdiction where the spouses are domiciled when they execute the agreement. *See* Wis. Stat. § 766.58(12); *see also supra* § 7.121, *infra* ch. 13.

In addition, nonresident spouses intending to move to Wisconsin may wish to consider executing a statutory terminable individual property classification agreement (STIPCA) without disclosure as a temporary expedient to preserve their existing property arrangements for a three-year period. *See* Wis. Stat. § 766.589. The use of the STIPCA for this purpose is covered in section 7.74, *supra*.

V. Sample Agreements [§ 7.148]

A. Sample Agreement to Classify All or Most Property as Marital Property, with Option to Dispose of Spouses' Property at Death [§ 7.149]

1. Introduction [§ 7.150]

The primary purpose of this agreement is to classify all or most of the spouses' property as marital property. It also contains an optional provision disposing of all of the spouses' property at death to a revocable trust jointly created by them. The agreement has been drafted for persons who are married to each other. If the form is to be used by parties who intend to marry, it may be modified accordingly. By its terms, the form is not intended to govern the division of the spouses' assets in the event of the dissolution of their marriage, although such provisions might be added if the parties desire. It is a sample form only and does not purport to be all-inclusive. Marital property agreements must be tailored to the parties' circumstances, and tax issues must be carefully considered. For other resources concerning the drafting of provisions for marital property agreements, see section 7.109, *supra*.

➤ **Note.** With respect to the methods by which spouses may classify or reclassify property, see section 766.31(10) and chapter 2, *supra*. See chapters 9 and 10, *infra*, for tax and estate planning considerations, respectively.

➤ **Caution.** Be careful in using this agreement if either or both of the spouses are not citizens of the United States. If the reclassification of property pursuant to the agreement results in a gift to the spouse who is not a United States citizen, there may be an immediate federal gift tax liability not sheltered by the marital deduction. See *infra* § 9.100.

2. Form [§ 7.151]

MARITAL PROPERTY AGREEMENT

This is a marital property agreement between _____ and _____, husband and wife, of _____ County, Wisconsin.

WHEREAS, each party has made and acknowledges receiving a fair and reasonable disclosure under the circumstances of the parties' property and financial obligations,¹ as set forth in a separate Memorandum of Assets, Liabilities and Income executed by them on this date];

WHEREAS, the parties desire to classify property that they now own or hereafter acquire pursuant to Wisconsin law;

NOW, THEREFORE, it is agreed as follows:

I. ALL PROPERTY IS MARITAL PROPERTY

Except as otherwise provided in Article II, the parties agree that all assets of either or both of them, whether now owned or later acquired, shall be classified as marital property.² In determining whether an asset

¹ There are no court decisions under the Act as to what constitutes a "fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations" for purposes of enforceability under section 766.58(6)(c). Inferentially, the financial disclosure statements that are included as part of the statutory terminable marital property classification agreement and the statutory terminable individual property classification agreement, *see infra* §§ 7.175, .178, should be sufficient. The memoranda of assets, liabilities, and income at sections 7.169 and .172, *infra*, should also be sufficient because they provide even greater detail than the statutory financial disclosure forms.

² By virtue of the definition of marital property in Article [XIII][XIV], Article I adopts all of Wisconsin's marital property rules, including the following:

a. The special terminable interest rules that apply to the marital property interest of a nonemployee spouse in a deferred-employment-benefit plan (including assets in a rollover IRA account traceable to such a plan), and to the marital property interest of a noninjured spouse in a recovery for loss of future income arising from a personal injury. Wis. Stat. §§ 766.62, .31(3), .31(7)(f).

b. The special classification rules for determining the marital property portion of life insurance policies and proceeds and the marital property portion of deferred employment benefits. Wis. Stat. §§ 766.61, .62.

is or is not classified as marital property for purposes of this agreement, the following rules shall apply:

A. Special Rules with Respect to Assets Titled in Both Names

1. Assets presently held jointly in the names of both parties with right of survivorship shall be classified as [marital property and shall be survivorship marital property unless the document of title, account under section 705.01(1) of the Wisconsin Statutes, brokerage account, registration of an uncertificated security, or partnership agreement is changed to indicate that the asset is no longer held with right of survivorship.] [marital property without right of survivorship.]³ In

c. The limitation on the marital property interest of a deceased spouse's estate in a life insurance policy owned by and insuring the surviving spouse. Wis. Stat. § 766.61.

d. The survivorship marital property rule with respect to homestead realty acquired in both spouses' names after the determination date. Wis. Stat. § 766.605.

To be clear about the applicability of the special rules listed above, an agreement to classify all or most property as marital property should specifically deal with these special rules by making them expressly applicable or inapplicable. The subsequent portions of Article I of the agreement deal with these issues. It is suggested that the drafter review with the client the effect the agreement will have on the following types of property:

- a. Tangibles;
- b. Gifts, inheritances, and interests in trusts created by third parties;
- c. Life insurance (including policies owned by one spouse and insuring the other's life and policies insuring third parties and used to fund cross-purchase agreements);
- d. Life insurance trusts;
- e. Stock in professional corporations;
- f. Deferred employment benefits (both qualified and nonqualified), including deferred compensation;
- g. IRAs;
- h. Assets subject to a specific bequest to a child or other third parties;
- i. Real estate or tangible personal property located in other jurisdictions;
- j. Assets that have substantially declined in value; and
- k. Recoveries for personal injury.

The optional provisions in the balance of Article I of the agreement are designed to present alternative methods of dealing with some of these assets. It is suggested the drafter consider whether new documents of title (e.g., deeds, stock certificates, etc.) should be prepared to inform third parties of ownership changes made by the agreement.

³ A marital property agreement provision may be ineffective to negate the survivorship feature of a joint bank account under chapter 705, particularly in

addition, the parties confirm that any previously acquired homestead that is survivorship marital property (or other assets held in the names of both parties as survivorship marital property) shall remain survivorship marital property.

2. Assets acquired in the future in the names of both parties shall be classified as marital property without right of survivorship unless the document of title, account under section 705.01(1) of the Wisconsin Statutes, brokerage account, registration of an uncertificated security, or partnership agreement clearly states that there is a survivorship feature, in which case the asset shall be survivorship marital property. [A homestead acquired in the future exclusively in the names of both parties shall be survivorship marital property unless the document of title specifies otherwise.]⁴

B. Deferred Employment Benefits

1. This agreement does not purport to classify deferred employment benefits while held by a qualified plan under ERISA for the benefit of a party who is a participant in the plan.⁵ When the benefits are distributed to, or withdrawn from a qualified plan by the party who is the plan participant, such benefits [shall be classified as the individual property of the party who was the plan participant] [shall be classified as marital property].

2. Deferred employment benefits held in a deferred employment benefit plan that is not a qualified plan under ERISA [shall be classified as the individual property of the party who is the plan participant] [shall be classified as marital property].

the case of account agreements executed before the marital property agreement was entered into. The same may be true of survivorship provisions in a joint brokerage account agreement. *See supra* § 7.118. To the extent that it is important to achieving the purposes of their marital property agreement, or would create undesirable results under their combined estate plan, the spouses should close out such accounts and reopen them as marital property accounts or tenancy-in-common accounts without a right of survivorship.

⁴ Delete the bracketed phrase if the statutory rule of section 766.605 is not desired.

⁵ This provision acknowledges the preemption by federal law governing ERISA-qualified deferred-employment-benefit plans of any contrary provisions of state community property laws. *See Boggs v. Boggs*, 520 U.S. 833 (1997). The benefits are what they are under federal law as long as they remain in the plan. Once the benefits are distributed or withdrawn from the plan, however, the agreement purports to classify them.

3. Any marital property interest of the nonemployee party in a deferred-employment-benefit plan (or rollover IRA account) terminates as provided by sections 766.31(3) and 766.62(5) of the Wisconsin Statutes if the nonemployee party predeceases the employee party.⁶

4. The interest of a party in an individual retirement account or similar arrangement (IRA), including an IRA created by rollover of deferred employment benefits previously held by a qualified plan, shall be classified in the same manner as withdrawn or distributed deferred employment benefits in this agreement. For this purpose, the party holding the IRA shall be considered the employee/plan participant, and the IRA shall be considered a benefit provided as a result of employment.

[5. The special time-based apportionment rules in section 766.62 of the Wisconsin Statutes [shall not be applied for the purpose of determining the marital property interest of each party in deferred employment benefits; rather, each party shall own a present undivided one-half interest as marital property in such benefits] [shall be applied for the purpose of determining the marital property interest of each party in deferred employment benefits].]⁷

C. Life Insurance Policies and Proceeds

1. The special time-based apportionment and other ownership rules in section 766.61 of the Wisconsin Statutes [shall not be applied for the purpose of determining the marital property interest of each party in the ownership interest and proceeds of life insurance policies on each of their lives. Rather, each party shall own an undivided one-half interest as marital property in the ownership interest and proceeds of each such policy [, except that a life insurance policy owned by one party on the life of the other is the individual property of the party who is owner regardless of the classification of property used to pay premiums on the policy]]⁸ [shall be applied for the purpose of determining the marital

⁶ This treatment not only is consistent with Wisconsin statutory law, but also appears to be in accord with *Boggs v. Boggs*, 520 U.S. 833 (1997), with respect to benefits held by a qualified plan under ERISA.

⁷ This paragraph should be used only if deferred employment benefits (including IRA accounts) are classified as marital property under this paragraph. The second option in the sentence (i.e., preserving the time-based apportionment rules found in the statute) is not recommended because of its complexity.

⁸ The alternative choices in the first sentence permit the drafter either to select a simple rule that grants each spouse an equal one-half ownership interest in each policy and its proceeds or to adopt the classification and ownership rules with respect to life insurance found in section 766.61(3), including the time-

property interest of each party in the ownership interest and proceeds of life insurance policies on each of their lives].⁹

2. The marital property interest of a deceased party's estate in an insurance policy designating the surviving spouse as the owner and insured [shall] [shall not] be subject to the limitations of section 766.61(7) of the Wisconsin Statutes.¹⁰

D. Personal Injury Recovery for Loss of Future Income

*[Choose appropriate alternative]*¹¹

The marital property interest of the noninjured party in a personal injury recovery of damages for loss of future income terminates if the noninjured party predeceases the injured party.

[Or]

The marital property interest of the noninjured party in a personal injury recovery of damages for loss of future income does not terminate if the noninjured party predeceases the injured party but remains owned by

based apportionment rules. If the parties wish to adopt the simple classification rule but continue the rule of section 766.61(3)(c) that a life insurance policy owned by one spouse on the other spouse's life is the owner's individual property, the final clause of the first bracketed choice should be used. Special provisions should be made for life insurance policies required to be maintained by a spouse pursuant to a decree dissolving a prior marriage, *see* Wis. Stat. § 766.61(5), and for policies required to be maintained pursuant to a cross-purchase agreement for a business interest.

⁹ *See supra* note 7.

¹⁰ The alternative choices in this sentence permit the drafter either to adopt or to negate the frozen interest rule in section 766.61(7). If the insured spouse survives, that rule limits the property rights of the deceased noninsured spouse's estate to one half the marital property interest in the interpolated terminal reserve and unearned premium at the time of death.

¹¹ The first alternative preserves the special statutory rule in sections 861.01(3m) and 766.31(7m) that treats a personal injury recovery of damages for loss of future income as terminable interest marital property if the noninjured spouse dies first; the second alternative negates the statutory rule, thus making this portion of a recovery of damages "pure" marital property. The second alternative permits the property interest of a predeceasing noninjured spouse in the recovery to be disposed of at death to persons other than the surviving injured spouse.

the noninjured party and may be disposed of upon the death of the noninjured party regardless of the order of the parties' deaths.

[Continue]

II. INDIVIDUAL PROPERTY

A. The following assets shall be classified as individual property:

1. Assets acquired by either or both of the parties [in the future] through gift, inheritance, or distributions from trusts established by a third party.¹²

2. Currently owned beneficial interests in irrevocable trusts established by the other party or by third parties.

3. The personal effects, consisting of jewelry, clothing, and items of personal adornment, presently held by each party. To the extent consistent with the parties' obligations to act in good faith toward one another, personal effects acquired after the date of this agreement shall be the holding party's individual property, regardless of the classification of property used to make the acquisition.

[4. Each party shall own as his or her individual property each life insurance policy insuring his or her life regardless of the classification of any property used to make premium payments or additions. This classification shall extend to any and all replacement policies or supplemental life insurance or accidental death and disability contracts issued in connection with any such policy. Any property transferred to an irrevocable trust holding a life insurance policy insuring the life of either party shall, at the time of such transfer, be classified as the individual property of the party whose life is insured by the policy, including any premium or additions paid pursuant to a split-dollar agreement or with regard to group or other insurance paid by the employer of a party. The party designated as the owner of a life insurance policy insuring the life of a third party shall own such policy as his or her individual property regardless of the classification of property used to make premium payments or additions.]¹³

¹² If either of the spouses has received or anticipates receiving significant gifts or inheritances, excluding these from the operation of the agreement may be desirable.

¹³ Paragraph C of Article I should be deleted if this subparagraph is used. The drafter should be aware that this provision may raise ethical considerations in a dual-representation situation if the assets classified as individual property

B. The classification of an asset as individual property shall extend to the realized or unrealized appreciation in the value of such asset regardless of whether the appreciation occurred through general market conditions or through the application of labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity by either or both of the parties; and to property received in exchange for or with the proceeds of the asset. [The classification of an asset held by one or both of the parties shall not be affected by the classification of property added to or mixed with the asset, and any addition or mixing shall be deemed a gift to the holding party or parties.]¹⁴ [By signing this agreement, each party is exercising his or her unilateral right under section 766.59 of the Wisconsin Statutes to classify income on individual property as individual property.]¹⁵

III. RECLASSIFICATION OF PROPERTY

Nothing in this agreement shall prevent the parties from reclassifying marital property assets as the individual property assets of one party by gift, marital property agreement, [unilateral statement,] consent, or otherwise as permitted by law.

IV. MANAGEMENT AND CONTROL

[Insert any special provisions regarding management and control of marital property assets here. In the absence of such provisions, the management and control features of Wisconsin's marital property laws control.]

V. AGREEMENT NOT TO AFFECT PROPERTY DIVISION IN EVENT OF DISSOLUTION

In the event of the dissolution of the parties' marriage by divorce, annulment, legal separation, or other legal proceeding, this agreement

are substantial because the agreement adopts a classification rule contrary to that in the Act. *See infra* ch. 14.

¹⁴ Caution should be exercised in using the bracketed provision. Depending on the nature of the assets classified as individual property, this provision may permit one spouse unilaterally to convert marital property into the individual property of that spouse.

¹⁵ Note that Paragraph B of Article II does not automatically classify the *income* on property received by gift, inheritance, etc., as individual property. Such income will be marital property unless the drafter adds the bracketed final sentence, which treats the agreement as a signing party's unilateral statement pursuant to section 766.59 with respect to such property.

shall not affect how the court divides the parties' assets pursuant to section 767.255 of the Wisconsin Statutes or the comparable statute of any applicable jurisdiction.¹⁶ Except as otherwise necessary to enforce provisions intended to survive dissolution, this agreement is revoked by and shall terminate upon entry of a court judgment of dissolution of the parties' marriage.

[Add Article VI if appropriate]

VI. DISPOSITION AT DEATH

The parties on this date created and anticipate that they will continue to have a joint revocable trust known as the _____ and _____ Revocable Trust of 20___. If, at the death of the first of the parties to die, the deceased party's will (whether or not it is probated) gives the residue of his or her estate to the revocable trust, then the interest of [the deceased party] [both parties] in assets classified as marital property and in assets other than marital property shall immediately pass without probate to the trustee of the revocable trust, except that any interest in the tangible personal property of the deceased party shall directly pass without probate to the surviving party. In addition, at the death of the first of the parties to die, some or all of the marital property assets may be divided on the basis of aggregate value rather than item by item. The surviving spouse and the successor in interest to the deceased party's share of marital property may enter into an agreement providing how some or all of the marital property assets in which each has an interest will be divided based on aggregate value. If, at the death of the second of the parties to die, that party's will (whether or not it is probated) gives the residue of his or her estate to the revocable trust, then the assets of that spouse (including all after-acquired property) shall pass without probate to the revocable trust, provided that the second party to die may at any time amend this agreement with respect to the property to be disposed of at his or her death. This article is intended to be a

¹⁶ CAUTION: Although the agreement does not purport to govern how the court divides the spouses' assets in the event of dissolution of the marriage, it may be relevant to the *characterization* of those assets for purposes of division. See *Bonnell v. Bonnell*, 117 Wis. 2d 241, 344, N.W.2d 123 (1984). Thus, if property acquired by gift or inheritance is classified as marital property by the agreement, the property may be subject to division in the event of dissolution. In addition, future changes in statutory or case law may cause the property classifications accomplished in the agreement to have a substantive impact at dissolution despite any language in the agreement to the contrary. Specific language should be included if the agreement is to function as a settlement agreement in the event of divorce, separation, or annulment.

disposition of property as described in section 766.58(3)(f) of the Wisconsin Statutes.¹⁷

[Continue]

[VI.][VII.] FINANCIAL DISCLOSURE

Each party has made [a written] disclosure to the other of his or her property and obligations in connection with the preparation and execution of this agreement. Each party acknowledges receiving such disclosure from the other and represents that his or her own disclosure was fair and reasonable under the circumstances.

[VII.][VIII.] AMENDMENT OR REVOCATION

This agreement may be amended or revoked only by a later written marital property agreement.

[VIII.][IX.] BINDING EFFECT

This agreement shall be binding on the parties and their heirs, legatees, personal representatives, and legal representatives.

[IX.][X.] GOVERNING LAW

This agreement shall be interpreted in accordance with the laws of the state of Wisconsin, where the parties now reside and are domiciled.

[X.][XI.] CHANGE OF DOMICILE

This agreement determines the classification of assets owned or acquired while both parties are domiciled in Wisconsin, including assets traceable thereto following a change in domicile to another state. The classification of other assets acquired after either or both are domiciled in

¹⁷ Article VI should be used only if the parties have a joint revocable trust and intend to use the agreement as a will substitute agreement to fund the joint revocable trust. A simpler version of a will substitute agreement is found at section 7.163, *infra*. If the parties intend to use the agreement as a will substitute agreement and each has a revocable trust, this provision may be modified so that each spouse's share of marital property, plus his or her other property, passes at death to his or her own revocable trust.

another state shall be determined by the laws of the domiciliary state and not by this agreement.¹⁸

[XI.][XII.] SEVERABILITY

All provisions contained in this agreement are severable. If a provision is held to be invalid by any court, this agreement shall be interpreted as if the invalid provision were not contained herein.¹⁹

[XII.][XIII.] REVOCATION OF PRIOR AGREEMENTS

By execution of this agreement, the parties hereby revoke each and every marriage agreement previously entered into by them, including each and every marital property agreement pursuant to Wisconsin's marital property laws. The parties further agree that any such agreement shall be of no further force and effect in any respect, as if it had never been entered into.²⁰

[XIII.][XIV.] DEFINITIONS

Except as otherwise provided in this agreement, the terms *held*, *individual property*, *marital property*, and *deferred employment benefit* shall be interpreted in accordance with and shall have the incidents provided under Wisconsin law [as amended to date].²¹ An "asset" or "assets" shall consist of property rights and interests of any nature or description, whether present or future, legal or equitable, vested or contingent, in real or personal property, and shall include assets that either or both of the parties have transferred to a revocable trust of which either or both are the settlor(s).

¹⁸ The treatment of Wisconsin marital property removed to another jurisdiction upon the change of domicile of one or both spouses is discussed in chapter 13, *infra*.

¹⁹ If the invalidity of one provision would make the enforcement of the remainder of the agreement inappropriate, modification of this provision should be considered. *See supra* § 7.70.

²⁰ Note that if certain actions taken or certain property classifications established by earlier agreements are to be preserved, special provisions should be included for that purpose.

²¹ See note 4, *supra*, for a discussion of the scope of the marital property definition. Use the bracketed language at the end of the sentence if the definitions are to be restricted to the law in effect at the time the agreement is executed. If the definitions are to "float" with the evolution of Wisconsin law following the date of execution of the agreement, the bracketed language should be deleted.

[XIV.][XV.] LEGAL REPRESENTATION

[Before signing this agreement, each party consulted with an attorney of his or her choice.]²² [The parties are represented by one attorney in connection with this agreement, and each has agreed in writing to such dual representation.]²³ Each party has received from his or her attorney an explanation of the terms and legal significance of this agreement. Each party acknowledges that he or she understands this agreement and its legal effect and is signing voluntarily.

Dated: _____.

_____ *(party's signature)*

_____ *(party's signature)*

STATE OF WISCONSIN
COUNTY OF _____

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

Notary Public, State of Wisconsin
My commission expires _____

[If a Memorandum of Assets, Liabilities, and Income is to be used, see §§ 7.169 and .172, infra.]

²² See generally *infra* ch. 14 (separate representation).

²³ In the event of a conflict of interest, the consent to dual representation must be in writing after consultation. See SCR 20:1.7; see also ch. 14, *infra*.

B. Sample Agreement to Classify All or Most Property as Individual Property [§ 7.152]

1. Introduction [§ 7.153]

The primary purpose of this agreement is to classify all or most of the spouses' property as individual property. This agreement has been drafted for use either by persons who are married to each other or by persons contemplating marriage. It is a sample form only and does not purport to be all-inclusive. Marital property agreements must be tailored to the parties' circumstances, and tax issues must be carefully considered. For other resources concerning the drafting of provisions for marital property agreements, see sections 7.109, *supra*. With respect to the methods by which spouses may classify or reclassify property, see section 766.31(10) and chapter 2, *supra*. See chapters 9 and 10, *infra*, for tax and estate planning considerations, respectively.

2. Form [§ 7.154]

MARITAL PROPERTY AGREEMENT

[Choose appropriate alternative]

This is a marital property agreement between _____ and _____, husband and wife, of _____ County, Wisconsin.

[Or]

This is a marital property agreement entered into in contemplation of marriage between _____, of _____ County, Wisconsin, and _____, of _____ County, Wisconsin.

WHEREAS, the parties intend to marry;

WHEREAS, _____ [and _____] [was] [were] previously married, and _____ [and _____] [has] [have] [a child] [children] from [his] [her] [their] previous marriage[s];¹

¹ Recitals explaining the spouses' circumstances and the reasons for the agreement may be inserted at this point.

[Continue]

WHEREAS, the parties desire by this agreement to determine the system of property classification and ownership applicable during their marriage and upon the termination of their marriage [by divorce, annulment, legal separation, or other legal proceeding, or] by the death of one or both of the parties, both as to assets that they now own and as to those they hereafter acquire;

WHEREAS, each party has made and acknowledges receiving a fair and reasonable disclosure under the circumstances of the parties' property and financial obligations² [, as set forth in a separate Memorandum of Assets, Liabilities, and Income executed by them on this date];

WHEREAS, each party understands that the income and assets of the other may increase in the future, such as by reason of inheritances, gifts, compensation, business profits, realized or unrealized appreciation, accumulated income, and other increases or additions, or may decrease, such as by reason of investment reverses, business losses, general market decline, illness or disability, loss of employment, or other cause, and each party acknowledges that he or she is entering into this agreement regardless of the level of present or future income of the other party or the present or future value of the other party's assets;

WHEREAS, each party understands that in the absence of this agreement the law would confer upon him or her property rights and interests in certain of the present and future assets possessed or acquired by the other, and each party further understands that those rights and interests will be affected by this agreement;

WHEREAS, the parties desire to classify, pursuant to Wisconsin law, all present and future assets of either or both of them as individual property and none as marital property except as otherwise specifically provided in this agreement;

² There are no court decisions under the Act as to what constitutes a "fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations" for purposes of enforceability under section 766.58(6)(c). Inferentially, the financial disclosure statements that are included as part of the statutory terminable marital property classification agreement and the statutory terminable individual property classification agreement, *see infra* §§ 7.175, .178, should be sufficient. The memoranda of assets, liabilities, and income at sections 7.169 and .172, *infra*, should also be sufficient because they provide even greater detail than the statutory financial disclosure forms.

WHEREAS, the parties further desire to provide that all obligations now outstanding and hereafter incurred by either of them shall be their respective sole obligations, as if they were unmarried persons;

NOW, THEREFORE, it is agreed as follows:

I. ALL PROPERTY IS INDIVIDUAL PROPERTY

A. The parties agree that all of the assets of either or both of them shall be classified as individual property and none of their assets shall be classified as marital property except as otherwise provided in this agreement.³ In carrying out that intention, the following rules shall apply:

1. An asset now or hereafter held by a party shall be classified as that party's individual property.

2. Unless expressly provided to the contrary in a document of title or other writing signed by both parties, an asset now or hereafter held by both parties shall be classified as the individual property of both parties as joint tenants with right of survivorship.

3. An asset not held by a party shall be classified as the individual property of a party to the extent that such party (a) furnished the consideration in money or money's worth (including the incurring of a debt) for the asset; or (b) received the asset by gift, inheritance, nontestamentary transfer, or trust distribution. The parties recognize that assets acquired as described in (a) and (b) above may be co-owned as individual property. The parties further agree that when one party furnishes the consideration for an asset that he or she gives to the other party, the asset is the individual property of the donee party.

B. The classification of an asset as individual property shall extend to the income from the asset; to the realized or unrealized appreciation in the value of the asset regardless of whether such appreciation occurred through general market conditions or through the application of labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity by either or both of the parties; and to property received in exchange for or with the proceeds of the asset. The classification of an asset held by one or both of the parties shall not be affected by the classification of property added to or mixed with the asset, and any addition or mixing shall be deemed a gift to the holding party or parties.

³ If the parties wish to classify certain of their assets as marital property or to hold certain assets as survivorship marital property, a mechanism is provided in Article II of the agreement.

C. By way of illustration and not of limitation, the following assets shall be classified as individual property:

1. All compensation, earnings, and income generated by a party through the provision of services, labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity;

2. All deferred employment benefits attributable to the services of a party, including all pensions, retirement benefits, and deferred compensation;

3. All claims, causes of action, or recoveries of whatever nature for personal injury or property damage sustained by a party;

4. All life insurance policies and annuities, and all disability, health, and accident policies of which a party is designated as the owner on the records of the policy issuer or the employer;

5. All business and investment property of a party, including all bank accounts, stocks, bonds, notes, debentures, sole proprietorships, partnerships, limited liability companies, joint ventures, patents, copyrights, royalty interests, real estate, and individual retirement accounts (IRAs) or similar arrangements;

6. All distributions from partnerships, limited liability companies, corporations, and joint ventures, all income from sole proprietorships, rents, interest, dividends, royalties, and all other income received from the investments or assets owned by a party;

7. All beneficial interests of a party in an estate or in a trust created by either party or by a third person, including all distributions of principal or income from an estate or a trust;

8. All gifts to a party, whether from the other party or a third party;
and

9. All undivided interests in property owned by a party as a joint tenant or tenant in common with the other party and/or with third parties.

II. MARITAL PROPERTY

Notwithstanding any other provision in this agreement, an asset shall be marital property only if this classification either is expressly stated in the document of title to the property or, as to either held assets or assets that are not held, is expressly stated in a written instrument signed by

both parties. An asset classified as marital property can be held as survivorship marital property if the survivorship form of holding is expressly stated in the document of title to the property or other written instrument signed by both parties.

III. SUPPORT AND OBLIGATIONS

[Choose appropriate alternative]⁴

[Alternative I]

[Choose appropriate Paragraph A]

A. Because _____ has and is likely to continue to have more individual property than _____, _____ agrees to assume primary responsibility for providing support for the parties in the form of food, clothing, shelter, transportation, insurance, health care, and other expenditures consistent with an appropriate standard of living for the parties. If either party files an action seeking dissolution of the marriage by divorce, annulment, legal separation, or other legal proceeding, this paragraph shall have no further effect.

[Or]

A. Each of the parties is financially able to provide for his or her own support at an appropriate standard of living, and the parties shall share approximately equally in the financial responsibility for providing support for the parties in the form of food, clothing, shelter, transportation, insurance, health care, and other expenditures consistent with an appropriate standard of living for the parties. If either party files an action seeking dissolution of the marriage by divorce, annulment, legal separation, or other legal proceeding, this paragraph shall have no further effect.

[Or]

A. Each of the parties is capable of contributing to their combined support. The parties shall agree from time to time during their marriage on the proportions and/or amount to be contributed by each, taking into account their then current employment status, health, and other relevant circumstances. The parties recognize and acknowledge that under this

⁴ The general purpose of the alternative paragraphs in Article III is to attempt to provide for the financial security of both parties. The alternatives are samples only and must be tailored to the parties' specific circumstances.

paragraph the primary responsibility for providing support may shift from one party to the other at various times during the course of their marriage. If either party files an action seeking dissolution of the marriage by divorce, annulment, legal separation, or other legal proceeding, this paragraph shall have no further effect.

[Or]

A. Each of the parties is financially able to provide for his or her own support at an appropriate standard of living, and each shall be financially responsible for himself or herself. Except as otherwise required by law, neither shall be responsible for providing support for the other in the form of food, clothing, shelter, transportation, insurance, health care, or other similar expenditures.

[Continue]

B. [The responsibility for self-support and all] [All] other obligations, including but not limited to contractual obligations and those for torts, punitive damages, penalties, fines, or forfeitures that either party has incurred or hereafter incurs, and the parties' respective shares of obligations that have been or may be incurred jointly, either with each other or with third persons, shall be the obligations of the incurring party as though he or she were an unmarried person, regardless of when the obligation is incurred. Unless prohibited by law, any such obligation shall be satisfied exclusively out of the individual property of the incurring party as defined by this agreement. If a creditor obtains payment or satisfaction in connection with the obligation of a party out of the individual property of the other party as defined by this agreement, the other party shall be entitled to full reimbursement from the incurring party or his or her estate.

C. Each party shall provide all prospective credit grantors (except those for normal support) with a copy of this agreement before the time credit is granted or an open-end credit plan is entered into.⁵

D. Either party may voluntarily pay or satisfy an individual obligation of the other in whole or in part. The payment or satisfaction shall not be deemed to be an assumption of the obligation by the contributing party

⁵ It is not yet entirely clear whether furnishing a copy of *excerpts* from the agreement will suffice to bind creditors under sections 766.55(4m) and 766.56(2)(c). If the parties are reluctant to disclose their entire marital property agreement to creditors, the provisions applicable to debt and credit could be included in a separate marital property agreement.

nor shall it be deemed to be a waiver of this article as to any other obligation.

[Or]

[Alternative II]

A. Except for obligations for normal support and maintenance, neither party shall incur without the other's written consent a contractual obligation that may be satisfied from the individual property of the other party as defined by this agreement. Each party shall provide a copy of this agreement to all credit grantors (except those for normal support and maintenance) before the time credit is granted or an open-end credit plan is entered into.⁶

B. If a creditor obtains payment or satisfaction in connection with a contractual or noncontractual obligation of a party out of the individual property of the other party as defined by this agreement, the other party shall be entitled to full reimbursement from the incurring party or his or her estate.

[Continue]

IV. MANAGEMENT AND CONTROL

A. Each party shall have full and exclusive power of management and control over his or her individual property free from any interference or claims of the other party. Each party shall have the unqualified right to dispose of his or her individual property at any time by sale, exchange, gift, will, beneficiary designation, trust arrangement, or otherwise to any person or persons he or she may choose without the other party's consent [except as provided in Article [VI][VII]].⁷ If asked by the other party or by any grantee or donee of the other party, a party shall join in any deed, mortgage, or other conveyance of individual property necessary for the purpose of documenting that he or she has no right, claim, or interest in the property conveyed or for the purpose of perfecting a clear record title to the property [; however, the foregoing shall not apply to conveyances of homestead real estate]. The foregoing provisions shall constitute consent under section 767.215(2)(i) of the Wisconsin Statutes that each party may continue to unilaterally manage

⁶ *See id.*

⁷ The bracketed language should be included if financial provisions for a spouse are made in Article [VI][VII].

and control his or her individual property after commencement of an action to dissolve the marriage.

B. If asked by the other party, a party shall execute any spousal waivers and consents or take any other action necessary under the provisions of the Employee Retirement Income Security Act of 1974, the Retirement Equity Act of 1984, or any similar laws, to relinquish any right, claim, or property interest arising out of such law in any employment benefits attributable to the other party's employment or self-employment and shall allow the other party to name any beneficiary and to elect any settlement option under any employment benefit plan.⁸

C. Either party may make provision for the other by gift, will, beneficiary designation, trust arrangement, or otherwise, and neither party shall be precluded by virtue of this agreement from receiving and enjoying the benefits of such provisions. The making of any such provision shall not constitute a waiver of any of the provisions of this agreement.

[Add Article V if appropriate]

V. PROPERTY AND SUPPORT RIGHTS UPON DISSOLUTION OF MARRIAGE

A. Property Division

[Choose appropriate alternative]

If there is a dissolution of the parties' marriage by divorce, annulment, legal separation, or other legal proceeding, each party shall have the absolute right to retain all his or her individual property, and that property shall not be subject to division pursuant to section 767.61 of the Wisconsin Statutes. Assets held by the parties as joint tenants with right of survivorship shall be divided equally between the parties, and assets held as tenants in common shall be divided between the parties according to their respective percentage ownership interests. If the parties acquire marital property or survivorship marital property pursuant to Article II, those assets shall be divided equally between the parties.

[Or]

⁸ Regarding the enforceability of this provision, see section 2.214, *supra*. See chapter 9, *infra*, for a discussion of possible gift tax issues.

If there is a dissolution of the parties' marriage by divorce, annulment, legal separation, or other legal proceeding, _____ agrees to transfer property to _____ as a full and final settlement of [his] [her] rights to a property division under section 767.61 of the Wisconsin Statutes, as follows:

[Insert appropriate provisions. A phase-in of financial benefits, in trust or outright, may be appropriate. Several factors may be relevant, including the length of the marriage, the birth of children, the ages of children, the parties' health, the completion of education, the receipt of anticipated inheritances, and the like.]

Subject to the foregoing, each party shall have the absolute right to retain all his or her individual property. Assets held by the parties as joint tenants with right of survivorship shall be divided equally between the parties, and assets held as tenants in common shall be divided between the parties according to their respective percentage ownership interests. If the parties acquire marital property or survivorship marital property pursuant to Article II, those assets shall be divided equally between the parties.

[Continue]

Each party agrees to pay all debts incurred by him or her, and all other liabilities or obligations imposed on him or her, and each agrees to hold the other harmless from all such debts, liabilities, or obligations. The parties agree to share equally all joint obligations. Each party agrees to pay his or her own attorney fees and disbursements in connection with the dissolution proceeding.

B. Maintenance

If either party files an action seeking the dissolution of the marriage by divorce, annulment, legal separation, or other legal proceeding, the parties agree that no temporary alimony or maintenance payments shall be awarded to either party. If the action results in the termination of the parties' marriage or in a legal separation, both parties waive any entitlement to alimony or maintenance, and neither party shall be awarded any limited or permanent alimony or maintenance payments of any kind. Each party specifically acknowledges that by accepting the benefits of other provisions of this agreement, he or she is estopped from requesting or accepting maintenance.⁹

⁹ Section 767.56 provides that any mutual agreement of the parties on the issue of maintenance is only a factor to be considered by the divorce court, that

[Or]

In lieu of temporary maintenance, which is specifically waived by both parties, _____ agrees to pay _____ within 30 days of service of a petition for dissolution of the marriage the sum of \$_____ for each full year of marriage, with the duration of the marriage measured from the wedding date to the date that a petition for dissolution of the marriage is filed, but in no event less than \$_____ nor more than \$_____.

C. Stipulation

If either party files an action seeking the dissolution of the marriage by divorce, annulment, legal separation or other legal proceeding, the parties agree to enter into a written stipulation carrying out the provisions of this article.

D. Miscellaneous

The parties specifically affirm that this agreement is at this time a fair and equitable written agreement under section 767.61 of the Wisconsin Statutes relating to property division and a mutual agreement under section 767.56 of the Wisconsin Statutes relating to maintenance payments. If either party files an action seeking the dissolution of the marriage, the parties intend that this agreement shall be deemed equitable as to both of them at the time of its execution and at all times thereafter.¹⁰ The parties realize that the value of the individual property owned by each of them and the earning capacity or experience of each of them may significantly increase or decrease in the future, and they acknowledge that any such increase or decrease shall not constitute a change of circumstances affecting the equitableness of this agreement.

[Continue]

is, such agreements are not binding on the court. This provision is one possible approach, and may be used when the parties' property division is intended to cover their entire financial settlement. Under other circumstances, the provision of maintenance may be appropriate.

¹⁰ To be enforceable upon dissolution under section 767.61(3)(L), a marital property agreement must be equitable as to both parties both at the time of execution and also when the parties' marriage is dissolved. *See Button v. Button*, 131 Wis. 2d 84, 388 N.W.2d 546 (1986). The tests for determining whether or not an agreement will be considered equitable are discussed in detail in sections 7.107 and .133-.140, *supra*. It is not certain to what extent the parties can agree that the agreement will be considered equitable in the future regardless of the circumstances.

[V.][VI.] WAIVER OF PROPERTY RIGHTS UPON THE DEATH OF EITHER PARTY

[Except as otherwise provided in Article [VI][VII], each] [Each] party waives and releases all rights, claims, and property interests, of whatever nature, under the present or future laws of Wisconsin or any other jurisdiction, that he or she might otherwise have or acquire as a result of the death of the other party in or to the individual property of the other party. This article is intended to apply to all rights and property interests acquired as a result of the parties' marriage including, but not limited to, [rights of intestate succession,]¹¹ dower and curtesy, rights to elect against the will, the deferred marital property elective share, community property, quasi-community property rights, marital property, and, to the extent permitted by law, spousal support allowances and rights of selection; provided, however, that this article shall not divest the surviving party of his or her one-half interest in marital property or of his or her interest in survivorship marital property to the extent that such marital or survivorship marital property was acquired pursuant to Article II. Neither party shall make or assert any claim or ownership right of any kind in or to the individual property of the other as a result of the death of the other, except:

1. Claims for satisfaction of a bona fide debt or to enforce a right under this agreement;

2. Rights to property given or devised to the party by will or transferred to the party by nontestamentary, nonprobate disposition; and

[3.Rights of intestate succession.]¹²

Each party shall join in the execution and filing of any instrument or conveyance and take any other action necessary to relinquish or otherwise avoid the effects of the law of any jurisdiction conferring any right or interest relinquished above; if the other party's legal representative or successor in interest so requests. [If either party leaves assets passing by the laws of intestate succession of any jurisdiction, those assets shall be distributed as if the surviving party had

¹¹ Delete bracketed language if number 3 is left in.

¹² If the surviving spouse is *not* to receive the individual property described in the agreement in the event the owner dies intestate, number 3 should be deleted and the two bracketed sentences dealing with intestacy near the conclusion of Article [V][VI] should be left in. If the surviving spouse is to receive the individual property by intestate succession, leave in number 3 and strike the later bracketed sentences.

predeceased the deceased party. If necessary, the surviving party shall execute any instrument required to disclaim any assets that would otherwise pass to him or her under the laws of intestate succession.] [Neither party shall act as a personal representative of the other's estate unless nominated pursuant to the terms of the other's will.]

[VI.][VII.] PROVISION FOR SPOUSE

[Insert agreed-upon reasonable provisions and/or possible gift restrictions for the benefit of the spouse giving up significant rights. Phased-in financial provisions based on the length of the marriage may be appropriate in some circumstances. Alternatively, the financial provisions might consist of a promise to transfer a specific amount of property at death or to maintain provisions for the spouse substantially identical to those in the current estate plan. This article might also provide that if the arrangement or plan for a spouse were not maintained, the survivor would have certain remedies and elective rights defined in the agreement. An example of an outright gift or gifts might be as follows:]

[A. If (husband) dies while the parties are married to each other and (wife) survives him by 30 days, (husband) agrees to make the following provisions for (wife) in his will or other estate planning documents, and (wife) agrees to accept these provisions in lieu of any other provisions that might be available to her as the surviving spouse under applicable law:

1. If (wife) survives (husband) by 30 days, (husband) shall give to (wife) any interest he owns in their then principal residence[, free of any mortgages or liens,] and in the contents of the principal residence, including all household furniture, furnishings, goods, and effects intended for utilitarian or ornamental use.

2. If (wife) survives (husband) by 30 days, (husband) shall give to (wife) [property with a net after-tax value of \$ _____] [[an amount] [a fractional share of the residue of the estate] equal to _____% of the amount by which (husband's) gross estate as defined in section 2031 of the Internal Revenue Code (and any successor provisions thereto) as finally determined for federal estate tax purposes exceeds funeral expenses, administration expenses, debts, mortgages, and liens that are allowed as deductions in (husband's) estate for federal estate tax purposes].

B. If (wife) dies while the parties are married to each other and (husband) survives her by 30 days, (wife) agrees to make the

following provisions for (husband) in her will or other estate planning documents, and (husband) agrees to accept such provisions in lieu of any other provisions that might be applicable to him as the surviving spouse under any applicable law:

1. If (husband) survives (wife) by 30 days, (wife) shall give to (husband) any interest she owns in their then principal residence[, free of any mortgage or liens] and in the contents of the principal residence, including all household furniture, furnishings, goods, and effects intended for utilitarian or ornamental use.

2. If (husband) survives (wife) by 30 days, (wife) shall give to (husband) [property with a net after-tax value of \$_____] [[an amount] [a fractional share of the residue of the estate] equal to _____% of the amount by which (wife's) gross estate as defined in section 2031 of the Internal Revenue Code (and any successor provisions thereto) as finally determined for federal estate tax purposes exceeds funeral expenses, administration expenses, debts, mortgages, and liens that are allowed as deductions in (wife's) estate for federal estate tax purposes].]

[VII.][VIII.] TAXES

The parties shall file joint United States and state income tax returns for each calendar year for which a joint return will result in less aggregate United States and state income taxes than would result from their filing separate returns. The income tax liability due with respect to any such joint return shall be allocated between the parties and paid by each of them out of his or her respective individual property, and if either party is required to pay the tax obligation of the other, the party liable shall hold the other harmless for amounts paid on his or her behalf. The amount paid by each party shall bear the same ratio to the total tax payable with respect to the joint return as the amount of tax that would be payable by him or her if he or she filed a separate return bears to the total tax that would be payable by the parties if both filed separate returns¹³ [; provided, however, that if one party would have paid less total tax by filing a separate return instead of a joint return with the tax allocations provided for by this article, that party shall pay the lesser amount and the other party shall pay the balance owed pursuant to the joint return]. If the parties file a combined state income tax return, then for purposes of determining how the combined income tax obligation shall be allocated

¹³ This method of apportionment generally follows that found in former Treas. Reg. § 1.6015(b)-1(b). A somewhat simpler method of apportionment is to allocate the taxes in proportion to the respective adjusted gross incomes of each of the spouses.

between them, the deductions and tax credits shall be attributed to each party in the same ratio as the state total income of each bears to the total state total income. Any additional assets, penalties, interest, or costs arising out of any audit or other adjustment shall be allocated between the parties as provided in this article. Each party may, but shall not be obligated to, join in any gifts made by the other for federal or state gift tax reporting purposes.

[VIII.][IX.] MISCELLANEOUS PROVISIONS

[Choose appropriate alternative]¹⁴

A. Scope of Agreement

This agreement governs the parties' property rights and obligations and the economic incidents of their marriage during the marriage and upon the death of either or both of them. In the event of the dissolution of the parties' marriage by divorce, annulment, legal separation, or other legal proceedings, this agreement shall not affect how the court divides the parties' assets, as provided in section 767.61 of the Wisconsin Statutes or the comparable statute of any applicable jurisdiction. Except as otherwise necessary to enforce provisions intended to survive a dissolution, this agreement is revoked by and shall terminate upon entry of a court judgment of dissolution of the parties' marriage.

[Or]

A. Scope of Agreement

This agreement governs the parties' property rights and obligations and the economic incidents of their marriage during the marriage, upon the dissolution of the marriage by divorce, annulment, legal separation, or other legal proceeding, and upon the death of either or both of them. Except as otherwise necessary to enforce provisions intended to survive a dissolution, this agreement is revoked by and shall terminate upon entry of a court judgment of dissolution of the parties' marriage.

[Continue]

¹⁴ If optional Article V is used, *supra*, the first alternative should be deleted and the second alternative should be used.

B. Financial Disclosure

Each party has made [a written] disclosure to the other in connection with the preparation and execution of this agreement of his or her property and obligations. Each party acknowledges receiving such disclosure from the other and represents that his or her own disclosure was fair and reasonable under the circumstances.

C. Entire Agreement

This agreement represents the entire agreement and understanding between the parties regarding the property and obligations described herein. Both parties acknowledge that neither party has made any conflicting or additional promise or representation to the other regarding any of the subject matter covered by this agreement.

D. Amendment or Revocation

This agreement shall not be amended or revoked except by a later marital property agreement.

E. Binding Effect

This agreement shall be binding on the parties and their heirs, legatees, personal representatives, and legal representatives.

F. Governing Law

This agreement shall be interpreted in accordance with the laws of the state of Wisconsin, where the parties now reside and are domiciled. The establishment by either or both of the parties of a residence or domicile in another state shall not affect the binding nature or validity of this agreement, the parties' rights under it, or the laws under which it shall be interpreted.

G. Change of Domicile

If necessary to validate this agreement and make its substance enforceable in a jurisdiction in which the parties later become domiciled, the parties (or their legal representatives) agree to reexecute this agreement or one that is in substantially the same form and accomplishes the same objectives, all in accordance with the requirements of such jurisdiction.

H. Severability

All provisions contained in this agreement are severable. If any of them shall be held to be invalid by any court, this agreement shall be interpreted as if such invalid provisions were not contained in the agreement.¹⁵

I. Revocation of Prior Agreements

By execution of this agreement, the parties revoke each and every marriage agreement previously entered into by them, including each and every marital property agreement pursuant to Wisconsin's marital property laws. The parties further agree that any such agreement shall be of no further force and effect in any respect, as if it had never been entered into.¹⁶

J. Definitions

Except as otherwise provided in this agreement, the terms *held*, *individual property*, *marital property*, and *deferred employment benefit* shall be interpreted in accordance with and shall have the incidents provided under the laws of Wisconsin [as amended to date].¹⁷ For purposes of this agreement, *individual property* also includes individual property under the laws of any other jurisdiction adopting the Uniform Marital Property Act or some variant thereof, separate property under the laws of any community property jurisdiction, and common-law property interests under the laws of any common-law jurisdiction. *Marital property* also includes marital property under the laws of any other jurisdiction adopting the Uniform Marital Property Act or some variant thereof, and community property under the laws of any community property jurisdiction. An *asset* or *assets* shall consist of property rights and interests of any nature or description, whether present or future, legal or

¹⁵ If the invalidity of one provision would make the enforcement of the remainder of this agreement inappropriate, modification of this provision should be considered. *See supra* § 7.70.

¹⁶ Note that if certain actions taken or certain property classifications established by earlier agreements are to be preserved, special provisions should be included for that purpose.

¹⁷ See footnote 2 of the marital property agreement at section 7.151, *supra*, for a discussion of the scope of the marital property definition. Use the bracketed language at the end of the sentence if the definitions are to be restricted to the law in effect at the time the agreement is executed. If the definitions are to “float” with the evolution of Wisconsin law following the date of execution of the agreement, the bracketed language should be deleted.

equitable, vested or contingent, in real or personal property, and shall include assets that either or both of the parties have transferred to a revocable trust of which either or both are the settlor(s).

K. Legal Representation

[Before signing this agreement, each party consulted with an attorney of his or her choice.]¹⁸ [The parties are represented by one attorney in connection with this agreement, and each has agreed in writing to such dual representation.]¹⁹ Each party has received from his or her attorney an explanation of the terms and legal significance of this agreement. Each party acknowledges that he or she understands this agreement and its legal effect and is signing voluntarily.

L. Effective Date

[This agreement becomes effective upon the marriage of the parties.]
[This agreement becomes effective upon the date that both parties are domiciled in Wisconsin.] [This agreement becomes effective upon the later of the marriage of the parties or the date that both parties are domiciled in Wisconsin.] [This agreement becomes effective upon execution.]

¹⁸ See generally *infra* ch. 14 (separate representation). If optional Article V (relating to property and support rights upon dissolution) is included, dual representation is inappropriate. See ch. 14, *infra*.

¹⁹ In the event of a conflict of interest, the consent to dual representation must be in writing after consultation. See SCR 20:1.7; see also ch. 14, *infra*.

Dated: _____.

(party's signature)

(party's signature)

STATE OF WISCONSIN
COUNTY OF _____

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

Notary Public, State of Wisconsin
My commission expires _____

[If a Memorandum of Assets, Liabilities, and Income is to be used, see §§ 7.169 and .172, infra.]

CERTIFICATION

Each of the undersigned certifies that he or she is an attorney, duly licensed to practice law in the state of Wisconsin; that _____ has been employed by _____ and _____ has been employed by _____; that each has advised and consulted with his or her client with respect to the client's rights and has explained to the client the legal significance of the foregoing agreement and the effect that it has upon the client's rights otherwise conferred as a matter of law; that each party, after being advised by his or her respective counsel, acknowledged to the undersigned that he or she understood the agreement and that he or she has executed the agreement freely and voluntarily; and that each undersigned has no reason to believe that his or her client did not understand the agreement and that he or she did not freely and voluntarily execute this agreement [, such execution being in the presence of each of the undersigned].

Dated: _____.

Attorney for

Attorney for

C. Sample Agreement for Classification of Certain Assets (Limited Marital Property Agreement)
[§ 7.155]

1. Introduction [§ 7.156]

The primary purpose of this agreement is to provide for (1) the classification of one or more assets or (2) specific rights and responsibilities (such as management and control) with regard to certain items of property. With respect to the treatment of liabilities, see the alternative versions of Article III of the agreement in section 7.154, *supra*, for examples. The agreement has been drafted for use either by persons who are married to each other or by persons contemplating marriage. It is a sample form only and by definition does not purport to be all-inclusive. Marital property agreements must be tailored to the parties' circumstances, and tax issues must be carefully considered. For other resources concerning the drafting of provisions for marital property agreements, see section 7.109, *supra*. With respect to the methods by which spouses may classify or reclassify property, see section 766.31(10) and chapter 2, *supra*. See chapters 9 and 10, *infra*, for tax and estate planning considerations, respectively.

2. Form [§ 7.157]

MARITAL PROPERTY AGREEMENT

[Choose appropriate alternative]

This is a marital property agreement between _____ and _____, husband and wife, of _____ County, Wisconsin.

[Or]

This is a marital property agreement entered into in contemplation of marriage between _____, of _____ County, Wisconsin, and _____, of _____ County, Wisconsin.

WHEREAS, the parties intend to marry;

WHEREAS, _____ [and _____] [was] [were] previously married, and _____ [and _____] [has] [have] [a child] [children] from [his] [her] [their] previous marriage[s];

[Continue]

WHEREAS, the parties desire to classify certain assets they now own or hereafter acquire pursuant to Wisconsin law;

[Describe the purpose or purposes of the agreement. These might include one or more of the following:

1. Classifying certain assets held by each spouse or by both spouses, either as individual property or as marital property;

2. Classifying income on predetermination date property and/or individual property now owned or hereafter acquired as individual property;

3. Agreeing that the deferred marital property election in sections 861.02 to 861.06 does not apply to some or all property owned by the spouses;

4. Providing specific management and control rights with respect to certain assets;

5. Classifying as individual property funds used to pay premiums on life insurance policies owned by the spouses, by third parties, or by irrevocable life insurance trusts; or, alternatively, relinquishing marital property rights in specific life insurance policies owned by the spouses or by third parties, even if marital property is used to pay premiums;

6. Agreeing that either spouse can designate the beneficiary of specific life insurance policies or specific deferred employment benefits without the other spouse's consent, and that the spouse with the power to designate the beneficiary can reclassify any marital property or deferred marital property rights to components in the policy as his or her individual property;

7. Granting general or limited unilateral authority to one or both spouses to make gifts of marital property and waiving any remedy with respect thereto or to bar gifts of marital property without joinder by both spouses; and

8. *Fixing responsibility on one of the spouses for payment of certain obligations, including the granting of a right of reimbursement to the nonobligated spouse if marital property is used to pay the indebtedness.*

Assuming that the agreement's purpose is to classify certain enumerated assets as individual property, the following recital might be included:]

[WHEREAS, the parties desire to avail themselves of the right contained in section 766.58 of the Wisconsin Statutes to classify certain assets owned by or titled in the names of one or both of them as their respective individual property;]

WHEREAS, each party has made and acknowledges receiving a fair and reasonable disclosure under the circumstances of the parties' property and financial obligations¹ [, as set forth in a separate Memorandum of Assets, Liabilities, and Income executed by them on this date];²

WHEREAS, each party understands that in the absence of this agreement the law might confer on him or her property rights and interests in certain of the property that is classified as the individual property of the other in this agreement, and each party by this agreement relinquishes all such rights and property interests in such property;

NOW, THEREFORE, it is agreed as follows:

I. HUSBAND'S INDIVIDUAL PROPERTY

The parties agree that the following assets shall be classified as the individual property of _____:

[Describe the assets]

¹ There are no court decisions under the Act as to what constitutes a "fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations" for purposes of enforceability under section 766.58(6)(c). Inferentially, the financial disclosure statements that are included as part of the statutory terminable marital property classification agreement and the statutory terminable individual property classification agreement, *see infra* sections 7.175, .178, should be sufficient. The memoranda of assets, liabilities, and income at sections 7.169 and .172, *infra*, should also be sufficient because they provide even greater detail than the statutory financial disclosure forms.

² Full and detailed disclosure of the sort involved in completing a memorandum of assets, liabilities, and income may not be necessary for a limited marital property agreement. *See supra* § 7.116.

II. WIFE'S INDIVIDUAL PROPERTY

The parties agree that the following assets shall be classified as the individual property of _____:

[Describe the assets]

III. INCOME; [ADDITIONS;] APPRECIATION; EXCHANGES

The classification of an asset as the individual property of a party shall extend to income from the asset; [to additions to the asset regardless of the classification of the funds or property used to make or acquire the addition;]³ to realized or unrealized appreciation in the asset's value, regardless of whether that appreciation occurred through general market conditions or through the application of labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity to the asset by either of the parties without receiving reasonable compensation therefor; and to property received in exchange for or with the proceeds of the asset.⁴

IV. MANAGEMENT AND CONTROL

During their marriage, each party shall have full and exclusive powers of management and control over those assets classified as his or her individual property under this agreement.

V. RIGHT TO DISPOSE OF INDIVIDUAL PROPERTY

Each party shall have the absolute and unqualified right to dispose of assets classified as his or her individual property under this agreement, at any time, by sale, exchange, gift, disposition at death, or otherwise, to any person or persons he or she may choose, including the other party.

³ Caution should be exercised in using the bracketed provision. Depending on the nature of the assets classified as individual property, this provision may permit one spouse unilaterally to convert marital property into the individual property of that spouse.

⁴ If an interest in a closely held business is included in the property classified as individual property, the parties may wish to modify the final phrase of this sentence so that it does *not* apply to publicly traded securities or cash received in exchange for the closely held-business interest.

VI. RIGHT OF REIMBURSEMENT

If a creditor obtains satisfaction from assets that are classified under this agreement as the individual property of one of the parties, and the party owning the assets is not personally liable for the obligation, that party shall be entitled to reimbursement of such amount from the other party if the other party is personally liable for the obligation or from the estate of such party if the other party is deceased. The amount reimbursed shall be the individual property of the recovering party.

[Add Article VII if appropriate]

VII. PROPERTY RIGHTS UPON DISSOLUTION OF MARRIAGE

If there is a dissolution of the parties' marriage by divorce, annulment, legal separation, or other legal proceeding, each party shall have the absolute right to retain all his or her individual property, and that property shall not be subject to division pursuant to section 767.61 of the Wisconsin Statutes nor shall the value of the individual property be considered in dividing the parties' other property interests. The parties specifically affirm that this agreement is at this time a fair and equitable written agreement under section 767.61 of the Wisconsin Statutes relating to property division. If either party files an action seeking dissolution of the marriage, the parties intend that this agreement shall be deemed equitable as to both of them at the time of its execution and at all times thereafter.⁵

[Continue]

⁵ The normal limited marital property agreement used for estate planning purposes would include neither optional Article VII nor optional Article [VII] [VIII]. Instead, the drafter would proceed directly to Article [VIII][XIX]. However, if the agreement is classifying assets that represent a significant portion of one or both spouses' estates, these optional provisions might be included. Note that unless the property classified as individual property by this agreement in fact was received by inheritance or gift, it may be subject to division by the court under section 767.61 in the event of dissolution. To avoid this result, the parties must specifically agree that the property is not subject to division and is to be awarded to the party who is designated the owner. To be enforceable upon dissolution under section 767.61(3)(L), a marital property agreement must be equitable as to both parties both at the time of execution and also when the parties' marriage is dissolved. See *Button v. Button*, 131 Wis. 2d 84, 388 N.W.2d 546 (1986). The tests for determining whether or not an agreement will be considered equitable are discussed in detail in sections 7.107 and .133-.140, *supra*.

[Add Article [VII][VIII] if appropriate]

[VII.][VIII.] WAIVER OF PROPERTY RIGHTS UPON DEATH OF EITHER PARTY

Each party waives and releases all rights, claims, and property interests, of whatever nature, under the present or future laws of Wisconsin or any other jurisdiction, that he or she might otherwise have or acquire as a result of the death of the other party in or to all or any part of the assets classified as the individual property of the other party. This article is intended to apply to all rights and property interests acquired as a result of the parties' marriage including, but not limited to, [rights of intestate succession,]⁶ dower and curtesy, rights to elect against the will, election of deferred marital property, election of augmented marital property estate treatment, election against the augmented estate, community property, quasi-community property rights, marital property, and, to the extent permitted by law, spousal support allowances and rights of selection. Neither party shall make or assert any claim or ownership right of any kind in or to the assets classified as the individual property of the other as a result of the death of the other except:

1. Claims for satisfaction of a bona fide debt or to enforce a right under this agreement;

2. Rights to property given or devised to the party by will or transferred to the party by nontestamentary, nonprobate disposition; and

[3. Rights of intestate succession.]⁷

Each party shall join in the execution and filing of any instrument or conveyance and take any other action necessary to relinquish or otherwise avoid the effects of the law of any jurisdiction conferring any such right or interest, if the other party's legal representative or successor in interest so requests. [If either party leaves assets classified as individual property under this agreement passing by the laws of intestate succession of any jurisdiction, those assets shall be distributed

⁶ Delete bracketed language if number 3 is left in.

⁷ If the surviving spouse is *not* to receive the individual property described in the agreement if the owner dies intestate, number 3 should be deleted, and the two bracketed sentences dealing with intestacy near the conclusion of Article [VII][VIII] should be left in. If the surviving spouse is to receive the individual property by intestate succession, leave in number 3 and strike the later bracketed sentences.

as if the surviving party had predeceased the deceased party. If necessary, the surviving party shall execute any instrument required to disclaim any assets that would otherwise pass to him or her under the laws of intestate succession.⁸

[Continue]

[VIII.][IX.] SCOPE OF AGREEMENT

This agreement governs certain of the parties' property rights and obligations during the marriage [, upon dissolution of the marriage either by divorce, annulment, legal separation, or other legal proceeding,]⁹ and upon the death of either or both of them. [In the event of the dissolution of the parties' marriage by divorce, annulment, legal separation, or other legal proceedings, this agreement shall not affect how the court divides the parties' assets pursuant to section 767.61 of the Wisconsin Statutes or the comparable statute of any applicable jurisdiction.]¹⁰ Except as otherwise necessary to enforce provisions intended to survive dissolution, this agreement is revoked by and shall terminate upon entry of a court judgment of dissolution of the parties' marriage.

[IX.][X.] FINANCIAL DISCLOSURE

Each party has made [a written] disclosure to the other of his or her property and obligations in connection with the preparation and execution of this agreement. Each party acknowledges receiving such disclosure from the other and represents that his or her own disclosure was fair and reasonable under the circumstances.

[X.][XI.] ENTIRE AGREEMENT

This agreement represents the entire agreement and understanding between the parties regarding the property and obligations described herein. Both parties acknowledge that neither party has made any conflicting or additional promise or representation to the other regarding any of the subject matter covered by this agreement.

⁸ *See id.*

⁹ If optional Article VII is used, the bracketed language in the first sentence of this article should be left in, and the bracketed second sentence should be deleted.

¹⁰ *See id.*

[XI.][XII.] AMENDMENT OR REVOCATION

This agreement shall not be amended or revoked except by a later marital property agreement.

[XII.][XIII.] BINDING EFFECT

This agreement shall be binding on the parties and their heirs, legatees, personal representatives, and legal representatives.

[XIII.][XIV.] GOVERNING LAW

This agreement shall be interpreted in accordance with the laws of the state of Wisconsin, where the parties now reside and are domiciled. The establishment by either or both of the parties of a residence or domicile in another state shall not affect the binding nature or validity of this agreement, the rights of the parties under it, or the laws under which it shall be interpreted.

[XIV.][XV.] CHANGE OF DOMICILE

If necessary to validate this agreement and make the substance of it enforceable in a jurisdiction in which the parties later become domiciled, the parties (or their legal representatives) agree to reexecute this agreement or one that is in substantially the same form and accomplishes the same objectives, in accordance with the requirements of such jurisdiction.

[XV.][XVI.] SEVERABILITY

All provisions contained in this agreement are severable. If any of them shall be held to be invalid by any court, this agreement shall be interpreted as if such invalid provisions were not contained herein.¹¹

[XVI.][XVII.] REVOCATION OF PRIOR AGREEMENTS

[By execution of this agreement, the parties revoke each and every marriage agreement, including each and every marital property agreement pursuant to Wisconsin's marital property laws, previously entered into by them that is inconsistent with this agreement. The

¹¹ If the invalidity of one provision would make the enforcement of the remainder of this agreement inappropriate, modification of this provision should be considered. *See supra* § 7.70.

parties further agree that any such agreement shall be of no further effect in any respect, as if it had never been entered into.]¹²

[XVII.][XVIII.] DEFINITIONS

Except as otherwise provided in this agreement, the terms *held*, *deferred employment benefit*, *individual property*, and *marital property*¹³ shall be interpreted in accordance with and have the incidents provided under the laws of Wisconsin [as amended to date].¹⁴ For purposes of this agreement, individual property also includes individual property under the laws of any other marital property jurisdiction adopting the Uniform Marital Property Act or some variant thereof, separate property under the laws of any community property jurisdiction, and common-law property interests under the laws of any common law jurisdiction. Marital property also includes marital property under the laws of any other jurisdiction adopting the Uniform Marital Property Act or some variant thereof, and community property under the laws of any community property jurisdiction. An asset or assets shall consist of property rights and interests of any nature or description, whether present or future, legal or equitable, vested or contingent, in real or personal property, and shall include assets that either or both of the parties have transferred to a revocable trust of which either or both are the settlor(s).

[XVIII.][XIX.] LEGAL REPRESENTATION

[Before signing this agreement, each party consulted with an attorney of his or her choice.]¹⁵ [The parties are represented by one attorney, and

¹² Because a limited marital property agreement may be one of a series intended to have cumulative effect or may be a supplement to a more comprehensive marital property agreement, the drafter may wish to delete this article or to substantially modify it to preserve specific portions or features of prior agreements.

¹³ Delete any terms not appropriate to the agreement.

¹⁴ See footnote 2 of the marital property agreement at section 7.151, *supra*, for a discussion of the scope of the marital property definition. Use the bracketed language at the end of the sentence if the definitions are to be restricted to the law in effect at the time the agreement is executed. If the definitions are to “float” with the evolution of Wisconsin law following the date of execution of the agreement, the bracketed language should be deleted.

¹⁵ See generally *infra* ch. 14 (separate representation). If this agreement would have a significant impact on the financial position of either of the parties, dual representation may be inappropriate. If optional Article VII (relating to treatment of individual property upon dissolution) is included, dual representation is inappropriate.

they have agreed in writing to such dual representation.]¹⁶ Each party has received from his or her attorney an explanation of the terms and legal significance of this agreement and the effect that it has on any interest that might accrue to each party in property acquired by the other. Each party acknowledges that he or she understands the agreement and its legal effect and is signing the agreement freely and voluntarily.

[XIX.][XX.] EFFECTIVE DATE

[This agreement becomes effective upon the marriage of the parties.]
[This agreement becomes effective upon the date that both parties are domiciled in Wisconsin.] [This agreement becomes effective upon the later of the marriage of the parties or the date that both parties are domiciled in Wisconsin.] [This agreement becomes effective upon execution.]

Dated: _____.

_____ *(party's signature)*

_____ *(party's signature)*

STATE OF WISCONSIN
COUNTY OF _____

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

Notary Public, State of Wisconsin
My commission expires _____

[If a Memorandum of Assets, Liabilities, and Income is to be used, see §§ 7.169 and .172, infra.]

¹⁶ In the event of a conflict of interest, the consent to dual representation must be in writing after consultation. *See* SCR 20:1.7; *see also infra* ch. 14.

D. Sample Agreement to Classify All Property as Individual Property, Terminable by One or Both Spouses [§ 7.158]

1. Introduction [§ 7.159]

The primary purpose of this agreement is to classify all of the spouses' property as individual property, but to permit either spouse unilaterally to cause the spouses' property regime to revert to that which would apply in the absence of the agreement. The agreement has been drafted for persons who are married to each other. If the form is to be used by parties who intend to marry, it may be modified accordingly. By its terms, it is not intended to affect the division of the spouses' assets in the event of the dissolution of their marriage. One of its advantages is that, in appropriate circumstances, it may permit the spouses to be represented by a single attorney. *See infra* ch. 14. Similarly, it may permit less detailed financial disclosures than might otherwise be required. A severability provision, *see supra* § 7.70, has not been included because of the likelihood that the spouses would not wish to have the agreement at all if one of its key provisions (such as the elective right of either spouse to change the property classification system) were found to be invalid. It is a sample form only and does not purport to be all-inclusive. With respect to the methods by which spouses may classify or reclassify property, see section 766.31(10) and chapter 2, *supra*. See chapters 9 and 10, *infra*, for tax and estate planning considerations, respectively. Marital property agreements must be tailored to the parties' circumstances, and tax issues must be carefully considered. For other resources concerning the drafting of provisions for marital property agreements, see section 7.109, *supra*.

2. Form [§ 7.160]

MARITAL PROPERTY AGREEMENT

This is a marital property agreement between (husband) and (wife) , husband and wife, of _____ County, Wisconsin.

WHEREAS, the parties desire by this agreement to determine the system of property classification and ownership applicable during their marriage and upon termination of their marriage by the death of one or

both of the parties, both as to assets that they now own and as to those they hereafter acquire;

WHEREAS, each party has made and acknowledges receiving a fair and reasonable disclosure under the circumstances of the parties' property and financial obligations¹ [, as set forth in a separate Memorandum of Assets, Liabilities, and Income executed by them on this date];

WHEREAS, each party understands that in the absence of this agreement the law would confer upon him or her property rights and interests in certain of the present and future assets possessed or acquired by the other, and each party further understands that those rights and interests will be affected by this agreement;

WHEREAS, the parties desire to classify, pursuant to Wisconsin law, all assets of either or both of them as individual property and none as marital property except as otherwise specifically provided in this agreement;

WHEREAS, the parties further desire to provide that all obligations now outstanding and hereafter incurred by either of them shall be their respective sole obligations, as if they were unmarried persons;

NOW, THEREFORE, it is agreed as follows:

I. ALL PROPERTY IS INDIVIDUAL PROPERTY

A. The parties agree that all of the assets of either or both of them shall be classified as individual property and none of their assets shall be classified as marital property except as otherwise provided in this agreement. In carrying out this intention, the following rules shall apply:

1. An asset now or hereafter held by a party shall be classified as that party's individual property.

¹ There are no court decisions under the Act as to what constitutes a "fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations" for purposes of enforceability under section 766.58(6)(c). Inferentially, the financial disclosure statements that are included as part of the statutory terminable marital property classification agreement and the statutory terminable individual property classification agreement, *see infra* §§ 7.175, .178, should be sufficient. The memoranda of assets, liabilities, and income at sections 7.169 and .172, *infra*, should also be sufficient because they provide even greater detail than the statutory financial disclosure forms.

2. Unless expressly provided to the contrary in a document of title or other writing signed by both parties, an asset now or hereafter held by both parties shall be classified as the individual property of both parties as joint tenants with right of survivorship and shall have all of the incidents of such tenancy.

3. An asset not held by a party shall be classified as the individual property of a party to the extent that the party (a) furnished the consideration in money or money's worth (including the incurring of a debt) for the asset; or (b) received the asset by gift, inheritance, nontestamentary transfer, or trust distribution. The parties recognize that assets acquired as described in (a) and (b) above may be co-owned as individual property. The parties further agree that when one party furnishes the consideration for an asset that he or she gives to the other party, the asset is the individual property of the donee party.

B. The classification of an asset as individual property shall extend to the income from the asset; to the realized or unrealized appreciation in the value of the asset regardless of whether the appreciation occurred through general market conditions or through the application of labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity by either of the parties; and to property received in exchange for or with the proceeds of the asset. The classification of an asset held by one or both of the parties shall not be affected by the classification of property added to or mixed with the asset, and any such addition or mixing shall be deemed a gift to the holding party or parties.

C. The parties agree that they shall not acquire any marital property until such time as the right granted under Article IV of this agreement is exercised, if ever.

D. The parties agree that:

1. If the parties are domiciled in Wisconsin at the death of the first of them to die, only the elective rights in Article[s] [IV and V] [IV] shall apply, and each party waives any statutory deferred marital property elective rights in and to assets classified as individual property under this agreement.

2. If the parties are domiciled in another community property jurisdiction at the death of the first of them to die, only the elective rights in Article[s] [IV and V] [IV] shall apply, and each party waives any quasi-community property or other elective rights in and to assets classified as individual property under this agreement.

3. If the parties are domiciled in a common law jurisdiction at the death of the first of them to die, the surviving spouse shall have either the elective rights in Article[s] [IV and V] [IV] or any elective rights the surviving spouse may have under the laws of the common law jurisdiction that are applicable to the assets of the deceased party, but not both.

II. MANAGEMENT AND CONTROL

Each party shall have the full and exclusive power of management and control over his or her individual property, free from any interference or claims by the other party. Each party shall have the unqualified right to dispose of his or her individual property at any time by sale, exchange, gift, disposition at death, or otherwise, to any person or persons he or she may choose, including the other party, without the other party's consent.

III. OBLIGATIONS AND CREDITORS²

A. Except for obligations for normal support and maintenance, all other obligations, including but not limited to contractual obligations and those for torts, punitive damages, penalties, fines, or forfeitures that either party has incurred or hereafter incurs, and the parties' respective shares of obligations that have been or may be incurred jointly, either with each other or with third persons, shall be the obligation of the incurring party as though he or she were an unmarried person, regardless of when the obligation is incurred. Unless prohibited by law, any such obligation shall be satisfied exclusively out of the individual property of the incurring party as defined by this agreement. If a creditor obtains payment or satisfaction in connection with the obligation of a party out of the individual property of the other party as defined by this agreement, the other party shall be entitled to full reimbursement from the incurring party or his or her estate.

B. Each party shall provide all prospective credit grantors (except those for normal support) with a copy of this agreement before credit is granted or an open-end credit plan is entered into.

² See Article III of the marital property agreement at section 7.154, *supra*, for additional and alternative clauses dealing with obligations and creditors.

[Choose appropriate alternative]³

[Alternative I]

IV. ELECTIVE RIGHT TO PROSPECTIVELY CHANGE PROPERTY CLASSIFICATION SYSTEM

Either party may at any time during the marriage cause a change from the property classification system in Article I to that which would apply to the parties' property in the jurisdiction or jurisdictions where the parties are domiciled on and after the effective date of the change. The change shall be prospective only and shall not alter the classification of, or the rights of the parties in or with respect to, the individual property owned or acquired by either party before such change. The change shall be accomplished by delivery of a notice in substantially the form of attached Exhibit A by the invoking party to the other. The effective date of the change shall be 30 days from the date the notice is delivered. The parties understand and specifically intend that the terms of this article give each party acting alone the right to cause a prospective change in their property rights. The exercise of that right shall not be an amendment or revocation of this agreement. This agreement shall continue in full force and effect following any such exercise until amended or revoked by the parties as provided in Article [VIII][IX].

³ If the right to change from the individual property classification system spelled out in the agreement is to be prospective only, Alternative I should be used. If the right to change is to be completely retroactive, Alternative II should be used. It may be fairer to allow full retroactivity, except for gifts to third persons (such gifts could be made subject to a good-faith standard). Moreover, if the agreement is fully retroactive, a death-bed election to change the property classification system may create a larger body of marital property assets that would qualify for a full adjustment in basis at the death of the first spouse to die. On the other hand, questions as to whether the agreement is illusory may arise in situations in which one spouse alone is permitted to effectively rescind the agreement on a retroactive basis. *See supra* § 7.117.

Permitting only a prospective change in the property classification system adopted by the agreement increases the likelihood that separate representation may be required if the agreement would have a significant impact on the financial position of either of the parties. On the other hand, making the right to change prospective only has the advantage that it is consistent with the format used in the statutory terminable individual property classification agreement in section 766.589. *See supra* §§ 7.73–82.

V. ELECTIVE RIGHT AT DEATH OF A PARTY

A. If one party dies while married to the other, the surviving party shall have an elective right to an amount equal to the excess, if any, of (1) the value of all property that the surviving party would have owned if Wisconsin's marital property laws, as amended to date and from time to time hereafter, had been in effect throughout their marriage and no property had passed to the surviving party from the deceased party by will, trust, beneficiary designation, annuity, or otherwise as a result of the deceased party's death, over (2) the value of the property actually owned by the surviving party immediately following the deceased party's death, including that passing to the surviving party from the deceased party. For purposes of (2) above, property passing to the surviving party or to a trustee from the deceased party shall be treated as owned by the surviving party if the property qualifies for the federal estate tax marital deduction under section 2056 of the Internal Revenue Code as amended.⁴

B. For purposes of this article, all survivorship requirements of less than six months shall be deemed to have been satisfied and any statutory elective rights exercised by the survivor shall be deemed to have been exercised immediately following the deceased party's death. All values shall be determined as of the deceased party's date of death.

C. The surviving party may assert his or her elective right under this article in whole or in part at any time before the first to occur of the following:

1. The expiration of six months following the death of the predeceasing party;
2. The last date for filing claims under the applicable statute governing claims based on a marital property agreement; or
3. The death of the surviving party.

The elective right shall be satisfied first and to the greatest extent possible out of the deceased party's probate estate. Each party understands that in order to enforce this contractual right, he or she may

⁴ This sentence has the effect of permitting property passing into a qualified terminable interest property (QTIP) trust for the benefit of a surviving spouse to be counted against the amount available for election. This provision may be more restrictive than the statutory provisions for satisfaction of the deferred marital property elective share. *See, e.g.*, Wis. Stat. §§ 861.02–.06.

be required to comply with the claim-filing requirements of the probate laws governing the deceased party's estate. The parties agree that a contingent claim for the maximum amount under this article shall be sufficient if asserted in general terms that apprise the personal representative(s) of the deceased party's estate of the nature and extent of the claim. If the full amount of the elective right asserted by the surviving party cannot be satisfied out of the deceased party's probate estate, the parties agree that the surviving party shall have a pro rata ownership interest in all of the deceased party's nonprobate assets that are includible in the deceased party's gross estate for federal estate tax purposes sufficient to satisfy the balance of the elective right. If the reason that the elective right asserted by the surviving party cannot be satisfied out of the deceased party's probate estate is the failure by the surviving party to file a claim against the deceased party's probate estate within the period of time allowed by applicable law, the amount of the asserted elective right shall be reduced by the amount that could have been satisfied out of the deceased party's probate estate had a timely claim been filed.

D. If the surviving party exercises the elective right in whole or in part, the parties agree that the exercise of the election shall constitute a disclaimer by the surviving party of any provisions made for the surviving party in the will or any revocable trust of the deceased party, and the surviving party shall execute such documents and take such actions as are required to effect such disclaimer as a condition of the exercise of such election.

[Or]

[Alternative II]

IV. ELECTIVE RIGHT TO RETROACTIVELY CHANGE PROPERTY CLASSIFICATION SYSTEM

A. Either party at any time during the marriage, or if the marriage ends by the death of one of the parties, the surviving party, may elect the alternative rights in this article in lieu of the rights conferred on the electing party in other articles of this agreement. If one of the parties elects the rights conferred by this article, both parties shall forfeit the provisions made in the other articles in this agreement, and such provisions shall be unenforceable by either party. If one of the parties elects the rights conferred by this article during the parties' marriage, both the electing party and the other party shall have the rights conferred by this article in lieu of any rights conferred on the parties in other articles of this agreement. The parties understand and specifically intend that the terms of this article give each party acting alone the right to cause a

retroactive change in their property rights. The exercise of that right shall not be an amendment or revocation of this agreement. This agreement shall continue in full force and effect following any such exercise until otherwise amended or revoked as provided in this agreement.

B. If an election of the alternative rights in this article is made during the lifetimes of both parties, then the following shall occur:

1. All of the property that at the time of the election would have been marital property of the parties if this agreement had not been entered into shall be reclassified as marital property by virtue of this agreement and without the necessity of further agreement between the parties or further action by either party. Both parties agree to take such action and execute such documents as may be required to confirm such reclassification.

2. Upon the death of the first of the parties to die, all of the property of the deceased party that at the death of the deceased party would have been subject to any rights of the surviving spouse conferred by operation of law if this agreement had not been entered into, including the deferred marital property and the augmented marital property estate elective rights, shall be subject to the elective right of the surviving party described in Paragraph D of this article. All other property of the deceased party shall be classified as the individual property of the deceased party.

C. If the election of the alternative rights in this article is made after the death of the one of the parties, then the following shall occur:

1. All of the property that at the time of the election would have been marital property of the parties if the parties were then living and if this agreement had not been entered into shall be divided into two equal shares. One share shall be paid and distributed to the surviving party, and the other share shall be paid and distributed to the deceased party's estate.

2. All of the property of the deceased party that at the death of the deceased party would have been subject to any rights of the surviving spouse conferred by operation of law if this agreement had not been entered into, including the deferred marital property and augmented marital property estate elective rights, shall be subject to the elective right of the surviving party described in Paragraph D of this article. All other property of the deceased party shall be classified as the individual property of the deceased party.

D. The elective right of the surviving party referred to in Paragraphs B.2. and C.2. of this article shall be a right to receive property following the deceased party's death that is equal in amount to the property that would have been received under the rights of the surviving spouse conferred by operation of law if this agreement had not been entered into, including the rights granted to the surviving spouse with respect to the deferred marital property and augmented marital property estate elections under chapters 766 and 861 of the Wisconsin Statutes or any successor statutes in effect at the time of the first party's death. This elective right shall be subject to bar and to reduction in the same manner and to the same extent that would have applied to the rights of the surviving spouse conferred by operation of law if this agreement had not been entered into, including the rights with respect to the deferred marital property and augmented marital property estate elections under chapters 766 and 861 of the Wisconsin Statutes, or any successor statutes in effect at the time of the first party's death.

E. The election of the alternative rights conferred by this article shall be accomplished by execution by one of the parties of a notice making specific reference to this article and by delivery of such notice (1) within five days of execution to the other party, if living, or (2) if not living, to the personal representative of the other party's estate, within the time period specified below. Following the death of a party, the surviving party may assert his or her elective right under this article in whole or in part at any time before the first to occur of the following:

1. The expiration of six months following the death of the predeceasing party;
2. The last date for filing claims under the applicable statute governing claims based on a marital property agreement; or
3. The death of the surviving party.

All values shall be determined as of the deceased party's date of death. The elective rights shall be satisfied first and to the greatest extent possible out of the deceased party's probate estate. Each party understands that in order to enforce this contractual right, he or she may be required to comply with the claim-filing requirements of the probate laws governing the deceased party's estate. The parties agree that a contingent claim for the maximum amount under this article shall be sufficient if asserted in general terms that apprise the personal representative(s) of the deceased party's estate of the nature and extent of the claim. If the surviving party exercises the elective right in whole or in part, the parties agree that the exercise of the election shall constitute a disclaimer by the surviving party of any provisions made for the

surviving party in the will or any revocable trust of the deceased party, and the surviving party shall execute such documents and take such actions as are required to effect such disclaimer as a condition of the exercise of such election.

[Continue]

[V.][VI.] AGREEMENT NOT TO AFFECT PROPERTY DIVISION IN EVENT OF DISSOLUTION

In the event of the dissolution of the parties' marriage by divorce, annulment, legal separation, or other legal proceeding, this agreement shall not affect how the court divides the parties' assets, pursuant to section 767.61 of the Wisconsin Statutes or the comparable statute of any applicable jurisdiction. Except as otherwise necessary to enforce provisions intended to survive a dissolution, this agreement is revoked by and shall terminate upon entry of a court judgment of dissolution of the parties' marriage.

[VI][VII.] FINANCIAL DISCLOSURE

Each party has made [a written] disclosure to the other of his or her property and obligations in connection with the preparation and execution of this agreement. Each party acknowledges receiving such disclosure from the other and represents that his or her own disclosure was fair and reasonable under the circumstances.

[VII.][VIII] ENTIRE AGREEMENT

This agreement represents the entire agreement and understanding between the parties regarding the property and obligations described herein. Both parties acknowledge that neither party has made any conflicting or additional promise or representation to the other regarding any of the subject matter covered by this agreement.

[VIII.][IX.] AMENDMENT OR REVOCATION

This agreement shall not be amended or revoked except by a later marital property agreement.

[IX.][X.] BINDING EFFECT

This agreement shall be binding on the parties, their heirs, legatees, personal representatives, and legal representatives.

[X.][XI.] GOVERNING LAW

This agreement shall be interpreted in accordance with the laws of the state of Wisconsin, where the parties now reside and are domiciled. The establishment by either or both of the parties of a domicile in another state shall not affect the binding nature or validity of this agreement, the rights of the parties under it, or the laws under which it shall be interpreted.

[XI.][XII.] CHANGE OF DOMICILE

If necessary to validate this agreement and make the substance of it enforceable in a jurisdiction in which the parties later become domiciled, the parties (or their legal representatives) agree to reexecute this agreement or one that is in substantially the same form and accomplishes the same objectives, all in accordance with the requirements of such jurisdiction.

[XII.][XIII.] REVOCATION OF PRIOR AGREEMENTS

By execution of this agreement, the parties revoke each and every marriage agreement previously entered into by them, including each and every marital property agreement pursuant to Wisconsin's marital property laws. The parties further agree that any such agreement shall be of no further force and effect in any respect, as if it had never been entered into.⁵

[XIII.][XIV.] DEFINITIONS

Except as otherwise provided in this agreement, the terms *held*, *individual property*, *marital property*, and *deferred employment benefit* shall be interpreted in accordance with and have the incidents provided under the laws of Wisconsin [as amended to date].⁶ For purposes of this agreement, individual property also includes individual property under the laws of any other jurisdiction adopting the Uniform Marital Property

⁵ Note that if certain actions taken or certain property classifications established by earlier agreements are to be preserved, special provisions should be included for that purpose.

⁶ See footnote 2 of the marital property agreement at section 7.151, *supra*, for a discussion of the scope of the marital property definition. Use the bracketed language at the end of the sentence if the definitions are to be restricted to the law in effect at the time the agreement is executed. If the definitions are to “float” with the evolution of Wisconsin law following the date of execution of the agreement, the bracketed language should be deleted.

Act or some variant thereof, separate property under the laws of any community property jurisdiction, and common law property interests under the laws of any common law jurisdiction. Marital property also includes marital property under the laws of any other jurisdiction adopting the Uniform Marital Property Act or some variant thereof and community property under the laws of any community property jurisdiction. An *asset* or *assets* shall consist of property rights and interests of any nature or description, whether present or future, legal or equitable, vested or contingent, in real or personal property, and shall include assets that either or both of the parties have transferred to a revocable trust of which either or both are the settlor(s).

[XIV.][XV.] LEGAL REPRESENTATION

[Before signing this agreement, each party consulted with an attorney of his or her choice.]⁷ [The parties are represented by one attorney in connection with this agreement, and each has agreed in writing to such dual representation.]⁸ Each party has received from his or her attorney an explanation of the terms and legal significance of this agreement and the effects it will have on the property and rights of the parties, as well as an explanation of the marital property system that would apply under present Wisconsin law in the absence of this agreement. Each party acknowledges that he or she understands this agreement and its legal effect and is signing voluntarily.

Dated: _____.

_____ (party's signature)
 _____ (party's signature)

STATE OF WISCONSIN
 COUNTY OF _____

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

 Notary Public, State of Wisconsin
 My commission expires _____

⁷ See generally *infra* ch. 14 (separate representation).

⁸ In the event of a conflict of interest, the consent to dual representation must be in writing after consultation. See SCR 20:1.7; see also *infra* ch. 14.

[If a Memorandum of Assets, Liabilities, and Income is to be used, see sections 7.169 and .172, *infra*.]

[Include if appropriate]

EXHIBIT A⁹

NOTICE OF ELECTION TO PROSPECTIVELY CHANGE PROPERTY CLASSIFICATION

Pursuant to Article IV of a marital property agreement dated _____, between my spouse, _____, and me, I elect to change the property classification provided in Article I of that agreement to that which would apply to our property in the jurisdiction or jurisdictions in which my spouse and I are domiciled on and after the effective date of this election. This change shall be effective 30 days from the date this notice is delivered to my spouse.

Dated: _____.

ACKNOWLEDGMENT OF DELIVERY

I acknowledge that a copy of the foregoing Notice of Election to Prospectively Change Property Classification was delivered to me on _____.

⁹ Include Exhibit A only if Alternative I, *supra*, is selected.

E. Sample Will Substitute Agreement [§ 7.161]

1. Introduction [§ 7.162]

The primary purpose of this agreement is to transfer all marital, individual, and predetermination date property owned by a deceased spouse to the surviving spouse without probate by nontestamentary disposition pursuant to section 766.58(3)(f). This sample agreement does not govern disposition at the death of the surviving spouse and thus leaves the surviving spouse free to dispose of the property as he or she desires after the death of the first spouse to die. See footnote 4, *infra*, regarding provisions intended to operate at the deaths of both spouses. If the spouses also desire to reclassify most or all of their property as marital property, the appropriate recital clauses and the operative language of Article I from the sample agreement in section 7.151, *supra*, might be included. The agreement applies only to property that would otherwise be subject to administration; it does not purport to transfer nonprobate assets because of the possibility of conflicts with outstanding beneficiary designations or other nonprobate transfer arrangements. See *supra* §§ 7.102–.104. This agreement has been drafted for persons who are married to each other. If the form is to be used by parties who intend to marry, it may be modified accordingly. The agreement is a sample form only and does not purport to be all-inclusive. Marital property agreements must be tailored to the parties' circumstances, and tax issues must be carefully considered. For other resources concerning the drafting of provisions for marital property agreements, see section 7.109, *supra*.

2. Form [§ 7.163]

MARITAL PROPERTY AGREEMENT

This is a marital property agreement between _____ and _____, husband and wife, of _____ County, Wisconsin.

WHEREAS, the parties are presently married to each other, and each desires to dispose of all property that would otherwise be subject to probate administration and that he or she owns at the death of the first of

them, without probate by nontestamentary disposition and without any intention to revoke the will of either party;¹

WHEREAS, each party has made and acknowledges receiving fair and reasonable disclosure under the circumstances of the parties' property and financial obligations² [, as set forth in a separate Memorandum of Assets, Liabilities, and Income executed by them on this date];

WHEREAS, the parties desire to avail themselves of the right contained in section 766.58(3)(f) of the Wisconsin Statutes to dispose of the marital property, individual property, and predetermination date property that each of them now owns or hereafter acquires to the survivor by nontestamentary disposition upon the death of the first of them to die;

NOW, THEREFORE, it is agreed as follows:

I. SCOPE OF AGREEMENT

This agreement applies to the interest of both parties in assets classified as marital property and in assets other than marital property owned by the parties at the death of the first of the parties to die.

II. TRANSFER OF ASSETS WITHOUT PROBATE UPON DEATH OF A PARTY

Upon the death of either of the parties, all of the decedent's ownership interests in assets described and classified in Article I that in

¹ A marital property agreement ordinarily will not suffice to revoke a will, either expressly or by inconsistency, unless executed with all the formalities of a will. Wis. Stat. § 853.11(1). However, a will substitute agreement may dispose of all assets that otherwise would be subject to probate at the death of the first spouse to die, thus having the same practical consequence as a revocation of the will.

² There are no court decisions under the Act as to what constitutes a "fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations" for purposes of enforceability under section 766.58(6)(c). Inferentially, the financial disclosure statements that are included as part of the statutory terminable marital property classification agreement and the statutory terminable individual property classification agreement, *see infra* §§ 7.175, .178, should be sufficient. The memoranda of assets, liabilities, and income at sections 7.169 and .172, *infra*, should also be sufficient because they provide even greater detail than the statutory financial disclosure forms.

the absence of this agreement would be subject to probate, shall immediately pass to and vest in the survivor without probate by nontestamentary disposition.³ This article is intended to be a disposition of property as described in section 766.58(3)(f) of the Wisconsin Statutes.

III. REVOCATION UPON DISSOLUTION OF MARRIAGE

Except as otherwise necessary to enforce provisions intended to survive dissolution, this agreement is revoked by and shall terminate upon entry of a court judgment of dissolution of the parties' marriage.

IV. CHANGE OF DOMICILE

This agreement is revoked and shall terminate at such time as either or both of the parties establish a domicile in another state.⁴

V. FINANCIAL DISCLOSURE

Each party has made [a written] disclosure to the other of his or her property and obligations in connection with the preparation and execution of this agreement. Each party acknowledges receiving that disclosure from the other and represents that his or her own disclosure was fair and reasonable under the circumstances.

VI. AMENDMENT OR REVOCATION

This agreement may be amended or revoked only by a later written marital property agreement.

³ For an example of a will substitute provision that operates at the deaths of both spouses, see Article VI of the opt-in marital property agreement at section 7.151, *supra*. These provisions envisage transfers of assets to a jointly created revocable trust. Consistent with section 766.58(3)(f), these provisions specifically permit the surviving spouse to amend the will substitute agreement with regard to the property to be disposed of at his or her death. This right to amend may be restricted if the agreement expressly so provides or if the property is held in trust expressly established under the agreement. *See supra* § 7.100. If a restrictive provision of this sort is used, the final "whereas" clause in the recitals of this agreement should be modified appropriately.

⁴ It would appear that many states would not recognize an agreement of this kind as a will substitute, particularly with respect to property acquired after either or both of the spouses change their domicile to that state. Exceptions are Washington, Idaho, Texas, and perhaps states that have enacted Uniform Probate Code § 6-201.

VII. BINDING EFFECT

This agreement shall be binding on the parties, their heirs, legatees, personal representatives, and legal representatives.

VIII. GOVERNING LAW

This agreement shall be interpreted in accordance with the laws of the state of Wisconsin, where the parties now reside and are domiciled.

IX. DEFINITIONS

Except as otherwise provided in this agreement, the terms *held*, *individual property*, and *marital property* shall be interpreted in accordance with and have the incidents provided under the laws of Wisconsin [as amended to date.]⁵ An *asset* or *assets* shall consist of property rights and interests of any nature or description, whether present or future, legal or equitable, vested or contingent, in real or personal property, and shall include assets that either or both of the parties have transferred to a revocable trust of which either or both are the settlor(s).

X. LEGAL REPRESENTATION

[Before signing this agreement, each party consulted with an attorney of his or her choice.]⁶ [The parties are represented by one attorney in connection with this agreement, and each has agreed in writing to such dual representation.]⁷ Each party has received from his or her attorney an explanation of the terms and legal significance of this agreement. Each party acknowledges that he or she understands this agreement and its legal effect and is signing voluntarily.

⁵ See footnote 2 of the marital property agreement at section 7.151, *supra*, for a discussion of the scope of the marital property definition. Use the bracketed language at the end of the sentence if the definitions are to be restricted to the law in effect at the time the agreement is executed. If the definitions are to “float” with the evolution of Wisconsin law following the date of execution of the agreement, the bracketed language should be deleted.

⁶ See generally *infra* ch. 14 (separate representation).

⁷ In the event of a conflict of interest, the consent to dual representation must be in writing after consultation. See SCR 20:1.7; see also *infra* ch. 14.

Dated: _____.

(party's signature)

(party's signature)

STATE OF WISCONSIN
COUNTY OF _____

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

Notary Public, State of Wisconsin
My commission expires _____

[If a Memorandum of Assets, Liabilities, and Income, is to be used, see sections 7.169 and .172, infra.]

F. Sample Revocation of Prior Marital Property Agreements [§ 7.164]

1. Introduction [§ 7.165]

The purpose of this agreement is to revoke all prior marriage agreements and marital property agreements in a manner consistent with the requirements of section 766.58(4). One reason to revoke prior agreements is to ensure that forgotten earlier agreements do not jeopardize the current estate plan. Similar revocation language is also used in the agreement forms in sections 7.151–.163, *supra*. The following is a sample form only and does not purport to be all-inclusive.

2. Form [§ 7.166]

MARITAL PROPERTY AGREEMENT

This is a marital property agreement between _____ and _____, husband and wife, of _____ County, Wisconsin.

WHEREAS, each party has made and acknowledges receiving fair and reasonable disclosure under the circumstances of the parties' property and financial obligations¹ [, as set forth in a separate Memorandum of Assets, Liabilities, and Income executed by them on this date];

NOW, THEREFORE, it is agreed as follows:

I. REVOCATION OF PRIOR AGREEMENTS

By execution of this agreement, the parties revoke each and every marriage agreement previously entered into by them, including each and

¹ There are no court decisions under the Act as to what constitutes a “fair and reasonable disclosure, under the circumstances, of the other spouse’s property or financial obligations” for purposes of enforceability under section 766.58(6)(c). Inferentially, the financial disclosure statements that are included as part of the statutory terminable marital property classification agreement and the statutory terminable individual property classification agreement, *see infra* §§ 7.175, .17, should be sufficient. The memoranda of assets, liabilities, and income at sections 7.169 and .172, *infra*, should also be sufficient because they provide even greater detail than the statutory financial disclosure forms.

every marital property agreement pursuant to Wisconsin's marital property laws. The parties further agree that any such agreement shall be of no further force and effect in any respect, as if it had never been entered into.²

II. FINANCIAL DISCLOSURE

The parties agree that the disclosures of assets, liabilities, and income that they have made to each other in connection with this agreement are fair and reasonable disclosures of each other's property and financial obligations.

III. AMENDMENT OR REVOCATION

This agreement (including this agreement against oral modification or waiver) shall not be modified or waived except by a later marital property agreement.

IV. BINDING EFFECT

This agreement shall be binding on the parties, their heirs, legatees, personal representatives, and legal representatives.

V. GOVERNING LAW

This agreement shall be interpreted in accordance with the laws of the state of Wisconsin, where the parties now reside and are domiciled. The establishment by either or both of the parties of a domicile in another state shall not affect the binding nature or validity of this agreement, the rights of the parties under it, or the laws under which it shall be interpreted.

² To the extent practicable, it is desirable to specifically identify each agreement that is revoked. Also note that if certain actions taken or certain property classifications established by earlier agreements are to be preserved, special provisions should be included for that purpose, or a separate marital property agreement should be prepared.

MARRIAGE AGREEMENTS

Dated: _____.

(party's signature)

(party's signature)

STATE OF WISCONSIN
COUNTY OF _____

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

Notary Public, State of Wisconsin
My commission expires _____

[If a Memorandum of Assets, Liabilities, and Income is to be used, see sections 7.169, .172, infra.]

G. Sample Memorandum of Assets, Liabilities, and Income (Asset Disclosure by Classification) [§ 7.167]

1. Introduction [§ 7.168]

The purpose of this Memorandum of Assets, Liabilities, and Income is to provide a framework for memorializing the parties' disclosures in a manner that will meet the fair and reasonable disclosure requirements of section 766.58(6)(c)1. It is a sample form only, and in some instances attachment of schedules listing one or more categories of assets or liabilities in greater detail may be appropriate.

2. Form [§ 7.169]

MEMORANDUM OF ASSETS, LIABILITIES, AND INCOME

This memorandum contains a fair and reasonable disclosure of our property and financial obligations at approximate fair market values that we believe to be accurate and correct. We understand and agree that this memorandum has been prepared in connection with a marital property agreement executed by us on this date.

Dated: _____.

_____ *(party's signature)*

_____ *(party's signature)*

Assets and Liabilities

Property acquired before the determination date (January 1, 1986, for married persons resident in Wisconsin at that time) in one of our names is listed entirely in the predetermination date property column of the spouse who owns it. Predetermination date property owned by us as tenants in common is listed half in the husband's column and half in the wife's column, and mortgages against that property are divided equally. Property acquired after the determination date that is owned as individual property is listed entirely in the individual property column of the spouse who owns it. Property acquired after the determination date that is owned as marital property is listed half in the husband's column and half in the wife's column under marital property. Property owned by us in a

predetermination date joint tenancy with right of survivorship or as survivorship marital property acquired after the determination date is listed half in the husband's column and half in the wife's column under joint tenancy and survivorship marital property, and mortgages against that property are divided equally.

Unsecured debts or obligations incurred before the determination date and any premarital debts are shown in the predetermination date property column of the spouse who incurred the debt. Unsecured debts or obligations incurred after the determination date in the interest of the marriage and the family (family purpose debts) are shown entirely in the marital property column of the spouse who incurred the debt, even though marital property interests of the other spouse may be reached to satisfy these obligations. Unsecured non-family purpose debts or obligations incurred after the determination date are shown in the individual property column of the spouse who incurred them.

Husband				
	Predeter- mination Date <u>Property</u> ¹	Individual <u>Property</u>	Marital <u>Property</u> ² (1/2 only)	Joint Tenancy and Survivorship <u>Marital</u> <u>Property</u> (1/2 only)
Principal residence (Less mortgage)	\$ _____ (_____)	\$ _____ (_____)	\$ _____ (_____)	\$ _____ (_____)
Other residential property in Wisconsin (Less mortgage)	(_____)	(_____)	(_____)	(_____)
Other residential property not in Wisconsin (Less mortgage)	(_____)	(_____)	(_____)	(_____)
Investment real estate in Wisconsin (Less mortgage)	(_____)	(_____)	(_____)	(_____)
Investment real estate not in Wisconsin (Less mortgage)	(_____)	(_____)	(_____)	(_____)
Stock in closely held corporations	_____	_____	_____	_____
Partnership interests	_____	_____	_____	_____
Marketable stocks and bonds	_____	_____	_____	_____
Cash, checking accounts, savings accounts, savings bonds, and money market investments	_____	_____	_____	_____
Notes, mortgages, and land contracts	_____	_____	_____	_____
Automobiles, boats, snowmobiles, and airplanes	_____	_____	_____	_____
Antiques, collections, art, jewelry	_____	_____	_____	_____
Other household furnishings	_____	_____	_____	_____
Other significant property	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
Property held in revocable trusts (describe)	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Husband

	<u>Predeter- mination Date Property¹</u>	<u>Individual Property</u>	<u>Marital Property² (1/2 only)</u>	<u>Joint Tenancy and Survivorship Marital Property (1/2 only)</u>
Other interests in trusts (describe whether income or principal, mandatory or discretionary, termina- tion date(s), approximate value of trust assets)	_____	_____	_____	_____
_____	_____	_____	_____	_____
Secured debts other than mortgages deducted above (indicate security)	(_____)	(_____)	(_____)	(_____)
_____	(_____)	(_____)	(_____)	(_____)
Unsecured debts	(_____)	(_____)	(_____)	
_____	(_____)	(_____)	(_____)	
Death value of pension, profit- sharing, and other employ- ment benefits (Beneficiary _____)	_____	_____	_____	
Death value of HR-10 and IRA accounts (Beneficiary _____)	_____	_____	_____	

Life insurance on life of husband	<u>Face Amount</u>	<u>Current Cash Value⁴</u>
1. Owned by husband ³ (Beneficiary _____)	\$ _____	\$ _____
2. Owned by wife (Beneficiary _____)	_____	_____
3. Owned by someone else (Beneficiary _____)	_____	_____

Life insurance on life of another	<u>Face Amount</u>	<u>Current Cash Value⁴</u>	<u>Person Insured</u>
Owned by husband ³ (Beneficiary _____)	\$ _____	\$ _____	\$ _____

Wife

	Predeter- mination Date Property ¹	Individual Property	Marital Property ² (1/2 only)	Joint Tenancy and Survivorship Marital Property (1/2 only)
Principal residence (Less mortgage)	\$ _____	\$ _____	\$ _____	\$ _____
Other residential property in Wisconsin (Less mortgage)	_____	_____	_____	_____
Other residential property not in Wisconsin (Less mortgage)	_____	_____	_____	_____
Investment real estate in Wisconsin (Less mortgage)	_____	_____	_____	_____
Investment real estate not in Wisconsin (Less mortgage)	_____	_____	_____	_____
Stock in closely held corporations	_____	_____	_____	_____
Partnership interests	_____	_____	_____	_____
Marketable stocks and bonds	_____	_____	_____	_____
Cash, checking accounts, savings accounts, savings bonds, and money market investments	_____	_____	_____	_____
Notes, mortgages, and land contracts	_____	_____	_____	_____
Automobiles, boats, snowmobiles, and airplanes	_____	_____	_____	_____
Antiques, collections, art, jewelry	_____	_____	_____	_____
Other household furnishings	_____	_____	_____	_____
Other significant property	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
Property held in revocable trusts (describe)	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Wife

	<u>Predeter- mination Date Property</u> ¹	<u>Individual Property</u>	<u>Marital Property</u> ² (1/2 only)	<u>Joint Tenancy and Survivorship Marital Property</u> (1/2 only)
Other interests in trusts (describe whether income or principal, mandatory or discretionary, termina- tion date(s), approximate value of trust assets)	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
Secured debts other than mortgages deducted above (indicate security)	(_____)	(_____)	(_____)	(_____)
_____	(_____)	(_____)	(_____)	(_____)
Unsecured debts	(_____)	(_____)	(_____)	
_____	(_____)	(_____)	(_____)	
Death value of pension, profit- sharing, and other employ- ment benefits (Beneficiary _____)	_____	_____	_____	
Death value of HR-10 and IRA accounts (Beneficiary _____)	_____	_____	_____	

Life insurance on life of wife	<u>Face Amount</u>	<u>Current Cash Value</u> ⁴
1. Owned by wife ³ (Beneficiary _____)	\$ _____	\$ _____
2. Owned by husband (Beneficiary _____)	_____	_____
3. Owned by someone else (Beneficiary _____)	_____	_____

Life insurance on life of another	<u>Face Amount</u>	<u>Current Cash Value</u> ⁴	<u>Person Insured</u>
Owned by wife ³ (Beneficiary _____)	\$ _____	\$ _____	\$ _____

	Income		
	<u>Husband</u>	<u>Joint</u>	<u>Wife</u>
Last year's salary or other compensation	_____		_____
This year's estimated salary or other compensation	_____		_____
Other income last year	_____	_____	_____
Other estimated income this year	_____	_____	_____

-
1. Consider the desirability of further subcategorizing predetermination date property into property that is deferred marital property and that which is not.
 2. Mixed property should be treated as being entirely marital unless the nonmarital component can be traced, in which case the asset's value should be allocated between the marital property column and the other applicable columns.
 3. *Owner* means the person appearing on the records of the policy issuer as the person having the ownership interest.
 4. Net after any outstanding policy loans.

H. Sample Memorandum of Assets, Liabilities, and Income (Asset Disclosure by Title) [§ 7.170]

1. Introduction [§ 7.171]

The purpose of this Memorandum of Assets, Liabilities, and Income is to provide a framework for memorializing the parties' disclosures in a manner that will meet the fair and reasonable disclosure requirements of section 766.58(6)(c)1. It is a sample form only, and in some instances attachment of schedules listing one or more categories of assets or liabilities in greater detail may be appropriate.

2. Form [§ 7.172]

MEMORANDUM OF ASSETS, LIABILITIES, AND INCOME

This memorandum has been prepared in connection with a marital property agreement to be executed by the undersigned on this date. Each party to that agreement and this memorandum certifies respectively that

1. He or she has made a fair and reasonable disclosure, reflected in this memorandum, of all assets, liabilities, and income in which he or she has any present or future vested or contingent interest, at approximate fair market values believed to be correct and accurate;

2. He or she understands that this memorandum categorizes the assets, liabilities, and income of each of the parties on the basis of title, possession, or who incurred the obligation (and not necessarily on the basis of ownership or liability for satisfaction), as they exist before the execution of the marital property agreement.

[Choose appropriate alternative]

3. He or she understands that before the execution of the marital property agreement, he or she may have had a marital property ownership interest in property listed in this memorandum that is titled in the name of, or possessed by, the other to the extent that all or part of such property was acquired after [1985] [the determination date] with income, with property traceable to income, or with other marital property. In addition, he or she understands that before the execution of the marital property agreement he or she may have had deferred marital

property elective rights under sections 861.02 to 861.06 of the Wisconsin Statutes in property titled in the name of, or possessed by, the other and that was acquired in whole or in part before [1986] [the determination date] with property that would have been marital property if the Wisconsin Marital Property Act had then been in effect.¹

[Or]

3. Each party further understands that his or her marital property ownership interest may be reached by certain creditors even though he or she did not incur the obligation and is not personally liable for it.²

[Continue]

4. He or she further understands that the marital property agreement may change the ownership interests in assets or income, or the liabilities for obligations, as listed in this memorandum.

Dated: _____.

(party's signature)

(party's signature)

¹ Use with the opt-out agreement form in section 7.154, *supra*.

² Use with the opt-in agreement form in section 7.151, *supra*.

Titled Assets and Liabilities

	<u>Husband</u>	<u>Wife</u>	<u>Joint</u>
Principal residence (Less mortgage)	\$ _____ (_____)	\$ _____ (_____)	\$ _____ (_____)
Other residential property in Wisconsin (Less mortgage)	(_____)	(_____)	(_____)
Other residential property not in Wisconsin (Less mortgage)	(_____)	(_____)	(_____)
Investment real estate in Wisconsin (Less mortgage)	(_____)	(_____)	(_____)
Investment real estate not in Wisconsin (Less mortgage)	(_____)	(_____)	(_____)
Stock in closely held corporations	_____	_____	_____
Partnership interests	_____	_____	_____
Marketable stocks and bonds	_____	_____	_____
Checking accounts, savings accounts, savings bonds, and money market investments	_____	_____	_____
Notes, mortgages, and land contracts	_____	_____	_____
Automobiles, boats, snowmobiles, and airplanes	_____	_____	_____
Other significant property	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
Property held in revocable trusts (describe)	_____	_____	_____
Other interests in trusts (describe whether income or principal, mandatory or discretionary, termination date(s), approximate value of trust assets)	_____	_____	_____
Debts other than mortgages deducted above	(_____)	(_____)	(_____)
_____	(_____)	(_____)	(_____)

Titled Assets and Liabilities

	<u>Husband</u>	<u>Wife</u>	<u>Joint</u>
Death value of pension, profit-sharing, and other employment benefits (Husband's beneficiary _____) (Wife's beneficiary _____)	_____	_____	
Death value of HR-10 and IRA accounts (Husband's beneficiary _____) (Wife's beneficiary _____)	_____	_____	

	<u>Husband</u>	<u>Wife</u>
Life insurance on life of husband		
1. Owned by husband ³ (Beneficiary _____) (Face amount: \$ _____) Cash value ⁴	\$ _____	
2. Owned by wife ³ (Beneficiary _____) (Face amount: \$ _____) Cash value ⁴		\$ _____

Life insurance on life of wife		
1. Owned by wife ³ (Beneficiary _____) (Face amount: \$ _____) Cash value ⁴		\$ _____
2. Owned by husband ³ (Beneficiary _____) (Face amount: \$ _____) Cash value ⁴	\$ _____	

Life insurance on life of another		
1. Owned by husband ³ (Beneficiary _____) (Face amount: \$ _____) Cash value ⁴	\$ _____	
2. Owned by wife ³ (Beneficiary _____) (Face amount: \$ _____) Cash value ⁴		\$ _____

Untitled Assets

	<u>Husband</u>	<u>Wife</u>	<u>Joint</u>
Cash	_____	_____	_____
Jewelry	_____	_____	_____
Silver	_____	_____	_____
Furs	_____	_____	_____
Antiques	_____	_____	_____
Art	_____	_____	_____
Collections	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
Other household furnishings	_____	_____	_____
Other significant property	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Income

	<u>Husband</u>	<u>Wife</u>
Last year's salary or other compensation	_____	_____
This year's estimated salary or other compensation	_____	_____
Other income last year	_____	_____
Other estimated income this year	_____	_____

3. Owner means a person appearing on the records of the policy issuer as the person having the ownership interest.

4. Net of any outstanding policy loans.

I. Sample Statutory Terminable Marital Property Classification Agreement (Including Termination and Financial Disclosure Forms) [§ 7.173]

1. Introduction [§ 7.174]

The wording of this agreement is taken directly from section 766.588. The spouses may execute only one such agreement without disclosure during their marriage. If provisions other than those contained in the statutory form are desired, the spouses must use a regular marital property agreement.

2. Form [§ 7.175]

NOTICE TO PERSONS WHO SIGN THIS AGREEMENT:

1. A PROPERTY LAW KNOWN AS THE MARITAL PROPERTY SYSTEM GOVERNS THE PROPERTY RIGHTS OF MARRIED PERSONS IN WISCONSIN. AFTER THE MARITAL PROPERTY SYSTEM APPLIES TO A MARRIED COUPLE, EACH SPOUSE HAS AN UNDIVIDED ONE-HALF OWNERSHIP INTEREST IN PROPERTY, SUCH AS WAGES, DEFERRED EMPLOYMENT BENEFITS, LIFE INSURANCE, INCOME FROM PROPERTY AND CERTAIN APPRECIATION OF PROPERTY, THEREAFTER ACQUIRED DURING MARRIAGE DUE TO THE EFFORTS OF EITHER OR BOTH SPOUSES. PROPERTY WHICH IS BROUGHT TO THE MARRIAGE AND PROPERTY WHICH IS ACQUIRED BY ONE SPOUSE DURING THE MARRIAGE BY GIFT OR INHERITANCE IS NOT MARITAL PROPERTY BUT IS SOLELY OWNED BY THE ACQUIRING SPOUSE. THIS AGREEMENT ALTERS THE LAW GOVERNING YOUR PROPERTY RIGHTS. THE PURPOSE OF THE FOLLOWING INFORMATION IS TO APPRISE YOU, IN VERY GENERAL TERMS, OF SOME OF THE MORE IMPORTANT ASPECTS AND POSSIBLE EFFECTS OF THIS AGREEMENT. THE INFORMATION IS NOT INTENDED TO BE A PRECISE OR COMPLETE RECITATION OF THE LAW APPLICABLE TO THIS AGREEMENT AND IS NOT A SUBSTITUTE FOR LEGAL ADVICE.

2. BY ENTERING INTO THIS AGREEMENT, YOU HAVE AGREED TO RELINQUISH YOUR RIGHTS TO A SOLE OWNERSHIP INTEREST IN YOUR SOLELY OWNED PROPERTY; HOWEVER, YOU ARE ACQUIRING AUTOMATIC, EQUAL OWNERSHIP RIGHTS, WITH

YOUR SPOUSE, TO ALL PROPERTY THAT YOU AND YOUR SPOUSE OWN OR ACQUIRE.

3. THIS AGREEMENT MAY AFFECT:

A. YOUR ACCESS TO CREDIT AND THE PROPERTY AVAILABLE TO SATISFY OBLIGATIONS INCURRED BY YOU OR YOUR SPOUSE.

B. THE ACCUMULATION OF AND THE MANAGEMENT AND CONTROL OF PROPERTY BY YOU DURING YOUR MARRIAGE.

C. THE AMOUNT OF PROPERTY YOU HAVE TO DISPOSE OF AT YOUR DEATH.

D. YOUR TAXES.

E. ANY PREVIOUS MARRIAGE AGREEMENT ENTERED INTO BY YOU AND YOUR SPOUSE.

4. THIS AGREEMENT DOES NOT:

A. AFFECT RIGHTS AT DIVORCE.

B. ALTER THE LEGAL DUTY OF SUPPORT THAT SPOUSES HAVE TO EACH OTHER OR THAT A SPOUSE HAS TO HIS OR HER CHILDREN.

C. BY ITSELF PROVIDE THAT, UPON YOUR DEATH, YOUR MARITAL PROPERTY PASSES TO YOUR SURVIVING SPOUSE. IF THAT IS WHAT YOU INTEND, YOU ARE ENCOURAGED TO SEEK LEGAL ADVICE TO DETERMINE WHAT MUST BE DONE TO ACCOMPLISH THAT RESULT.

5. IN GENERAL, THIS AGREEMENT IS NOT BINDING ON CREDITORS UNLESS THE CREDITOR IS FURNISHED A COPY OF THE AGREEMENT BEFORE CREDIT IS EXTENDED. (It is not necessary to furnish a copy of the financial disclosure form.) IN ADDITION, THIRD PARTIES OTHER THAN CREDITORS MIGHT NOT BE BOUND BY THIS AGREEMENT UNLESS THEY HAVE ACTUAL KNOWLEDGE OF THE TERMS OF THE AGREEMENT.

6. IF YOU WISH TO AFFECT AN INTEREST IN YOUR REAL PROPERTY WITH THIS AGREEMENT, PARTICULARLY IN RELATION TO THIRD PARTIES, ADDITIONAL LEGAL PROCEDURES AND FORMALITIES MAY BE REQUIRED. IF YOU HAVE QUESTIONS

REGARDING THE EFFECT OF THIS AGREEMENT ON YOUR REAL PROPERTY, YOU ARE URGED TO SEEK LEGAL ADVICE.

7. IF YOU DO NOT COMPLETE SCHEDULE "A," "FINANCIAL DISCLOSURE," AND THE AGREEMENT BECOMES EFFECTIVE, THE AGREEMENT TERMINATES 3 YEARS AFTER THE DATE THAT YOU BOTH HAVE SIGNED THE AGREEMENT, AND YOU MAY NOT EXECUTE A SUBSEQUENT STATUTORY TERMINABLE MARITAL PROPERTY CLASSIFICATION AGREEMENT WITH THE SAME SPOUSE DURING THE SAME MARRIAGE UNLESS YOU COMPLETE THE FINANCIAL DISCLOSURE FORM. IF YOU INTEND THAT THIS AGREEMENT EXTEND BEYOND 3 YEARS, EACH OF YOU, BEFORE SIGNING THE AGREEMENT, MUST DISCLOSE TO THE OTHER YOUR EXISTING PROPERTY AND YOUR EXISTING FINANCIAL OBLIGATIONS, BY COMPLETING SCHEDULE "A," "FINANCIAL DISCLOSURE." IF SCHEDULE "A" HAS BEEN FILLED OUT BUT, IN A LEGAL ACTION AGAINST YOU TO ENFORCE THE AGREEMENT, YOU SHOW THAT THE INFORMATION ON SCHEDULE "A" DID NOT PROVIDE YOU WITH FAIR AND REASONABLE DISCLOSURE UNDER THE CIRCUMSTANCES, THE DURATION OF THE AGREEMENT IS 3 YEARS AFTER BOTH PARTIES SIGNED THE AGREEMENT.

8. ONE SPOUSE MAY TERMINATE THIS AGREEMENT AT ANY TIME BY GIVING SIGNED NOTICE OF TERMINATION TO THE OTHER SPOUSE. THE AGREEMENT TERMINATES 30 DAYS AFTER NOTICE IS GIVEN.

9. TERMINATION OF THIS AGREEMENT DOES NOT BY ITSELF CHANGE THE CLASSIFICATION OF PROPERTY CLASSIFIED BY THE AGREEMENT.

10. THIS AGREEMENT MAY BE AMENDED, REVOKED OR SUPPLEMENTED BY A LATER MARITAL PROPERTY AGREEMENT.

11. BOTH PARTIES MUST SIGN THIS AGREEMENT AND THE SIGNATURES MUST BE AUTHENTICATED BY OR ACKNOWLEDGED BEFORE A NOTARY. THE AGREEMENT BECOMES EFFECTIVE ON THE DATE THAT YOU HAVE BOTH SIGNED IT, THE DATE THAT YOU MARRY, OR THE DATE ON WHICH YOU ARE BOTH DOMICILED IN WISCONSIN, WHICHEVER IS LATER. IF YOU ALTER THE LANGUAGE OF THE AGREEMENT ON THIS FORM, THE AGREEMENT WILL NOT CONSTITUTE A STATUTORY TERMINABLE MARITAL PROPERTY CLASSIFICATION AGREEMENT (BUT IT MAY QUALIFY AS A GENERAL MARITAL PROPERTY AGREEMENT UNDER SECTION 766.58, WISCONSIN STATUTES).

12. EACH SPOUSE SHOULD RETAIN A COPY OF THIS AGREEMENT, INCLUDING ANY DISCLOSURE OF PROPERTY AND OBLIGATIONS, WHILE THE AGREEMENT IS IN EFFECT AND AFTER IT TERMINATES. RETENTION OF A COPY MAY BE IMPORTANT TO PROTECT INTERESTS ACQUIRED UNDER OR AFFECTED BY THE AGREEMENT.

13. IF AFTER ENTERING INTO THIS AGREEMENT ONE OR BOTH OF YOU ESTABLISH A DOMICILE OUTSIDE THIS STATE, YOU ARE URGED TO SEEK LEGAL ADVICE CONCERNING THE CONTINUED EFFECTIVENESS OF THIS AGREEMENT.

**STATUTORY TERMINABLE MARITAL PROPERTY
CLASSIFICATION AGREEMENT
(Pursuant to Section 766.588, Wisconsin Statutes)**

This agreement is entered into by _____ and _____ (husband and wife) (who intend to marry) (strike one). The parties hereby classify all of the property owned by them when this agreement becomes effective, and property acquired during the term of this agreement, as marital property.

One spouse may terminate this agreement at any time by giving signed notice of termination to the other spouse. Notice of termination by a spouse is given upon personal delivery or when sent by certified mail to the other spouse's last-known address. The agreement terminates 30 days after such notice is given.

The parties (have) (have not) (strike one) completed Schedule "A," "Financial Disclosure," attached to this agreement. If Schedule "A" has not been completed, the duration of this agreement is 3 years after both parties have signed the agreement. If Schedule "A" has been completed, the duration of this agreement is not limited to 3 years after it is signed.

IF THE DURATION OF THIS AGREEMENT IS NOT TO BE LIMITED TO 3 YEARS, MAKE SURE THAT SCHEDULE "A," "FINANCIAL DISCLOSURE," IS COMPLETED AND THAT YOU HAVE REVIEWED THE SCHEDULE BEFORE SIGNING THE AGREEMENT. IF YOU AND YOUR SPOUSE HAVE PREVIOUSLY ENTERED INTO A STATUTORY TERMINABLE MARITAL PROPERTY CLASSIFICATION AGREEMENT WITH EACH OTHER WHICH WAS EFFECTIVE DURING YOUR PRESENT MARRIAGE, AND YOU AND YOUR SPOUSE DID NOT COMPLETE SCHEDULE "A," YOU MAY NOT EXECUTE THIS AGREEMENT IF YOU DO NOT COMPLETE SCHEDULE "A."

Signature of One Spouse: _____

Date: _____

Print Name Here: _____

Residence Address: _____

(Make Sure Your Signature is Authenticated
or Acknowledged Below.)

AUTHENTICATION

Signature _____ authenticated this _____ day of
_____, (year)

* _____

Signature: _____
Date: _____
Print Name Here: _____
Residence Address: _____

SCHEDULE "A" FINANCIAL DISCLOSURE

The following general categories of assets and liabilities are not all-inclusive, and if other assets or liabilities exist, they should be listed. Assets should be listed according to which spouse has title (including assets owned by a spouse or the spouses with one or more third parties) and at their approximate market value.

**SCHEDULE "A"
FINANCIAL DISCLOSURE**

The following general categories of assets and liabilities are not all-inclusive, and if other assets or liabilities exist, they should be listed. Assets should be listed according to which spouse has title (including assets owned by a spouse or the spouses with one or more third parties) and at their approximate market value.

	<u>Husband</u>	<u>Wife</u>	<u>Both Names</u>
I. ASSETS:			
A. Real Estate (gross value)	_____	_____	_____
B. Stocks, bonds and mutual funds	_____	_____	_____
C. Accounts at and certificates or other instruments issued by financial institutions	_____	_____	_____
D. Mortgages, land contracts, promissory notes and cash	_____	_____	_____
E. Partnership interests	_____	_____	_____
F. Trust interests	_____	_____	_____
G. Livestock, farm products, crops	_____	_____	_____
H. Automobiles and other vehicles	_____	_____	_____
I. Jewelry and personal effects	_____	_____	_____
J. Household furnishings	_____	_____	_____
K. Life insurance and annuities:			
1. Face value	_____	_____	_____
2. Cash surrender value	_____	_____	_____
L. Retirement benefits (include value):			
1. Pension plans	_____	_____	_____
2. Profit-sharing plans	_____	_____	_____
3. HR-10 KEOGH plans	_____	_____	_____
4. IRAs	_____	_____	_____
5. Deferred compensation plans	_____	_____	_____
M. Other assets not listed elsewhere	_____	_____	_____
II. OBLIGATIONS (TOTAL OUTSTANDING BALANCE):			
A. Mortgages and liens	_____	_____	_____
B. Credit cards	_____	_____	_____
C. Other obligations to financial institutions	_____	_____	_____
D. Alimony, maintenance, and child support (per month)	_____	_____	_____
E. Other obligations (such as other obligations to individuals, guarantees, contingent liabilities)	_____	_____	_____

	<u>Husband</u>	<u>Wife</u>	<u>Both Names</u>
III. ANNUAL COMPENSATION FOR SERVICES: (for example, wages and income from self-employment; also include social security, disability and similar income here)	_____	_____	_____

(IF YOU NEED ADDITIONAL SPACE, ADD ADDITIONAL SHEETS)

J. Sample Statutory Terminable Individual Property Classification Agreement (Including Termination and Financial Disclosure Forms) [§ 7.176]

1. Introduction [§ 7.177]

The wording of this agreement is taken directly from section 766.589. The spouses may execute only one such agreement without disclosure during their marriage. If provisions other than those contained in the statutory form are desired, the spouses must use a regular marital property agreement.

2. Form [§ 7.178]

NOTICE TO PERSONS WHO SIGN THIS AGREEMENT:

1. A PROPERTY LAW KNOWN AS THE MARITAL PROPERTY SYSTEM GOVERNS THE PROPERTY RIGHTS OF MARRIED PERSONS IN WISCONSIN. AFTER THE MARITAL PROPERTY SYSTEM APPLIES TO A MARRIED COUPLE, EACH SPOUSE HAS AN UNDIVIDED ONE-HALF OWNERSHIP INTEREST IN PROPERTY, SUCH AS WAGES, DEFERRED EMPLOYMENT BENEFITS, LIFE INSURANCE, INCOME FROM PROPERTY AND CERTAIN APPRECIATION OF PROPERTY, THEREAFTER ACQUIRED DURING MARRIAGE DUE TO THE EFFORTS OF EITHER OR BOTH SPOUSES. THIS AGREEMENT ALTERS THE LAW GOVERNING YOUR PROPERTY RIGHTS. THE PURPOSE OF THE FOLLOWING INFORMATION IS TO APPRISE YOU, IN VERY GENERAL TERMS, OF SOME OF THE MORE IMPORTANT ASPECTS AND POSSIBLE EFFECTS OF THIS AGREEMENT. THE INFORMATION IS NOT INTENDED TO BE A PRECISE OR COMPLETE RECITATION OF THE LAW APPLICABLE TO THIS AGREEMENT AND IS NOT A SUBSTITUTE FOR LEGAL ADVICE.

2. BY ENTERING INTO THIS AGREEMENT, YOU HAVE AGREED TO RELINQUISH YOUR RIGHTS TO AN AUTOMATIC OWNERSHIP INTEREST IN PROPERTY ACQUIRED AS A RESULT OF SPOUSAL EFFORT DURING MARRIAGE AND THE TERM OF THE AGREEMENT; HOWEVER, YOU ARE ACQUIRING AUTOMATIC OWNERSHIP RIGHTS TO PROPERTY TITLED IN YOUR NAME.

3. THIS AGREEMENT MAY AFFECT:

A. YOUR ACCESS TO CREDIT AND THE PROPERTY AVAILABLE TO SATISFY OBLIGATIONS INCURRED BY YOU OR YOUR SPOUSE.

B. THE ACCUMULATION OF AND THE MANAGEMENT AND CONTROL OF PROPERTY BY YOU DURING YOUR MARRIAGE.

C. THE AMOUNT OF PROPERTY YOU HAVE TO DISPOSE OF AT YOUR DEATH.

D. YOUR TAXES.

E. ANY PREVIOUS MARRIAGE AGREEMENT ENTERED INTO BY YOU AND YOUR SPOUSE.

4. THIS AGREEMENT DOES NOT:

A. AFFECT RIGHTS AT DIVORCE.

B. ALTER THE LEGAL DUTY OF SUPPORT THAT SPOUSES HAVE TO EACH OTHER OR THAT A SPOUSE HAS TO HIS OR HER CHILDREN.

5. NOTWITHSTANDING THIS AGREEMENT, THE PROPERTY CLASSIFIED BY THIS AGREEMENT THAT IS OWNED BY THE FIRST SPOUSE TO DIE IS SUBJECT TO CERTAIN ELECTIVE RIGHTS OF THE SURVIVING SPOUSE. YOU MAY BAR THESE ELECTIVE RIGHTS BY SEPARATE MARITAL PROPERTY AGREEMENT.

6. IN GENERAL, THIS AGREEMENT IS NOT BINDING ON CREDITORS UNLESS THE CREDITOR IS FURNISHED A COPY OF THE AGREEMENT BEFORE CREDIT IS EXTENDED. (IT IS NOT NECESSARY TO FURNISH A COPY OF THE FINANCIAL DISCLOSURE FORM.) IN ADDITION, THIRD PARTIES OTHER THAN CREDITORS MIGHT NOT BE BOUND BY THIS AGREEMENT UNLESS THEY HAVE ACTUAL KNOWLEDGE OF THE TERMS OF THE AGREEMENT.

7. IF YOU WISH TO AFFECT AN INTEREST IN YOUR REAL PROPERTY WITH THIS AGREEMENT, PARTICULARLY IN RELATION TO THIRD PARTIES, ADDITIONAL LEGAL PROCEDURES AND FORMALITIES MAY BE REQUIRED. IF YOU HAVE QUESTIONS REGARDING THE EFFECT OF THIS AGREEMENT ON YOUR REAL PROPERTY, YOU ARE URGED TO SEEK LEGAL ADVICE.

8. IF YOU DO NOT COMPLETE SCHEDULE "A," "FINANCIAL DISCLOSURE," AND THE AGREEMENT BECOMES EFFECTIVE, THE AGREEMENT TERMINATES 3 YEARS AFTER THE DATE THAT YOU BOTH HAVE SIGNED THE AGREEMENT, AND YOU MAY NOT EXECUTE A SUBSEQUENT STATUTORY TERMINABLE INDIVIDUAL PROPERTY CLASSIFICATION AGREEMENT WITH THE SAME SPOUSE DURING THE SAME MARRIAGE UNLESS YOU COMPLETE THE FINANCIAL DISCLOSURE FORM. IF YOU INTEND THAT THIS AGREEMENT EXTEND BEYOND 3 YEARS, EACH OF YOU, BEFORE SIGNING THE AGREEMENT, MUST DISCLOSE TO THE OTHER YOUR EXISTING PROPERTY AND YOUR EXISTING FINANCIAL OBLIGATIONS, BY COMPLETING SCHEDULE "A," "FINANCIAL DISCLOSURE." IF SCHEDULE "A" HAS BEEN FILLED OUT BUT IN A LEGAL ACTION AGAINST YOU TO ENFORCE THE AGREEMENT YOU SHOW THAT THE INFORMATION ON SCHEDULE "A" DID NOT PROVIDE YOU WITH FAIR AND REASONABLE DISCLOSURE UNDER THE CIRCUMSTANCES, THE DURATION OF THE AGREEMENT IS 3 YEARS AFTER BOTH PARTIES SIGNED THE AGREEMENT.

9. ONE SPOUSE MAY TERMINATE THIS AGREEMENT AT ANY TIME BY GIVING SIGNED NOTICE OF TERMINATION TO THE OTHER SPOUSE. THE AGREEMENT TERMINATES 30 DAYS AFTER NOTICE IS GIVEN. IF SUCH NOTICE OF TERMINATION IS GIVEN BY ONE SPOUSE TO THE OTHER SPOUSE, EACH SPOUSE HAS A DUTY TO THE OTHER SPOUSE TO ACT IN GOOD FAITH IN MATTERS INVOLVING THE PROPERTY OF THE SPOUSE WHO IS REQUIRED TO ACT IN GOOD FAITH THAT HAS BEEN CLASSIFIED AS INDIVIDUAL PROPERTY BY THIS AGREEMENT. THE GOOD FAITH DUTY CONTINUES UNTIL THE AGREEMENT TERMINATES (30 DAYS AFTER NOTICE IS GIVEN).

10. TERMINATION OF THIS AGREEMENT DOES NOT BY ITSELF CHANGE THE CLASSIFICATION OF PROPERTY CLASSIFIED BY THE AGREEMENT.

11. THIS AGREEMENT MAY BE AMENDED, REVOKED OR SUPPLEMENTED BY A LATER MARITAL PROPERTY AGREEMENT.

12. BOTH PARTIES MUST SIGN THIS AGREEMENT, AND THE SIGNATURES MUST BE AUTHENTICATED OR ACKNOWLEDGED BEFORE A NOTARY. THE AGREEMENT BECOMES EFFECTIVE ON THE DATE THAT YOU HAVE BOTH SIGNED IT, THE DATE THAT YOU MARRY, OR THE DATE ON WHICH YOU ARE BOTH DOMICILED IN WISCONSIN, WHICHEVER IS LATER. IF YOU ALTER THE LANGUAGE OF THE AGREEMENT ON THIS FORM, THE AGREEMENT WILL NOT CONSTITUTE A STATUTORY TERMINABLE

INDIVIDUAL PROPERTY CLASSIFICATION AGREEMENT (BUT IT MAY QUALIFY AS A GENERAL MARITAL PROPERTY AGREEMENT UNDER SECTION 766.58, WISCONSIN STATUTES).

13. EACH SPOUSE SHOULD RETAIN A COPY OF THIS AGREEMENT, INCLUDING ANY DISCLOSURE OF PROPERTY AND OBLIGATIONS, WHILE THE AGREEMENT IS IN EFFECT AND AFTER IT TERMINATES. RETENTION OF A COPY MAY BE IMPORTANT TO PROTECT INTERESTS ACQUIRED UNDER OR AFFECTED BY THE AGREEMENT.

14. IF AFTER ENTERING INTO THIS AGREEMENT ONE OR BOTH OF YOU ESTABLISH A DOMICILE OUTSIDE THIS STATE, YOU ARE URGED TO SEEK LEGAL ADVICE CONCERNING THE CONTINUED EFFECTIVENESS OF THIS AGREEMENT.

**STATUTORY TERMINABLE INDIVIDUAL PROPERTY
CLASSIFICATION AGREEMENT
(Pursuant to Section 766.589, Wisconsin Statutes)**

This agreement is entered into by _____ and _____ (husband and wife) (who intend to marry) (strike one). The parties hereby classify the marital property owned by them when this agreement becomes effective, and property acquired during the term of this agreement that would otherwise have been marital property, as the individual property of the owning spouse. The parties agree that ownership of such property shall be determined by the name in which the property is held and, if property is not held by either or both spouses, ownership shall be determined as if the parties were unmarried persons when the property was acquired.

Upon the death of either spouse, the surviving spouse may, except as otherwise provided in a subsequent marital property agreement, and regardless of whether this agreement has terminated, elect against the property of the decedent spouse as provided in section 766.589(7) of the Wisconsin Statutes.

One spouse may terminate this agreement at any time by giving signed notice of termination to the other spouse. Notice of termination by a spouse is given upon personal delivery or when sent by certified mail to the other spouse's last-known address. The agreement terminates 30 days after such notice is given.

The parties (have) (have not) (strike one) completed Schedule "A," "Financial Disclosure," attached to this agreement. If Schedule "A" has

not been completed, the duration of this agreement is 3 years after both parties have signed the agreement. If Schedule "A" has been completed, the duration of this agreement is not limited to 3 years after it is signed.

IF THE DURATION OF THIS AGREEMENT IS NOT TO BE LIMITED TO 3 YEARS, MAKE SURE THAT SCHEDULE "A," "FINANCIAL DISCLOSURE," IS COMPLETED AND THAT YOU HAVE REVIEWED THE SCHEDULE BEFORE SIGNING THE AGREEMENT. IF YOU AND YOUR SPOUSE HAVE PREVIOUSLY ENTERED INTO A STATUTORY TERMINABLE INDIVIDUAL PROPERTY CLASSIFICATION AGREEMENT WITH EACH OTHER WHICH WAS EFFECTIVE DURING YOUR PRESENT MARRIAGE, AND YOU AND YOUR SPOUSE DID NOT COMPLETE SCHEDULE "A," YOU MAY NOT EXECUTE THIS AGREEMENT IF YOU DO NOT COMPLETE SCHEDULE "A."

AFTER THE TERMINATION BECOMES EFFECTIVE IS CLASSIFIED AS PROVIDED UNDER THE MARITAL PROPERTY LAW.

3. IN GENERAL, THIS TERMINATION IS NOT BINDING ON CREDITORS UNLESS THEY ARE PROVIDED A COPY OF THE TERMINATION BEFORE CREDIT IS EXTENDED.

The undersigned terminates the statutory terminable individual property classification agreement entered into by me and my spouse on _____ (date last spouse signed the agreement) under section 766.589 of the Wisconsin Statutes.

Signature: _____

Date: _____

Print Name Here: _____

Residence Address: _____

SCHEDULE "A" FINANCIAL DISCLOSURE

The following general categories of assets and liabilities are not all inclusive, and if other assets or liabilities exist, they should be listed. Assets should be listed according to which spouse has title (including assets owned by a spouse or the spouses with one or more third parties) and at their approximate market value.

	<u>Husband</u>	<u>Wife</u>	<u>Both Names</u>
I. ASSETS:			
A. Real Estate (gross value)	_____	_____	_____
B. Stocks, bonds and mutual funds	_____	_____	_____
C. Accounts at and certificates or other instruments issued by financial institutions	_____	_____	_____
D. Mortgages, land contracts, promissory notes and cash	_____	_____	_____
E. Partnership interests	_____	_____	_____
F. Trust interests	_____	_____	_____
G. Livestock, farm products, crops	_____	_____	_____
H. Automobiles and other vehicles	_____	_____	_____
I. Jewelry and personal effects	_____	_____	_____
J. Household furnishings	_____	_____	_____
K. Life insurance and annuities:			
1. Face value	_____	_____	_____
2. Cash surrender value	_____	_____	_____
L. Retirement benefits (include value):			
1. Pension plans	_____	_____	_____
2. Profit-sharing plans	_____	_____	_____
3. HR-10 KEOGH plans	_____	_____	_____
4. IRAs	_____	_____	_____
5. Deferred compensation plans	_____	_____	_____
M. Other assets not listed elsewhere	_____	_____	_____
II. OBLIGATIONS (TOTAL OUTSTANDING BALANCE):			
A. Mortgages and liens	_____	_____	_____
B. Credit cards	_____	_____	_____
C. Other obligations to financial institutions	_____	_____	_____
D. Alimony, maintenance, and child support (per month)	_____	_____	_____
E. Other obligations (such as other obligations to individuals, guarantees, contingent liabilities)	_____	_____	_____
III. ANNUAL COMPENSATION FOR SERVICES: (for example, wages and income from self-employment; also include social security, disability and similar income here)	_____	_____	_____

(IF YOU NEED ADDITIONAL SPACE, ADD ADDITIONAL SHEETS)

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I. Scope of Chapter [§ 8.1]

Just as 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], created new ownership rights, it also created new causes of action between spouses during an ongoing marriage and new causes of action by a spouse against a third party to whom the other spouse has transferred marital property. The remedies provided are consistent with

the rights of ownership created by the Act. Inherent in the concept of ownership is the right to seek redress if one's property rights have been violated and damage results. This chapter examines the duties that spouses owe to each other and the causes of action that may result if these duties are breached.¹

II. Duties of Spouses with Respect to Personal Obligations and Property [§ 8.2]

A. Duty of Support [§ 8.3]

1. Personal Obligation of One Spouse to the Other for Support [§ 8.4]

The duty of one spouse to the other for support is a personal obligation. Each spouse has an equal obligation to support the other spouse and his or her minor children. Wis. Stat. § 765.001(2). This equal obligation means that neither spouse is presumed to have the primary obligation for support. *Id.* Although the obligation is equal, each spouse's individual obligation is measured on a case-by-case basis "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." *Id.*; *see supra* § 5.31; *infra* ch. 11.

Failure to fulfill this duty results in creation of a potential cause of action by one spouse against the other under section 767.501. *See infra* § 8.17. Section 767.501 was not created by the Act. The action under section 767.501 is among those involving the family that are enumerated in section 767.001 and the procedural rules of chapter 767 apply. The level of the support obligation is determined according to the considerations enumerated in section 767.511, which deals with child support, and section 767.56, which deals with maintenance. Wis. Stat.

¹ Unless otherwise indicated, all references to the Wisconsin Statutes are to the 2007–08 Wisconsin Statutes, as affected by acts through 2009 Wisconsin Act 189, and all references to the United States Code (U.S.C.) are current through Pub. L. No. 111-133 (Mar. 2, 2010). Textual references to the Wisconsin Statutes are hereinafter indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

§ 767.501(2)(b). In some cases, unjustified failure to support may also result in criminal sanctions. *See* Wis. Stat. § 948.22; *State v. Grayson*, 172 Wis. 2d 156, 493 N.W.2d 23 (1992); *State v. Monarch*, 230 Wis. 2d 542, 602 N.W.2d 179 (Ct. App. 1999); *State v. Duprey*, 149 Wis. 2d 655, 439 N.W.2d 837 (Ct. App. 1989). An additional means of fulfilling the obligation of support is created by section 766.55(2)(a). A spouse may bring an action against the other spouse who has a support obligation. This obligation may be satisfied from all marital property and from all other property of the “obligated” spouse. The amount of support payments ordered would probably be the same in actions brought under sections 767.501 and 766.55(2)(a).

Each spouse’s obligation to the other continues notwithstanding the incompetency of the obligated spouse, and a guardian of the estate has the continuing duty to expend assets of the estate for the ward and his or her dependents, including a spouse. Wis. Stat. § 54.19(4).

2. Liability of Spouses to Creditors [§ 8.5]

The obligated spouse might not be the spouse who incurs obligations during the course of providing support for the family because the extent of each spouse’s financial obligation under section 765.001(2) might not be equal. The nonincurring spouse may be better able to provide financial support than the incurring spouse, thereby making the nonincurring spouse the one personally obligated. *Id.* An action by a creditor to enforce a support obligation incurred by a spouse may be appropriate when the incurring spouse does not have access to sufficient funds to pay creditors who have extended credit for goods and services required for the support of the spouses and minor children. Each spouse is personally obligated to the creditor to the extent that he or she has property to satisfy the obligation. *St. Marys Hosp. Med. Ctr. v. Brody*, 186 Wis. 2d 100, 519 N.W.2d 706 (Ct. App. 1994). This personal obligation continues even though the spouses are divorced after the obligation is incurred. *Id.* An obligation arising under the doctrine of necessities is categorized as a support obligation under section 766.55(2)(a), thus making all assets classified as marital property and all other property of both spouses subject to recovery. *Id.*; *see infra* § 8.6.

3. Necessaries Doctrine [§ 8.6]

The common law doctrine of necessities also creates a direct, personal liability from the obligated spouse to the creditor who has provided goods and services necessary for the support of the recipient spouse and minor children, even if the obligated spouse has not dealt directly with the creditor. *St. Marys Hosp. Med. Ctr.*, 186 Wis. 2d 100. Obligations falling under the necessities doctrine are support obligations under section 766.55(2)(a). Consequently, the obligated, nonincurring spouse's nonmarital property is available to satisfy the obligation. The burden of pursuing the obligated spouse for payment is therefore borne by the creditor rather than by the recipient spouse.

The necessities doctrine is intended to facilitate the delivery of necessary goods and services because a creditor is more likely to deal directly with a nonemployed spouse if the creditor knows that the employed spouse is also legally obligated to the creditor. Moreover, the nonemployed spouse is able to receive such goods and services without resorting to court action against his or her spouse.

Before the Act, the husband was primarily liable and the wife secondarily liable for necessities. See *Marshfield Clinic v. Discher*, 105 Wis. 2d 506, 314 N.W.2d 326 (1982); *Stromsted v. St. Michael Hosp. of Franciscan Sisters (In re Estate of Stromsted)*, 99 Wis. 2d 136, 299 N.W.2d 226 (1980); *Sharpe Furniture, Inc. v. Buckstaff*, 99 Wis. 2d 114, 299 N.W.2d 219 (1980). This priority of liability was intended to reflect the economic disparity between men and women. Section 765.001(2) equalizes the support obligations of spouses even though on a case-by-case basis one spouse may be found to have a greater financial obligation. Under the Act, neither the husband nor the wife is presumed to be primarily liable to a creditor under the doctrine of necessities. Wis. Stat. § 765.001(2); *St. Marys Hosp. Med. Ctr.*, 186 Wis. 2d 100. To the extent that the marital property system equalizes ownership of property between spouses, the need for this priority is diminished.

B. Duties of Spouses Pending Termination of the Marriage [§ 8.7]

1. Transfers in Contemplation of Divorce [§ 8.8]

Before January 1, 1986, the effective date of the Act, spouses in Wisconsin were essentially free to manage their property as they chose as long as they fulfilled their obligations of support. Actions taken in contemplation of divorce, however, were subject to scrutiny by the court and were considered in determining a spouse's rights in property at divorce. For example, under section 767.63 (formerly section 767.275), which was not changed by the Act, any asset valued at \$500 or more that was transferred for inadequate consideration, wasted, given away, or otherwise unaccounted for within one year of the commencement of the action, and that would have been part of the estate but for the actions of the spouse disposing of the asset, is considered part of the estate in determining the property division under section 767.61. Wis. Stat. § 767.63; *see also* Wis. Stat. § 767.117(1)(b) (prohibiting spouses after filing of petition for dissolution from encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of spouses' property except under certain circumstances).

The statutory provision relating to one spouse's intentionally disposing of assets before divorce to deprive the other spouse of his or her share is not the only protection in Wisconsin for spouses contemplating divorce. The Wisconsin courts have at the time of divorce protected one spouse from the wasteful propensities of the other, whether or not the wrongful disposition of assets was done in contemplation of the dissolution of the marriage. In *Anstutz v. Anstutz*, 112 Wis. 2d 10, 331 N.W.2d 844 (Ct. App. 1983), the court held that an innocent spouse may receive a larger share of the estate than the spouse who has depleted the estate through squandering and neglect. The court's rationale in *Anstutz* was that the contributions to the marriage may be offset by negative factors resulting in loss of the marital estate. *Id.* at 12–13. Such factors should be considered when determining total contributions to the marriage under section 767.61(3)(d).

Similarly, after the Act became effective, the court of appeals held in *Gardner v. Gardner*, 175 Wis. 2d 420, 499 N.W.2d 266 (Ct. App. 1993), that section 767.255 (now section 767.61) provides the exclusive means in a dissolution action to compensate a spouse allegedly defrauded of his

or her interest in marital property assets by the other spouse's intentional misrepresentation. Citing *Anstutz*, the court held that remedies under section 766.70 and the common law tort of misrepresentation are unavailable after a dissolution action is commenced. 175 Wis.2d at 427–31. Moreover, these statutory remedies are unnecessary because comprehensive remedies are available under sections 767.255 and .275 (now sections 767.61 and .63). See *infra* §§ 8.18, .61; see also *Terry v. Terry*, 565 So. 2d 997, 1001–02 (La. Ct. App. 1990) (holding, under Louisiana law, that spouse managing community property asset has fiduciary duty to other spouse until community is partitioned after dissolution; duty extends to management of corporations, stock of which is community property, by spouses); Laura Breisky, *The Duty of Disclosure Between Spouses Dividing a Common Business Interest*, 2 Community Prop. Alert 1 (No. 4, July 1990).

While intentional harm to the other spouse's economic interests might affect property division, unintentional harm might not. The court in *Hauge v. Hauge*, 145 Wis. 2d 600, 427 N.W.2d 154 (Ct. App. 1988), did not find that the loss of divisible assets because of the husband's poor investment decisions was sufficient to overcome the presumption of equal division. The husband had used poor judgment in his exercise of management and control over assets that would have been subject to division. Nonetheless, he had intended to make a profit, and the fact that he had management and control did not warrant the court giving the wife a greater share in the property division.

Other community property states impose a general duty to account for community property before dissolution of the marriage. This right does not exist in those states during the ongoing marriage. See *supra* ch. 4. If the spouse's explanation of the disposition of the assets is unsatisfactory, the other spouse may be compensated in the dissolution action for the loss. For example, Louisiana requires that a spouse account for "community property under his control at the termination of the community property regime." La. Civ. Code Ann. art. 2369 (WESTLAW current through the 2009 Regular Session); see also *Jackson v. Jackson*, 425 So. 2d 379, 383 (La. Ct. App. 1982) (requiring husband to account for community property savings account in his name, from which he had withdrawn entire amount shortly before parties' separation). Other community property states without such statutes impose a similar duty by case law. See William A. Reppy, Jr. & Cynthia A. Samuel, *Community Property in the United States* 245–49 (2d ed. 1982). See also the discussion of cases involving the duty to account for

community property in a spouse's possession before dissolution of marriage in chapter 4, *supra*.

The Act allows the protections provided by section 767.63 and cases like *Anstutz* to continue. In addition, the Act permits one spouse to obtain an accounting of the spouses' property from the other spouse under section 766.70(2). *See infra* § 8.20.

2. Transfers in Fraud of Rights of Surviving Spouse [§ 8.9]

In general, if a spouse has transferred property or made arrangements for the transfer of property with the primary purpose of defrauding the rights of the surviving spouse in such property, the surviving spouse may be able to recover the property from the recipient. Wis. Stat. § 861.17. The surviving spouse may be able to recover either the share that he or she would have otherwise received under chapter 861 (Family Rights) or chapter 852 (Intestate Succession), or the surviving spouse's interest in marital property. Wis. Stat. § 861.17(3), (3m); *see also infra* §§ 8.18, .44–.59 (remedies under the Act for transfers of marital property).

C. Good-faith Duty Under the Act [§ 8.10]

1. In General [§ 8.11]

Before the Act became effective, spouses in Wisconsin owed each other an economic duty for support during the marriage and a duty to refrain from taking actions with the intent to deprive the other spouse of property rights at the termination of the marriage. *See supra* §§ 8.3–9. In other respects, each spouse generally could manage his or her property free of any claim by or duty to the other spouse.

The Act, however, created a duty of good faith related to the management of marital property and the nonmarital property of the other spouse. Wis. Stat. § 766.15; *see supra* ch. 4. The nature of marital property makes such a duty necessary; that is, the spouse who solely holds marital property has sole management and control over that property, even though it is owned equally by both spouses. *See* Wis. Stat. § 766.51(1)(am). To protect the property interests of the

nonmanaging spouse, the Act requires that the managing spouse act in good faith with respect to the other spouse's property. Wis. Stat. § 766.15. In contrast to the limited pre-Act duties that one spouse owed the other—namely, the duty of support and the duty of refraining from certain property transfers, the duty of good faith is an attempt to protect the property interests of both spouses *during* the ongoing marriage as well as at the termination of the marriage by death or dissolution.

A Wisconsin case addressed a spouse's duties with respect to the management of the spouse's individual and marital property in the context of a property division at the dissolution of the marriage. In *Noble v. Noble*, 2005 WI App 227, 287 Wis. 2d 699, 706 N.W.2d 166, the wife asked the court of appeals to increase the amount of property awarded to her because of the alleged waste of marital assets.

Danny and Dale Noble were brothers in the partnership that originally included their father. It is not clear from the decision, but it appears that at least a portion of the partnership may have been Danny's individual property at the time of his divorce from Deborah, while the remaining portion was marital property subject to division. The partnership owned no real estate; this was owned either by the brothers, or in the case of real estate that Danny's wife, Deborah, asserted should have been included in property to be divided, by Dale and his wife. All the real estate was used in the farming operation, but later-acquired real estate was put in the name of Dale and his wife, giving Danny no interest. All parties admitted the real estate was acquired in this manner to prevent Deborah from acquiring an interest if she and Danny divorced.

The court held that the marital estate was not diminished or wasted by Danny's failure to obtain an interest in the real estate. As to the use of the marital asset in which he had an interest, the court found that the repayment structure enabled Deborah to obtain her proper share in the property division. Dale and his wife borrowed from the partnership the money to purchase the real estate, and the partnership paid rent at market value in the form of forgiveness of that debt. The remaining receivable was included in the value of the partnership at the time of the dissolution and became part of the property division. The court distinguished waste, which assumes that assets are no longer in the estate, from the failure to take advantage of an opportunity to increase the marital estate.

In short, the law does not require a party to a prospective divorce to take advantage of an opportunity to acquire property that would increase the

value of the marital estate, and the use of partnership funds to finance the purchase of the properties did not improperly dissipate the value of the marital estate.

Id. ¶ 2; see Matthew J. Price, *Case Spotlight: Noble v. Noble*, 26 Wis. J. Fam. L. 24 (2006); see also *Somps v. Somps*, 58 Cal. Rptr. 304 (Ct. App. 1967) (holding that husband did not breach good-faith duty by taking advantage of investment opportunity for separate estate rather than community estate).

➤ **Comment.** A Wisconsin court interpreting an interspousal remedy under section 766.15 would probably rule consistently with *Noble* and *Somps*, both divorce cases, and find that a spouse does not violate the good-faith duty by failing to take advantage of an opportunity that would enhance the marital property of the spouses.

2. Definition of the Duty [§ 8.12]

The Act created a new duty between spouses in section 766.15: (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....

The term *good faith* is not defined in the Act. However, statutes and case law developed in other areas may help by analogy to provide a definitional framework, subject to limitations that result from the unique relationship between spouses. Good faith under the Uniform Commercial Code, for example, is defined as “honesty in fact in the conduct or transaction concerned,” Wis. Stat. § 401.201(19), and as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” Wis. Stat. § 402.103(1)(b). Mere negligence appears not to be actionable, although it is arguable that reckless disregard by one spouse of the rights of the other spouse may constitute a breach of the duty.

Under an early version of the Act, a spouse was obligated to act in a way that he or she reasonably believed was either in or not opposed to the best interests of the marriage and in a way that did not use the marital property or the property of the other spouse to the advantage of the managing spouse and to the detriment of the other spouse. Wis. Assem. Substitute 4 to 1979 A.B. 1090, section 48 (creating section 766.13(3)).

This version of the good-faith duty was replaced by the standard in the Uniform Marital Property Act (UMPA, reprinted in appendix A, *infra*). The comment to UMPA section 2 explains the duty as follows:

Spouses are not trustees or guarantors toward each other. Neither are they simple parties to a contract endeavoring to further their individual interests. The duty is between, and is one of good faith. A spouse is not bound always to succeed in matters involving marital property ventures, but while endeavoring to succeed in a venture, must proceed with an appropriate regard for the property interests of the other spouse and without taking unfair advantage of the other spouse.

The express language of section 766.15(1) and of the Committee Note to section 766.70(1) makes clear that the duty exists with respect to both the interest of the other spouse in marital property and the other spouse's nonmarital property. *See* Wis. Stat. Ann. § 766.70 Legis. Council. Comm. Supplemental Notes Relating to 1985 Act 37 (West 2009) (concerning the remedy for breach of the duty of good faith).

3. Analogy to Other Community Property States **[§ 8.13]**

Historically, the husband in other community property states was the sole manager of all community property, although some states required joinder by the wife for the alienation of real property. *See* William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* § 113 (2d ed. 1971); W.S. McClanahan, *Community Property Law in the United States* § 9:12 (1982 & Supp. 1992). Courts in community property states developed rules that were protective of the wife's interest in community property because she could do nothing to manage and control that property to protect her interest. In older cases, courts often imposed the fiduciary standards of a trustee although not the trustee's duty to account specifically for each transaction involving community property. Reppy & Samuel, *supra* § 8.8, at 245–46. In a 1971 case, a California appellate court described the extent of the husband's duty as follows:

It would seem that a husband's duty not to obtain an unfair advantage over his wife by reason of his control of the community property does not require that the husband be as prudent as a trustee or that he keep complete and accurate records of income received and disbursed.

Williams v. Williams, 92 Cal. Rptr. 385, 389 (Ct. App. 1971); *see also Vai v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 364 P.2d 247 (Cal. 1961) (“The key factor in the existence of a fiduciary relationship lies in control by a person over the property of another.”).

Resort to the court system should not be used for minor wrongs by spouses. *de Funiak & Vaughn, supra*, at § 120. However, immoderate gifts or expenditures of community property for immoral purposes would give rise to a remedy. *Id. But see infra* § 8.45 (discussion of the remedy under the Act relating to gifts of marital property).

Within the last several decades, all the original community property states enacted statutes giving husbands and wives equal management and control of community property, with some limited exceptions. *McClanahan, supra*, § 9:12 at 466–72. This right of equal management and control gives each spouse a means, probably more theoretical than practical, to protect his or her interest in community property without court intervention. As a result of this change, the courts in most community property states have been less likely to hold spouses to the strict fiduciary standards of a trustee. *Reppy & Samuel, supra* § 8.8, at 245–46. Rather, both case law and statutes have tended to require only a duty of honesty and good faith. *Id. But see* the discussion of the spouse’s duties under California law, *infra*.

Good faith, in contrast to the fiduciary duty of a trustee, does not require wisdom in investing. Losses as well as gains accrue to the marital estate as long as a benefit was intended. *See Peters v. Skalman*, 617 P.2d 448, 452 (Wash. Ct. App. 1980); *see also Hauge v. Hauge*, 145 Wis. 2d 600, 603–05, 427 N.W.2d 154 (Ct. App. 1988).

Spouses are not required to give every advantage to the community. For example, in *Somps v. Somps*, 58 Cal. Rptr. 304 (Ct. App. 1967), which was decided before enactment of the good-faith statute in California, Cal. Fam. Code § 1100(e) (West, WESTLAW current with all 2009 Reg. Sess. laws; all 2009-2010 1st through 5th, 7th, and 8th Ex. Sess. laws; urgency legislation through Ch. 14 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot), the husband took advantage of an investment opportunity by using his separate funds rather than community funds. The court found no breach of duty because, it said, the husband was not required to allow his separate estate to remain uninvested to give every advantage to the community. 58 Cal. Rptr. at 309–11.

A stricter standard of good faith may be imposed on spouses who are separated or for whom a divorce is pending, because the concept of the spouses' unity of purpose may no longer be valid. *Reppy & Samuel, supra* § 8.8, at 244–45. Thus, in *Ogden v. Ogden*, 331 So. 2d 592, 597 (La. Ct. App. 1976), the court found that the separated husband who acquired the right to exercise an investment opportunity by reason of ownership of community stock violated his duty to the community by purchasing the stock as his separate property.

Most of the cases involving breach of the good-faith duty in community property states arise in the divorce context. California, for example, divides community property equally at divorce and awards each spouse his or her separate property. Cal. Fam. Code § 2550 (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). Equitable considerations are not applied; however, one spouse may recover more than his or her share of community property from the share allocated to the other spouse if the claimant spouse can prove that the other spouse “deliberately misappropriated” property to the exclusion of the claimant’s community property interest. Cal. Fam. Code § 2602 (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). Deliberate misappropriation would certainly give rise to a claim for breach of the good-faith duty under the Act. However, the good-faith duty under the Act is broader than deliberate misappropriation. Thus, California decisions finding deliberate misappropriation may be helpful. Even though deliberate misappropriation was not found under the facts in a California case, *see Schultz v. Schultz*, 164 Cal. Rptr. 653 (Ct. App. 1980) (finding no deliberate misappropriation in spouse’s failing to defend lawsuit and allowing default judgment obligating community), similar facts may nevertheless constitute a breach of the good-faith duty under the Act.

On the other hand, Texas does not allow a separate tort action between spouses for fraud with respect to community property and instead restricts remedies for fraud to an unequal property division at divorce. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998).

Other cases have analyzed the duty of spouses with respect to management of undivided community property after marital dissolution.

For example, in *Terry v. Terry*, 565 So. 2d 997 (La. Ct. App. 1990), the court interpreted Louisiana Civil Code article 2354 and held that the good-faith duty in management of community property exists until partition. The husband violated this duty by liquidating a community property corporation and used a substantial portion of the resulting funds for a pension for himself, thus depleting the corporation's value, without informing the wife. Other cases involve postjudgment attacks on allegedly unfair marital settlement agreements that were procured by one spouse who had concealed community property at the time of the divorce. See, e.g., *In re Stanifer*, 236 B.R. 709 (9th Cir. B.A.P. 1999) (holding that existence of marriage created fiduciary duty between spouses under California law); *Stevenot v. Stevenot*, 202 Cal. Rptr. 116 (Ct. App. 1984) (summarizing cases relating to historical fiduciary duty that preceded statutory creation of good-faith duty between spouses and equal spousal rights of management and control); see also *Alexander v. Alexander*, 261 Cal. Rptr. 9, 13 (Ct. App. 1989) (noting that post-*Stevenot* statutory amendment extended good-faith duty beyond separation to final judgment, even though property acquired after separation is separate, not community, property); *Baltins v. Baltins*, 260 Cal. Rptr. 403, 417 (Ct. App. 1989) ("Each party is bound in transactions with the other to the highest and best of good faith and is obligated not to obtain and retain any advantage over the other resulting from concealment or undue pressure."). The higher fiduciary standard now imposed by statute may be similar to the fiduciary good-faith duty that existed before enactment of statutes granting equal management and control of community property.

As noted earlier, the other community property states generally grant husbands and wives equal management and control of community property, subject to a number of exceptions. The Act, however, does not. Under the Act, a spouse may manage and control all of his or her nonmarital property and all marital property that is held in that spouse's name alone or that is in the spouse's possession and is untitled. Wis. Stat. § 766.51(1)(a), (am). Either spouse acting alone may manage marital property held by both spouses in the alternative (i.e., A or B). Wis. Stat. § 766.51(1)(b). For the purpose of obtaining an extension of unsecured credit for a family-purpose obligation, each spouse may manage all marital property with the exception of interests in certain types of business property. Wis. Stat. § 766.51(1m). Each spouse may manage life insurance for which he or she is the owner on the issuer's records, employee-benefit plans that accrue by reason of that spouse's

employment, and any claim for relief that vests in that spouse by any law other than the Act. Wis. Stat. § 766.51(1)(d), (e), (f).

When held by one spouse, the management and control rights under the Act are closely analogous to the historical management and control rights held solely by the husband. The spouse who does not “hold” marital property does not have a direct right of access to that property without court intervention. This contrasts with the equal right of each spouse under current law in other community property states to manage and control all community property, subject to exceptions for certain types of property. If the Act provided no other remedies, the good-faith duty imposed by section 766.15(1) would probably be insufficient to protect the nonmanaging spouse who disagrees with actions taken in good faith by the managing spouse concerning marital property. To afford adequate protection, the standard of conduct would probably have to be closer to the fiduciary standard imposed by the community property states before equal management and control became the rule.

However, the Act provides other interspousal remedies to supplement the action under section 766.70(1) for breach of the good-faith duty. These remedies include a right to an accounting and (with certain exceptions) access to marital property in the hands of the other spouse or the other spouse’s transferee. Wis. Stat. § 766.70(2)–(8); *see infra* §§ 8.44–59. These additional remedies, in contrast to the remedy for breach of the good-faith duty, do not always require wrongdoing by the managing spouse. It is arguable that the right to recover marital property under these other remedies is similar to the right of control by a nontitled spouse in a community property state having equal management and control. Therefore, court decisions in community property states after the adoption of equal management and control may be useful in interpreting the good-faith duty in Wisconsin. However, cases from other community property states involving alleged violations of the good-faith duty should be read in the context of any applicable good-faith statutes in that state. For example, Louisiana’s statute is similar to section 766.15(1), and California’s statute is not. *See* La. Civ. Code Ann. art. 2354 (WESTLAW current through the 2009 regular session) (“A spouse is liable for any loss or damage caused by fraud or bad faith in the management of community property.”); Cal. Fam. Code §§ 1100(e), 721 (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) (imposing fiduciary duty higher than good-faith

standard). In cases decided under California's good-faith statute, Cal. Fam. Code § 1100(e), the fact situations appear to relate more to particular remedies under the California statutes than to the general good-faith duty. Typically, these cases include either recovery from the other spouse or from a recipient of community property transferred by one spouse without the other spouse's consent, or reimbursement for debts incurred by one spouse before the marriage and satisfied with community property. These situations are discussed in the relevant sections of this book. Section 1101 of the California Family Code (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) provides for remedies between spouses during the marriage, a number of which are similar to section 766.70.

D. Exception to Duty of Good Faith [§ 8.14]

A spouse's good-faith duty in matters involving marital property does not extend to matters involving that spouse's individual and predetermination date property. A spouse is free to manage and control that property in any manner, even though income (which is marital property unless one of the exceptions listed in section 2.63, *supra*, applies) is diminished or nonexistent. Wis. Stat. § 766.15(2). The comment to UMPA section 2 makes clear that a spouse may regulate the income of his or her nonmarital property without violating the good-faith duty.

III. Actions Between Spouses [§ 8.15]

A. In General [§ 8.16]

The creation of the marital property system of co-ownership not only resulted in the imposition of new duties regarding the property of the spouses, it also resulted in the creation of new causes of action to enforce those duties. The actions discussed in this chapter relate to statutorily created actions between spouses. Marital property agreements, other marriage agreements, and the enforcement of such agreements are discussed in chapter 7, *supra*. In addition to the previously existing cause of action to enforce support under section 767.501, independent causes of action arise under section 766.70. Each of these actions may

be commenced separately, or several may be commenced simultaneously, depending on the circumstances giving rise to the claim. Certain actions discussed in sections 8.44–.59, *infra*, may be commenced against a third party, the other spouse, or a third party and the other spouse. The measure of damages is discussed in section 8.38, *infra*. An interspousal remedy may not be commenced if an action for dissolution is pending. Wis. Stat. § 767.331; *see infra* § 8.61.

Remedies under section 766.70 are intended to affect only the rights of the spouses in relation to each other. Except under limited circumstances, a decree under section 766.70 may not adversely affect the rights of third parties. Wis. Stat. § 766.70(8). Third parties who may be affected include donees of a spouse, creditors with actual knowledge or a copy of a decree before extending credit, and certain purchasers from a spouse. *Id.*

Remedies under section 766.70 apply only to marital property and not to predetermination date property (regardless of whether such property is within the definition of deferred marital property) or other nonmarital property of the managing spouse.

There may be actions between spouses involving rights that do not arise under section 766.70 that can be maintained separately from an action under section 766.70 or from an action for dissolution. *See, e.g., Jezo v. Jezo*, 23 Wis. 2d 399, 127 N.W.2d 246 (1964) (allowing action for partition of joint-tenancy property); *Knafelc v. Dain Bosworth, Inc.*, 224 Wis. 2d 346, 591 N.W.2d 611 (Ct. App. 1999) (permitting claim of securities-fraud violations); *Caulfield v. Caulfield*, 183 Wis. 2d 83, 515 N.W.2d 278 (Ct. App. 1994) (allowing separate action on note); *Stuart v. Stuart*, 140 Wis. 2d 455, 410 N.W.2d 632 (Ct. App. 1987), *aff'd*, 143 Wis. 2d 347, 421 N.W.2d 505 (1988) (allowing separate action for assault, battery, and intentional infliction of mental distress); *see also* Nadine E. Roddy, *The Interspousal Tort Suit: A New Avenue of Recovery for Marital Misconduct*, 7 Divorce Litig. 213 (Oct. 1995).

B. To Compel Support [§ 8.17]

Although seldom used, section 767.501 provides for an independent cause of action that one spouse may commence against the other for support during an ongoing marriage. Since this is an action affecting the family, *see* Wis. Stat. § 767.001, procedures are as outlined in chapter

767. The general procedural statutes, chapters 801 to 807, govern actions under section 766.70. Typically, the action for support under section 767.501 has been used by child-support agencies to collect reimbursement of public funds. However, it appears that it could be used by one spouse attempting to obtain support from the other spouse. The amount of support is not limited to subsistence but is determined by the guidelines under sections 767.511 and .56, which enumerate the considerations for determining child support and spousal maintenance, respectively.

C. Breach of Good-faith Duty [§ 8.18]

Since each spouse owes a duty to the other to act in good faith in matters relating to their marital property and to each other's nonmarital property, it follows that a cause of action arises when one spouse breaches that duty. Section 766.70(1) provides, in part, that "[a] spouse has a claim against the other spouse for breach of the duty of good faith imposed by s. 766.15 resulting in damage to the claimant spouse's property." This remedy is available for any of a spouse's property damaged by the other spouse in violation of the duty, not just marital property. Wis. Stat. Ann. § 766.70(1) Legis. Council Comm. Supplemental Notes Relating to 1985 Act 37 (West 2009); *see also supra* § 8.12. An action under section 766.70(1) is independent of other claims one spouse may have against his or her spouse, although it may be combined with other claims.

A remedy is available only if the breach results in damage to the spouse's property, thereby eliminating from this action many interspousal wrongs that have no economic consequences. These might include interspousal actions for personal injury inflicted by one spouse on the other spouse, actions that are beyond the scope of this discussion. *See, e.g., Stuart v. Stuart*, 140 Wis. 2d 455, 410 N.W.2d 632 (Ct. App. 1987), *aff'd*, 143 Wis. 2d 347, 421 N.W.2d 505 (1988); *see also supra* § 2.134 (interspousal tort liability); *infra* §§ 8.41 (guarantees), .63 (sample forms).

The general civil-procedure statutes in chapters 801 to 807, including the right to trial by jury, apply to cases under section 766.70. *See infra* §§ 8.60–.62. Allegations in the complaint attempting to establish a breach of the good-faith duty should state that the plaintiff and the defendant are married to each other and that no action for dissolution is

pending, describe the transactions or course of conduct causing the damage, specify the damage, and state the relief requested. If fraud is pleaded, it must be described with specificity. Wis. Stat. § 802.03(2). Other remedies under section 766.70 may also be available under a particular set of facts.

The courts decide on a case-by-case basis what kinds of wrongful conduct give rise to a remedy under section 766.70(1). For example, in *Lloyd v. Lloyd*, 170 Wis. 2d 240, 264, 487 N.W.2d 647 (Ct. App. 1992), the court stated that the decedent's act of transferring bank accounts of marital property funds in violation of a court order while his divorce was pending constituted a violation of his good-faith duty. It appears that certain intentional acts causing damage to property of another person that would be actionable under common law property rules with respect to third parties would also be actionable between spouses under section 766.70(1). Acts of fraud or conversion are examples. In addition, acts that constitute unfair advantage and abuse of a confidential relationship, but that would not necessarily constitute an intentional tort if committed against a third person, may also constitute a breach of the good-faith duty. This might include granting a security interest in marital property to secure a debt that is not in the interest of the marriage or the family. Another example may be converting marital property (without the right of survivorship) into survivorship marital property to defeat the other spouse's testamentary power to will his or her interest in marital property. See *supra* ch. 4; see also Patrick K. McDaniel, *Claims and Remedies for Violation of Fiduciary Duty*, 15 *Divorce Litigation* 1 (Jan. 2003).

Finally, several remedies under section 766.70(1) are based on conduct of a spouse that would not have been actionable before the Act. These include, for example, a cause of action for failure of a spouse to protect the other spouse's property by failing to disclose to a creditor a marital property agreement, a unilateral statement under section 766.59, or a decree under section 766.70. The result of such failure is that the creditor is not bound by the terms of the undisclosed document under section 766.55(4m), and the nonincurring spouse's property may be recovered by the creditor in satisfaction of the nondisclosing spouse's obligation. Falsely signing the conclusive family-purpose statement under section 766.55(1) to obtain credit for other than a family purpose or failing to serve a unilateral statement under section 766.59 on the other spouse may also constitute a breach of the good-faith duty if economic damage results.

Certain conduct may be valid in some cases and actionable in others, depending on intent and whether damage results. For example, a spouse's execution of a guarantee that does not benefit the spouses may adversely affect the parties' credit and ability to conduct business, even though no default by the third-party principal has occurred and no payment with marital property has been made. *See supra* §§ 4.59, 6.22 (discussing the effect of guarantees executed by one spouse). Under some circumstances, one spouse's preemptive use of available credit may have the same result. *See supra* ch. 5 (discussing creditworthiness and the other spouse's exercise of management and control rights). Control of some assets may be governed by federal preemption. *See supra* §§ 2.211–.217, .265–.270. Provisions in a buy-sell agreement may improperly diminish a spouse's rights. *See supra* §§ 4.79–.84 (discussion of management and control in entering into buy-sell agreements). The concept of good faith is flexible and can be applied by the court to achieve equity.

A spouse bringing an action under section 766.70(1) must commence the action no later than six years after acquiring actual knowledge of the facts giving rise to the claim. An exception to this limitation is found in section 766.70(6)(a), relating to recovery from the other spouse (or from a third party) for completed unauthorized gifts of marital property. *See infra* § 8.45. An action under section 766.70(6)(a) must be brought within one year after the spouse has notice of the gift, within one year after a dissolution, or within the time limit for filing claims after the death of either spouse, whichever is earliest. Wis. Stat. § 766.70(6)(a).

There may be instances in which wrongful conduct by a spouse gives rise to an action for breach of the good-faith duty under section 766.70(1) as well as under another, more specific subsection of section 766.70. For example, payment of a nonfamily purpose obligation with marital property, perhaps because the incurring spouse falsely signed a statement of family purpose under section 766.55(1), could permit recovery under subsections 766.70(5) and (1). Section 766.70(5) has a limitation period of only one year from the satisfaction of the obligation. The better rule appears to be that even though the disputed conduct could fit under either section 766.70(1) or (5), the specific statute takes precedence over the general statute. Therefore, the shorter limitation period cannot be avoided by using the more general remedy under section 766.70(1), which has a six-year limitation period.

D. Accounting; Determination of Ownership; Classification of Property; Beneficial Enjoyment of or Access to Marital Property [§ 8.19]

1. Accounting [§ 8.20]

Section 766.70(2) provides for a variety of interspousal remedies: (2) Upon request of a spouse, a court may order an accounting of the spouses' property and obligations and may determine rights of ownership in, beneficial enjoyment of or access to marital property and the classification of all property of the spouses.

Section 766.70(2) provides that a spouse may require an accounting of marital property at any time during the ongoing marriage simply by bringing such an action. Traditional community property law does not provide a right to an accounting during the marriage; rather, the right arises only on termination of the marriage. *See supra* § 4.32; *but see McClung v. Smith*, 870 F. Supp. 1384 (E.D. Va. 1994) (holding that existence of marriage does not bar remedy of accounting when husband managed wife's assets), *aff'd in part, remanded in part*, No. 95-1106, No. 95-1187 (4th Cir. June 19, 1996). Generally, in an action for an accounting the court may require a spouse to disclose the nature and location of marital property assets under his or her control and the circumstances under which such assets were disposed of. The request for an accounting may be combined with a request for damages for breach of the good-faith duty, reimbursement, or other relief if the accounting reveals wrongful conduct for which a spouse is answerable. An accounting may also be necessary to invoke other remedies in section 766.70.

Since none of the remedies under section 766.70 is possible without disclosure, a duty of full disclosure at all times during marriage must be inferred. This duty is different from the duty to disclose the existence of property owned by a spouse at the time of making a marital property agreement, Wis. Stat. § 766.58(6)(c), and at the time of divorce, Wis. Stat. §§ 767.127(1), .63. *See also supra* §§ 8.7–8.

In *Brassett v. Brassett (In re Brassett)*, 332 B.R. 748 (Bankr. M.D. La. 2005), the court dealt with a managing spouse's duty to account to a nonmanaging spouse with respect to unpartitioned community property under Louisiana law. The issue arose when the former wife filed a

bankruptcy petition after a divorce and before the community property was partitioned. Under bankruptcy law, all community property becomes part of the bankruptcy estate when one spouse files, and unpartitioned community property after divorce is treated in the same manner. *See* 11 U.S.C. § 541(a)(2); *see also supra* §§ 6.74–.77. The nonfiling former husband argued that distributions from a community property joint venture were earned income, which would have been his separate property, but the court held that these were equity distributions of a community property business. Accordingly, all community property assets became part of the wife’s bankruptcy estate, and her right to an accounting and recovery of community property distributions received by the husband also passed to her estate.

2. Ownership; Classification [§ 8.21]

Under section 766.70(2), a spouse may ask the court to classify the parties’ property if the classifications are unclear or if the parties disagree. Wis. Stat. § 766.70(2); *see supra* ch. 2 (discussion of property classifications). No grounds for relief are required. Such an action may be appropriate to add certainty to estate planning, to clarify ownership for business or credit purposes, and to determine ownership in other situations.

Classification as it exists at the time of the decree is determined by the court. An action under section 766.70(2) does not authorize change from one classification of property to another. The comment to UMPA section 15, which provides for this remedy, indicates that such an action allows a balancing of property rights and should allow for the balancing of gains and losses. This comment apparently means that the aggregate of marital property may be classified and there would not necessarily be an item-by-item allocation of interests. The remedy under section 766.70(2) also may be used for “unmixing” property with marital and nonmarital components. UMPA § 15 cmt.

Only a spouse can require an accounting as an interspousal remedy under section 766.70(2). *See* Wis. Stat. Ann. § 766.70 Legis. Council Notes—1985 Act 37, §§ 89, 130 to 138 (West 2009). An accounting or determination of classification is not available to third parties, such as creditors. However, the need for such a remedy may be triggered by a creditor’s attempt to recover from property that the creditor claims is

marital property but that the nonincurring spouse can prove is his or her nonmarital property. *See also supra* ch. 3.

3. Beneficial Enjoyment; Access [§ 8.22]

Section 766.70(2) permits a determination of the right of a spouse to beneficial enjoyment of or access to marital property. No grounds are stated and apparently none are needed. Access and beneficial enjoyment connote management and control, although grounds involving some kind of misconduct are required to limit management and control. *See Wis. Stat. § 766.70(4)*. It appears that this remedy could be used to provide a right to use marital property notwithstanding the fact that the property is held by the other spouse, provided that the spouse who holds the property is not deprived of management and control. A determination of rights under this subsection may also settle who may use marital or mixed property such as an automobile or a vacation home.

E. Add a Name to Marital Property [§ 8.23]

1. In General [§ 8.24]

Marital property held in the name of one spouse is subject to his or her exclusive management and control, except in certain credit transactions. *Wis. Stat. § 766.51(1m)*. To prevent abuse of the right of exclusive management, or to provide control by both spouses, section 766.70(3) provides that except for certain business interests, *see infra* § 8.26, a spouse can have his or her name added to marital property or to the document evidencing ownership. If the name is added in the conjunctive (i.e., A *and* B), both spouses must act together to manage and control that asset. *Wis. Stat. § 766.51(2)*. This provides joint control or at least gives veto power to the spouse who previously had no control. The comment to UMPA section 15 states that this is the primary purpose of the remedy.

If a separated spouse is concerned that a marital property asset, such as a large cash or brokerage account, will be dissipated before a property division in a dissolution action is completed, then before the dissolution action is commenced, the spouse can attempt to use section 766.70(3) to prevent the loss. This provides a measure of direct control to the previously nonmanaging spouse. Joint control may be preferable to a

temporary restraining order set by the court under section 767.225(1). A temporary restraining order typically provides that the parties may not dispose of property or remove it from the state. *See* Wis. Stat. § 767.225(1)(h); *see also* Wis. Stat. § 767.117(1)(b). It is not always clear during separation whether expenditures of marital property by the managing spouse are for legitimate purposes or whether they constitute unreasonable dissipation or unfair use of marital property funds for the exclusive benefit of the managing spouse. The add-a-name remedy gives both spouses the right to control such decisions. Joint action by both spouses is also more flexible than freezing an account because the parties can confer and agree on expenditures to be made.

It must be noted, however, that section 767.331 prohibits commencing an action for any remedy under section 766.70 once an action under chapter 767 has been filed. *See also Gardner v. Gardner*, 175 Wis. 2d 420, 499 N.W.2d 266 (Ct. App. 1993); *Haack v. Haack*, 149 Wis. 2d 243, 440 N.W.2d 794 (Ct. App. 1989). Actions between spouses involving rights other than those that arise under section 766.70 may continue to be available. *Knafelc v. Dain Bosworth, Inc.*, 224 Wis. 2d 346, 591 N.W.2d 611 (Ct. App. 1999). If a dissolution is subsequently commenced and consolidated with the add-a-name action, it does not appear that there is conflict with any provision in chapter 767. If there is, chapter 767 supersedes section 766.70. Wis. Stat. § 767.331; *see infra* § 8.61 (discussion of *Haack*); *see also Gardner*, 175 Wis. 2d at 425–33.

Section 766.70(3) specifies no grounds for applying the remedy. The court will probably order the name of the spouse added unless the rights of the other spouse or a third party would be jeopardized, unless there are excepted business interests involved, or unless the petitioning spouse has only a minimal interest in the property (for example, if the property is mixed property that is primarily nonmarital in character). Also, a remedy under section 766.70(3) is probably not available with respect to the earnings of an employee spouse. *See infra* § 8.40.

The add-a-name remedy is only available with respect to marital property assets held solely in the name of the other spouse. Wis. Stat. § 766.70(3). If assets are transferred to a revocable trust, for example, the remedy is not available, even though the assets continue to be classified as marital property when held by the trustee. *See* Wis. Stat. § 766.31(5); *see also infra* ch. 10. The nontitled spouse may have other remedies during the transferor's lifetime, however, such as an action for

breach of the good-faith duty. Wis. Stat. §§ 766.15, .70(1); *see also supra* § 8.18.

In addition to protecting a spouse's interest in assets, section 766.70(3) may arguably be used in place of a guardianship, unless excepted business interests are involved, *see* Wis. Stat. § 766.70(3)(a)–(d), or if the rights of third persons would be adversely affected, *see* Wis. Stat. § 766.70(3)(e). The statute does not state that the name of the petitioning spouse must be added in the conjunctive (i.e., *A* and *B*), and thus it appears that adding the name in the alternative (i.e., *A* or *B*) may also be permitted. If one spouse is incompetent, it may be desirable for the name of the other spouse to be added in the alternative to marital property held by the incompetent spouse. The managing spouse is subject to a good-faith duty, but the time and administrative costs of a guardianship are avoided. It would also be possible for the managing spouse to make reasonable gifts under section 766.53 for estate-planning purposes, which a guardian could not make without court approval.

Although adding a name in the alternative theoretically does not diminish the rights of the spouse who originally held the property (because property held in the alternative may still be managed by either spouse acting alone), it may do so as a practical matter. It is arguable that this statute is not intended to deprive a spouse of management and control. This argument is based on section 766.70(4), which requires a finding of gross mismanagement, waste, or absence to limit a spouse's management and control under that section. Whether it is permissible to add the name of a spouse in the alternative will probably be clarified by statutory revision or judicial interpretation.

2. Exceptions [§ 8.25]

a. Business Assets [§ 8.26]

The add-a-name remedy provided by section 766.70(3) is not available for certain business interests that are marital property and that are held only by the spouse who is active in the business. The purpose of this exception is to allow the spouse who is knowledgeable about a business to operate it independently of the other spouse (subject to the duty of good faith), notwithstanding the marital property interest of the nonparticipating spouse.

The excepted business interests are as follows:

(a) An interest in a partnership [either general or limited] or joint venture held by the other spouse as a general partner or as a participant.

(aL) An interest in a limited liability company held by the other spouse as a member.

(b) An interest in a professional corporation, professional association or similar entity held by the other spouse as a stockholder or member.

(c) An asset of an unincorporated business if the other spouse is the only one of the spouses involved in operating or managing the business.

(d) A corporation, the stock of which is not publicly traded. Under this paragraph, stock of a corporation is publicly traded if both of the following apply:

1. The stock is traded on a national stock exchange or quoted on the national association of securities dealers' automated quotations system.

2. The employees, officers and directors of the corporation own, in the aggregate, less than 10% in value of the outstanding shares of the stock in the corporation.

Wis. Stat. § 766.70(3)(a)–(d).

Before passage of 1987 Wisconsin Act 393 [hereinafter 1988 Trailer Bill], section 766.70(3)(d) required that a spouse who holds stock in a closely held corporation also be employed by the corporation for the exception to apply. Under the modified section 766.70(3)(d), the add-a-name remedy is not available, regardless of whether the holding spouse is an employee.

b. Nonbusiness Assets [§ 8.27]

The add-a-name remedy under section 766.70(3) is not allowed if the rights of a third party would be adversely affected. Wis. Stat. § 766.70(3)(e). For example, creditors or other parties may have negotiated or taken action in reliance on the management and control of one spouse; on this basis they may have changed their positions with respect to sales, extensions of credit, joint ventures, or other transactions. It would be unfair to adversely affect the rights of a third person by changing management and control after the third person has relied on the control of the spouse holding the property.

F. Limitation of Rights of Management and Control; Change of Classification; Categorization of Present and Future Obligations and Property [§ 8.28]

1. In General [§ 8.29]

The remedies set forth in sections 8.18–.27, *supra*—namely, bringing an action for breach of the good-faith duty, requiring an accounting for marital property, and adding a name to marital property—are the only interspousal remedies in UMPA. The Act provides additional remedies between spouses and others.

A group of these additional remedies is under section 766.70(4). Each remedy relates to potential or actual damage to marital property and requires proof of gross mismanagement, waste, or absence by or of a spouse. Poor judgment or ineptness is apparently insufficient to support these remedies. There must be proof that substantial injury to marital property has occurred or is likely to occur in the future. Mere disagreement as to how property should be managed, without proof that substantial damage has occurred or will occur, does not support the action. Relief would not necessarily involve all marital property, but only that part of the marital property subject to the specified harm.

Under section 766.70(4), a spouse can ask the court to limit or terminate the other spouse's management and control rights to marital property. Wis. Stat. § 766.70(4)(a)1. The limitation can be temporary or permanent. *Id.* The court can change the classification of marital property owned by the spouses, Wis. Stat. § 766.70(4)(a)2., and can determine that property to be acquired by the spouses after entry of the order is the acquiring spouse's individual property, Wis. Stat. § 766.70(4)(a)5. Obligations can be divided after consideration of the categories of obligations under section 766.55(2) and the factors applicable to the parties under sections 767.56 and .61. Wis. Stat. § 766.70(4)(a)3. Responsibility for payment and property available for payment of future obligations can be determined. Wis. Stat. § 766.70(4)(a)4. Certain types of marital property assets related to a business in which one spouse has an interest may not be reached under this section. Wis. Stat. § 766.70(4)(c); *see infra* § 8.35. Finally, remedies under section 766.70(4) may be subject to any equitable condition. Wis. Stat. § 766.70(4)(b). The various remedies under section 766.70(4) are discussed in more detail below.

2. Limitation or Termination of Management and Control [§ 8.30]

The court can limit or terminate one spouse's management and control of marital property without changing ownership. Wis. Stat. § 766.70(4)(a)1. The change can be temporary or permanent, *id.*, and can be subject to any equitable condition, Wis. Stat. § 766.70(4)(b). *See supra* § 4.58 (disability or absence of spouse).

This remedy may be useful if a guardianship would be too cumbersome or not appropriate. For example, it may be used if one spouse is suffering from alcoholism or other chemical dependency, which may or may not be a permanent problem and may result in gross mismanagement, although the spouse falls short of legal incompetency. Also, annual accounts, restrictions on investments, and other requirements or limitations of legal guardianships are avoided. Certain protections under chapter 54 are lacking, however, such as mandatory appointment of a guardian ad litem, although it appears necessary to request that a guardian ad litem be appointed if the spouse's ability to respond is impaired. *See* Wis. Stat. § 803.01(3).

If the marital property asset subject to an action under section 766.70(4) is a deferred-employment-benefit plan to which 29 U.S.C. § 1056(d) (restriction on alienation of qualified plans) applies, a qualified domestic-relations order (QDRO) may be appropriate to require the plan administrator to pay benefits to the beneficiary's spouse. The term *domestic relations order* includes an order that relates to marital property rights and is made under state domestic-relations law, including a community property law. 29 U.S.C. § 1056(d)(3)(B)(ii). Although the Ninth Circuit Court of Appeals in *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991), held that a probate court order may not qualify as a domestic-relations order and that general community property orders other than those related to family support generally do not qualify as domestic-relations orders, remedies of the types described in section 766.70 were not addressed. *See also* Wis. Stat. § 765.001(1) (chapter 766 is part of the Family Code).

The good-faith duty applies to the spouse who acquires management rights under this section, but the standard of care is less than the fiduciary standard applicable to a guardian. *See supra* § 8.18; *see also* Wis. Stat.

§§ 54.19–.21 (duties and powers of guardian of estate of incompetent person).

3. Change in Classification of Property [§ 8.31]

Certain remedies under section 766.70, other than section 766.70(4), specify particular instances in which the classification of property may be changed, usually to award individual property to a spouse damaged by the other spouse's misuse of marital property. *See* Wis. Stat. § 766.31(7)(e). These include remedies for breach of the good-faith duty, for gifts in excess of value limits, and for use of marital property to pay obligations that are other than family-purpose obligations. *See supra* § 8.18, *infra* §§ 8.36, .45. The remedy under section 766.70(4)(a)2. for a change of classification of marital property could be used when these other remedies do not apply but gross mismanagement, waste, or absence, with resulting potential or actual damage to marital property, has occurred.

It should be noted that under section 766.70(4)(a)2., the court can only change the classification of marital property; the court cannot transfer the nonmarital property of one spouse to the other.

It appears that section 766.70(4)(a)2. is unavailable to provide relief for a spouse who wishes merely to obtain an order that reclassifies marital property accumulated during a separation as the individual property of the spouse who acquired it, unless proof of substantial injury to the property or the spouse's property interest is shown. Without such proof, the transfer of ownership of marital property requires the agreement of the spouses or an award of property upon dissolution. *But see infra* § 8.34 (classification of property acquired in the future).

Any change in the classification of assets by decree may not adversely affect a creditor whose rights arose before the decree or after the decree, if the creditor had no notice of the decree or was not provided a copy before the credit was granted. Wis. Stat. § 766.55(4m).

4. Division of Existing Obligations [§ 8.32]

Under section 766.70(4)(a)3. a spouse may request that the court divide existing obligations. This remedy may not adversely affect the

rights of existing creditors because they would not have had notice of the order before extending credit. Wis. Stat. §§ 766.55(4m), .70(8). Creditors who did not have notice of the order before extending credit may seek satisfaction from the same sources and classifications of property available before the order assigning obligations was entered.

In dividing the spouses' obligations, the court must apply the same standards used in an action for dissolution to determine property division, *see* Wis. Stat. § 767.61, and maintenance, *see* Wis. Stat. § 767.56. Wis. Stat. § 766.70(4)(a)3. Although these standards are more suitably applied to assets than to obligations, each spouse's access to income and assets will be considered in determining an equitable allocation of obligations. For example, obligations described in section 766.55(2)(c) that were incurred before the marriage or before January 1, 1986, would probably be assigned to the spouse who incurred them, just as property brought to the marriage by a spouse is more likely to be assigned to that spouse. Wis. Stat. § 767.61(2). Obligations that were not incurred in the interest of the marriage or the family, Wis. Stat. § 766.55(2)(d), would probably be assigned to the incurring spouse after the court considered the negative contributions (i.e., acts that diminish the assets subject to division) of that spouse to the marriage. Wis. Stat. § 767.61(3); *see also Anstutz v. Anstutz*, 112 Wis. 2d 10, 331 N.W.2d 844 (Ct. App. 1983). Family-purpose debts under section 766.55(2)(b) may be assigned to either spouse after the court considers such factors as the spouses' respective earning capacities, work experience, training, and responsibility for caring for minor children. *See* Wis. Stat. §§ 767.56(5), .61(3).

Although section 766.55(2m) provides that a creditor has a direct cause of action against the spouse who is assigned an obligation in a dissolution proceeding, there is no similar provision allowing a creditor to sue the spouse assigned the obligation under section 766.70(4)(a)3. Since an order under this subsection affects obligations incurred before the entry of the order, existing creditors are not bound by an adverse provision. Wis. Stat. § 766.55(4m). If the creditor is otherwise able to sue the assigned spouse directly, which is permitted by section 803.045, there are no adverse consequences to an existing creditor because of an order under section 766.70(4)(a)3.

5. Assignment of Future Obligations [§ 8.33]

If a spouse can prove substantial injury and wishes to have past obligations divided under section 766.70(4)(a)3., he or she will probably request an order assigning future obligations as well. Wis. Stat. § 766.70(4)(a)4. This remedy may be appropriate for a spouse who lives apart from the other spouse and intends to continue that arrangement but does not wish to obtain a divorce or legal separation. An order assigning responsibility for future obligations enables the spouses to remain married but to have separate financial obligations. Such an order may also be sought by a spouse who remains with the other spouse but who wishes to protect the property that he or she earns or holds. The reason could be the other spouse's spendthrift tendencies or substantial business obligations.

Similarly, in contemplation of an action for dissolution, a spouse may wish to protect his or her interest in marital property from obligations incurred by the other spouse. Under section 766.55(2m), the marital property that a spouse receives under a judgment of dissolution is subject to the satisfaction of family-purpose debts, even if the debts are incurred after the parties are living apart. An order determining that future obligations are the obligations of the party incurring them assures a spouse that the property he or she receives in the property division will not be subject to recovery for the unsecured obligations incurred by the other spouse during the time between the entry of the decree under section 766.70(4)(a)4. and the final dissolution judgment. The decree should require that the spouses disclose the decree to creditors. Then if a spouse fails to disclose such an order to a creditor, and the creditor obtains recovery from the property of the nonincurring spouse, the incurring spouse may be subject to sanctions for contempt of court or may have the property that he or she is awarded in a subsequent property division adjusted accordingly. Wis. Stat. § 767.61(3). An action under section 766.70(4)(a)4. must be commenced before an action for dissolution is filed. Wis. Stat. § 767.331.

6. Classification of Property to Be Acquired in the Future [§ 8.34]

Section 766.70(4)(a)5. provides that a court can classify property to be received after the entry of the order as the individual property of the

acquiring spouse. It is likely that a spouse wishing to assign responsibility for future and perhaps past obligations will also wish to have property to be acquired in the future classified. Debt satisfaction is based on personal liability and property classifications, and both should usually be considered in determining relief. A spouse who is separated but does not wish to obtain a dissolution, or a spouse who contemplates an action for dissolution, is most likely to seek this relief. The effect is to protect the property that each spouse earns or acquires from family-purpose obligations incurred by the other spouse during a period of separation. Each spouse is obligated by the good-faith duty to disclose the decree to future creditors, since without such disclosure those creditors are not bound by classifications set forth in the decree that adversely affect the creditors' right of recovery. Wis. Stat. § 766.55(4m).

7. Exceptions to Availability of Remedies [§ 8.35]

Remedies available under section 766.70(4) are subject to exceptions. First, limitation of management and control under section 766.70(4) is not available in connection with certain business interests listed in subsections 766.70(3)(a) and (b) (i.e., a spouse's interest in a partnership, joint venture, professional corporation, or other professional association described in subsections (a) and (b)). Consequently, the nontitled spouse cannot use section 766.70(4) to obtain control of a marital property business interest described in subsection 766.70(3)(a) or (b), even if the business is being substantially injured as a result of gross mismanagement by the other spouse. Other remedies, such as for breach of the good-faith duty, may be available in such cases. If the managing spouse is not legally incompetent, a guardian cannot be appointed.

The remedies in section 766.70(4) are not available in connection with a spouse's interest in closely held corporate stock. Wis. Stat. § 766.70(3)(d). The remedies in section 766.70(4) are unavailable, regardless of whether the holding spouse is an employee of the closely held corporation. The remedies in section 766.70(4) are available, however, with respect to a marital property interest in a sole proprietorship or a limited liability company.

The remedies under section 766.70(4) are also not available for any other property in which a third party's rights would be adversely affected. Wis. Stat. § 766.70(3)(e).

G. Marital Property Used to Satisfy Obligations Not Within the Duty of Support or Family Purpose Doctrine [§ 8.36]

No right of contribution or reimbursement between spouses is available for family-purpose obligations paid with marital property. However, a creditor may reach marital property to satisfy an obligation that was not incurred in the interest of the marriage or the family. These obligations include those incurred before marriage, those incurred before January 1, 1986, torts, and nonfamily purpose obligations. Wis. Stat. § 766.55(2)(c)–(d). In addition, a spouse may voluntarily use marital property under his or her control to pay such an obligation. For example, if the obligation arose before marriage, the spouse may pay with marital property, or if no voluntary payment is made, a creditor may choose to levy upon marital property (usually the obligated spouse's wages) that would have been available had the marriage not taken place. Wis. Stat. § 766.55(2)(c). Although the nonobligated spouse has a marital property interest in the obligated spouse's wages, a creditor's right to recover the obligation is not diminished by the nonobligated spouse's interest. The premarriage creditor may levy upon the marital property without first attempting to recover from the obligated spouse's nonmarital property. Under section 766.70(5), however, the nonobligated spouse then may have a right to reimbursement: he or she may recover as individual property marital property of an amount equal in value to the marital property recovered or used to meet such obligations of the other spouse.

In the context of property division in divorce, California has allowed recovery by one spouse if the other spouse has used community property to pay noncommunity debts. For example, in *Lister v. Lister*, 199 Cal. Rptr. 321 (Ct. App. 1984), the husband mortgaged the community property homestead to pay his premarital debts to his brother. He did not advise his wife of the purpose of the mortgage. Despite the fact that under California law the community was obligated to pay the husband's premarital debts, the court found that this encumbrance and payment constituted bad faith on the husband's part and justified a compensatory judgment for the wife. On the other hand, the court in *Smaltz v. Smaltz*, 147 Cal. Rptr. 154 (Ct. App. 1978), held that the husband was not required to reimburse the community for support payments made to his former spouse with community property funds, which were the only funds he had at his disposal. The court found that reimbursement is an equitable determination and that these payments neither constituted bad

faith nor were an abuse of the husband's management and control of community property.

A spouse who fails to assert a right under section 766.70(5) suffers economic loss. Assume that an obligation is incurred by a spouse during the marriage, but not for a family purpose. *See supra* ch. 5. Such an obligation is satisfied first from the nonmarital property of the incurring spouse and then from that spouse's interest in marital property, in that order. Wis. Stat. § 766.55(2)(d). Even though the creditor may reach only the incurring spouse's one-half interest in marital property, the amount not subject to recovery (the other spouse's one-half interest) continues to be marital property. If the nonobligated spouse does not exercise his or her remedy under section 766.70(5), the obligated spouse has the entire benefit of the property used to satisfy the obligation and continues to have a one-half interest in all remaining marital property. The analysis is the same for tort obligations paid with or recovered from marital property. *See* Wis. Stat. § 766.55(2)(cm).

If a spouse in obtaining an extension of credit signs a statement that the obligation is or will be incurred in the interest of the marriage or the family, that statement is conclusive in determining the creditor's right to payment. Wis. Stat. § 766.55(1); *Bank One v. Reynolds*, 176 Wis. 2d 218, 500 N.W.2d 337 (Ct. App. 1993); *see supra* ch. 6. The creditor may collect from all marital property held by either spouse. However, such a statement is not conclusive as between the spouses. If the obligation is not actually incurred for a family purpose, the other spouse may recover under section 766.70(5). *See also supra* § 8.18 (breach of the good-faith duty).

An action under section 766.70(5) must be commenced not later than one year after the obligation is satisfied. Wis. Stat. § 766.70(5); *Bille v. Zuraff (In re Estate of Bille)*, 198 Wis. 2d 867, 882, 543 N.W.2d 568 (Ct. App. 1995).

A court in another community property state has held that the nonobligated spouse has an equitable lien on the remaining community property to the extent of the amount levied in satisfaction of a separate obligation. This lien is superior to the rights of other creditors in the same property. *See deElche v. Jacobsen*, 622 P.2d 835, 840 (Wash. 1980). Whether or not such a superior lien exists in Wisconsin might sometime be the subject of legislation or judicial interpretation. If a lien

exists, it would apparently expire after the limitation period passes without commencement of an action.

It is not clear how the granting of a security interest in marital property for an obligation that is other than for support or a family purpose relates to the other spouse's right of recovery under section 766.70(5). If a spouse has management and control of marital property and can grant a security interest, the rights of the creditor in the collateral are protected. Wis. Stat. § 766.55(6). The statute of limitation applicable to a spouse's right of reimbursement begins to run when an obligation is "satisfied," and the granting of a security interest does not constitute satisfaction of an obligation. Wis. Stat. § 766.70(5). Satisfaction does not occur until the creditor is paid or the security interest is enforced and the collateral is liquidated. However, the granting of a security interest may diminish the value of an asset to the extent that there is a breach of the good-faith duty. *See* Wis. Stat. § 766.70(1); *see supra* § 8.18.

The spouse's right to reimbursement under section 766.70(5) is subject to the rights of third parties who relied on the "availability" of marital property for satisfaction of a support or family-purpose debt. Wis. Stat. § 766.70(5). A creditor whose rights arose before the entry of the order under section 766.70(5) is protected by section 766.55(4m) from the adverse provisions in the order (i.e., reclassification of marital property or recovery of nonmarital property of the incurring spouse as the individual property of the nonincurring spouse). *See infra* § 8.42. However, unless a particular asset is pledged as security for a loan, in which case the lien remains on the property even though it is transferred to the nonincurring spouse, it is unlikely that a creditor will be able to prove reliance on a particular asset to grant credit. *See* Wis. Stat. § 766.55(6). Possible proof of such reliance might be the listing of an asset as marital property on a credit application on which the creditor relied.

Finally, section 766.70(5) specifically provides that a court may invoke equitable considerations. For example, a spouse may be obligated to support dependents from a prior marriage, an obligation that qualifies under section 766.55(2)(c)1. as one arising before the subsequent marriage. This debt may be satisfied from the part of marital property that would have been available but for the subsequent marriage, which would include the marital property interest of the subsequent spouse in the property so used. The subsequent spouse would then be

entitled to bring an action for reimbursement. However, under equitable principles, it might not be fair to order that an amount equal to each support payment made in the past or to be made in the future be set aside as the subsequent spouse's individual property, particularly if the spouses are unable to accumulate significant amounts of marital property. *See Smaltz v. Smaltz*, 147 Cal. Rptr. 154 (Ct. App. 1978). On the other hand, such reimbursement may be fair if the payor spouse has substantial individual property available for use as payment but chooses to use his or her earned income or other marital property. *See In re Lam*, 364 B.R. 379 (Bankr. N.D. Cal. 2007) (husband paid child support from prior marriage with community property when he had separate property available; bankruptcy court excepted from discharge resulting obligation imposed by divorce court, on ground of husband's defalcation in a fiduciary capacity under California law).

If a spouse's salary or wages are used to pay an obligation that arose during the marriage but before the effective date of the Act and that would have been a family-purpose obligation under the Act, it seems inequitable to allow recovery under this subsection. The same reasoning applies if a nontortfeasor's interest in marital property is used to pay a tort obligation that would be within the family-purpose obligation if the doctrine were applied to torts. Reference to cases in community property states that follow the family-purpose doctrine for torts may be helpful. *See supra* § 6.9.

Section 766.70(5) refers to reimbursement from marital property. It would be logical to infer that a court could require that the defendant spouse transfer nonmarital as well as marital property to the other spouse as reimbursement for marital property used by the defendant spouse for other than a family-purpose obligation. There is nothing in the Act that would as a matter of policy prevent this result. If such a transfer is ordered, one-half the value of the marital property wrongfully transferred (the value of the recovering spouse's one-half interest) would be paid from the nonmarital property of the defendant as reimbursement of the interest of the recovering spouse. *See also infra* § 8.38 (regarding damages).

H. Special Issues [§ 8.37]

1. Damages [§ 8.38]

When one spouse is able to show a right to recover from the other spouse under section 766.70, the measure of damages, including punitive damages under appropriate circumstances, depends on the factual and equitable circumstances of each case. For example, in *Brooks v. Brooks*, 612 S.W.2d 233 (Tex. Civ. App. 1981), a community property case involving a request for reimbursement of the husband's separate property from the community, the husband was able to trace how much was paid out of the corpus of his separate-property corporation during the marriage for the benefit of the community. His measure of recovery was the amount expended from the corpus of the corporation. The court held that it was not necessary to show the value of the benefit to the community, even if it differed from the amount expended. Absent an agreement to the contrary in Wisconsin, the use of individual property for family purposes probably results in the reclassification of that property as marital property, but *Brooks* may be helpful in determining how damages are measured in an appropriate case. See Wis. Stat. § 766.63 (mixed property); see also *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988) (discussion of equitable considerations in reimbursement).

On the other hand, the wife in *Logan v. Barge*, 568 S.W.2d 863 (Tex. Civ. App. 1978), could not prove the dollar amount of community property expended by her deceased husband in concert with his daughter, son, and daughter-in-law in acquiring a business and other property in the names of the latter three persons. The court held that the proper measure of damages was the enhanced value of the property in the hands of the recipients, not the dollar amount transferred, citing *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964), but the evidence produced at trial was inadequate to support the jury's verdict. See also *Swope v. Swope*, 739 P.2d 273, 282–83 (Idaho 1987) (holding that measure of damages to community is enhanced value of spouse's separate property because of community property earnings used to increase value of separate property).

In *Auger v. Auger*, 381 So. 2d 879 (La. Ct. App. 1980), the court allowed recovery from a husband who, in anticipation of a divorce, transferred property without consideration to his relatives and business associates. His purpose was to reduce his wife's community property

interest in assets divided incident to the divorce. The court found that the wife was entitled to judgment against him in the amount of one-half the fair-market value of the transferred properties.

Similarly, in *Hall v. Allred*, 385 So. 2d 593 (La. Ct. App. 1980), the former husband sold property that had appreciated in value to his uncle, the previous owner of the property, for the same amount that the former husband had paid for the property approximately six years earlier. The former wife sued both men. The court held that the former husband had intentionally deprived her of her interest in community property and found that the measure of damages was one-half the difference between the property's fair market value when purchased in 1971 and when reconveyed in 1977. The court cited *Thigpen v. Thigpen*, 91 So. 2d 12 (La. 1956), as authority (awarding wife damages equal to one-half of difference between fair-market price and consideration received). *But see Fowler v. Fowler*, 861 So. 2d 181 (La. 2003) (holding, under Louisiana law, that life-insurance proceeds are separate property of beneficiary, regardless of source of premiums, and overruling *Thigpen* on life-insurance issue).

One court made the distinction between recovery sought incident to a dissolution action, which could be analogous to a Wisconsin interspousal remedy, and recovery sought after the death of the donor. *Osuna v. Quintana*, 993 S.W.2d 201, 209 (Tex. App. 1999). In that case, the husband conveyed substantial gifts of community property to another woman. In awarding judgment for joint-and-several liability against both the other woman and the husband for the full value of community property transferred, the court noted the difference in appropriate damages after the death of a spouse or while both spouses were alive but involved in a divorce. It pointed out that at death a party has the right to convey one-half the community property to whomever he or she wishes. Therefore, only one-half of community property is subject to recovery for improper transfers of community property. However, at divorce, all community property, including community property that was wrongfully transferred, is subject to division. Consequently, the court imposed a resulting trust, and required that the entire property transferred be returned to the community.

All the foregoing cases involved money damages. Under certain circumstances (e.g., the transfer of a unique asset such as an art object or real estate that is classified as marital property), rescission of the transfer or other remedy might be appropriate.

Section 766.70(6)(a) enables a nonparticipating spouse to sue either the spouse making the gift of marital property, the donee, or both, if the gift exceeds the value limits set by section 766.53. It is not clear how the Act would treat a bargain sale—in other words, part sale and part gift, as occurred in *Hall*. It appears that a spouse encountering such a fact situation could sue the grantee, and the court could order return of the property. The return should, of course, be conditioned on return of the consideration paid by the grantee. If the grantor spouse were unable to return the consideration, it might not be equitable to rescind the transfer. The relationship between the grantor and the grantee would probably enter into the court's consideration of these alternative remedies.

Section 766.70(1), regarding breach of the good-faith duty, does not classify the recovery under that subsection. Therefore, section 766.31(7)(e), which classifies such a recovery as individual property unless a decree or marital property agreement provides otherwise, applies.

It should be noted that the measure of damages to the property interests of a spouse under section 766.70(1) would be the full amount of marital property damaged if recovery is from marital property and one-half the amount if recovery is from the liable spouse's nonmarital property.

➤ *Example.* Assume that a wife squanders \$20,000 of marital property. Therefore, the husband's undivided one-half interest in marital property (valued at \$10,000) and the wife's one-half interest (also valued at \$10,000) are gone. The husband must recover \$20,000 of former marital property as his individual property to receive a value of \$10,000 from the wife's share of the former marital property. The other \$10,000 in value in the recovery already represents the husband's interest in the former marital property that is now reclassified as his individual property.

If the damage has been to one spouse's nonmarital property and recovery is from marital property, the recovering spouse must receive twice the value of the damaged property. This is necessary to achieve a transfer of the defendant spouse's one-half interest in marital property that is equal to the value of the nonmarital property damaged.

A spouse who owns nonmarital property and who has management and control over marital property may choose the property from which a

judgment for an interspousal remedy is voluntarily paid. If the judgment is not paid voluntarily, the recovering spouse may choose the property subject to execution or garnishment. If recovery is from predetermination date property owned by the liable spouse rather than from the liable spouse's individual property, the recovering spouse may be receiving property that is potentially augmented deferred marital property and that he or she could later elect to receive if the liable spouse dies before the recovering spouse. Wis. Stat. §§ 861.018–.11. The recovering spouse has no such elective rights in the liable spouse's individual property. Consequently, the recovering spouse should consider the classification of property to be recovered.

➤ *Example.* Assume that a husband is entitled to recover \$20,000 of marital property or \$10,000 of his wife's nonmarital property as a result of her wrongful transfer of \$20,000 of marital property. The wife has a solely owned bank account with a \$10,000 balance consisting of predetermination date property that would constitute augmented deferred marital property at her death. She also has an individual property account that contains \$10,000. Further assume that the wife continues to hold these accounts and dies before her husband. If the husband recovers for the interspousal remedy the \$10,000 in the account holding individual property, he may elect under section 861.02 to receive an additional \$5,000 from his wife's predetermination date account in her estate. If the husband recovers the interspousal judgment from the wife's predetermination date account, he will lose the potential right to elect to receive one-half of this account upon the wife's death.

If the bank account that is the wife's individual property was acquired by gift or inheritance, it would not usually be subject to division at divorce. Wis. Stat. § 767.61. However, an account holding property that potentially may become part of the deferred augmented marital property to which the other spouse has a right or an account holding property brought to the marriage is subject to division at divorce. The husband may wish to recover from the individual property account holding inherited funds rather than from the account holding other nonmarital funds to preserve the possibility of further recovery from the wife's assets if the marriage is dissolved or if the wife dies before the marriage is dissolved. *See infra* ch. 11, ch. 12; *see also supra* § 6.110 (dischargeability in bankruptcy of claims between spouses).

2. Exemptions [§ 8.39]

It is not clear what effect, if any, the exemptions under section 815.18 have on a judgment in favor of one spouse against another. For example, a third-party creditor with a judgment against a spouse cannot recover a depository account of up to \$5,000 from the debtor. Wis. Stat. § 815.18(3)(k). Married debtors may each claim an exemption in the same property, thereby doubling the value and exempting up to \$10,000. Wis. Stat. § 815.18(8). However, assume that a wife obtains a judgment against her husband for \$5,000, and that the recovery is classified as the wife's individual property. The wife must recover \$10,000 of marital property or \$5,000 of the husband's nonmarital property to satisfy the judgment. *See supra* § 8.38. If the husband holds a marital property bank account of \$10,000, does the wife recover the entire amount as individual property? Or may she only recover \$5,000, because the husband holds \$5,000 as exempt property? *See* Wis. Stat. § 815.18(3)(k). If he continues to hold \$5,000 as exempt under section 815.18(3)(k), is it still marital property? Judicial interpretation or clarifying legislation is needed to resolve these issues.

3. Access to Employee's Wages by Nonemployee Spouse [§ 8.40]

Earnings from employment represent the largest marital property asset for most couples. Section 109.01(3) defines *wages*, in part, as "remuneration payable to an employee for personal services." Section 109.03(1) states that "[e]very employer shall as often as monthly pay to every employee ... all wages earned by the employee." Payment to any person other than the one actually performing the services would therefore require specific authorization by statute, as in the case of court-ordered payment of support of dependents under section 767.225(1)(c). No such specific authorization exists in the Act, and it appears that the general remedies under section 766.70(2) and (3) are limited by the specific statutes relating to payment of employees.

If only the employee is paid by the employer, as is required by section 109.03(1), then only that employee spouse has management and control over the cash wages or paycheck. *See supra* § 4.18; *see also* Wis. Stat. § 766.51(1)(am). To divest a spouse of control over marital property otherwise within his or her management and control requires a showing

of actual or potential damage to marital property by gross mismanagement, waste, or absence. Wis. Stat. § 766.70(4)(a). Therefore, it appears that access and add-a-name remedies under section 766.70(2) and (3), which require no wrongdoing but arise solely by reason of ownership, are not available to require placement of both names on a spouse's paycheck or the issuance of two checks by the employer. On proof of gross mismanagement, waste, or absence, it appears that the court could order temporary or permanent limitation of the employee's management and control of his or her wages. Wis. Stat. § 766.70(4)(a)1.

Protection of the nonmanaging spouse's marital property right in his or her spouse's wages is often most crucial when a dissolution action is pending. Protection could be provided by a temporary order requiring that paychecks be issued in both names or that two checks be drawn, one for each spouse. However, this does not appear to be among the forms of temporary relief available incident to the dissolution action. Section 767.75 provides for direct payment of income to the court for temporary child support, maintenance, family support, spousal support, certain costs, and attorney fees. Property division or access to property under section 766.70 is not mentioned in section 767.75, and therefore, a temporary order for direct payment is not authorized. Moreover, no authority is granted to the court under section 767.225(1) to order the division of wages as a form of property division, although the amount of support ordered by the family court commissioner can accomplish the same result.

Because division of wages according to the property interests of each spouse, if the remedy is available, cannot be made incident to the dissolution action as a temporary order, it must be authorized, if at all, under section 766.70. However, an action under section 766.70 must be commenced before the commencement of the dissolution action. Wis. Stat. § 767.331. Once the dissolution action is pending, an interspousal remedy cannot be commenced. *Id.* There would be no sound policy reason to allow adding a name to a paycheck if a section 766.70(3) action was commenced before the dissolution action and not to allow such a remedy if the dissolution was filed first. It therefore appears that such a remedy might not be appropriate in either instance.

Other statutes indicate that it is the policy of Wisconsin to restrict the assignment of income, even by one who earns it. For example, wage assignments associated with consumer transactions must be revocable at

will and are limited in time. Wis. Stat. § 422.404. Wage assignments without a spouse's consent are invalid as fraudulent contracts except in limited situations. Wis. Stat. § 241.09.

It is arguable that the right to receive future earned income, even though subject to the contingency of future employment, is an interest vital to the concept of marital property. *See supra* § 5.22. Nevertheless, almost all the remedies set forth in section 766.70 relate to property, obligations, or rights in existence at the time of the commencement of the action, not those that are to be acquired in the future. The two exceptions, in subdivisions 766.70(4)(a)4. and 5., permit the court to classify future obligations and acquisitions of property and to order that any obligation or property acquired by a spouse is the obligation or the individual property of the incurring or acquiring spouse. Neither of these remedies provides a spouse with access to the marital property paycheck of the other spouse.

In summary, it appears that none of the remedies under section 766.70 is available to provide direct access by the nonemployee spouse to the employee's wages. Whether or not remedies under the Act supersede chapter 109 and other statutes to the contrary may be clarified by subsequent legislation or by judicial interpretation.

4. Guarantees [§ 8.41]

In determining the availability of assets to the creditor, a guarantee executed before the determination date and enforced thereafter is treated as an obligation in existence on the determination date. Wis. Stat. § 766.55(3). The spouse of the guarantor may, subject to equitable considerations, have a right of reimbursement under section 766.70(5) for marital property used to pay such an obligation. *See supra* § 8.36. The damage occurs at the time of payment, and the applicable statute of limitation runs from payment, not execution, of the guarantee.

The execution of a guarantee by a spouse after the determination date is not ordinarily an event causing damage to marital property. Without damage, the cause of action under section 766.70 does not arise and the statute of limitation does not run. The subsequent payment of the obligation with marital property may give rise to a remedy on behalf of the spouse who did not join in the guarantee. Wis. Stat. § 766.70(5), (6)(a).

Whether the obligation under a guarantee is a family-purpose obligation determines the classifications of property available to the creditor. *See* Wis. Stat. § 766.55(2)(b), (d). If a marital-purpose statement is signed by the incurring spouse, it is conclusive evidence as to the creditor that the guarantee is a family-purpose obligation. Wis. Stat. § 766.55(1); *Bank One v. Reynolds*, 176 Wis. 2d 218, 220–21, 500 N.W.2d 337 (Ct. App. 1993). A general analysis of other types of family-purpose obligations may be helpful. *See, e.g., supra* ch. 5, ch. 6. For example, a personal guarantee of an obligation of a family-owned corporation might be for a family purpose, but the guarantee of a loan to someone who is not a family member without benefit to the family might not be.

The Act does not provide for contribution between spouses for family-purpose obligations, so a guarantee of such an obligation does not give rise to a remedy. Payment of a nonfamily-purpose guarantee with marital property, however, may support a remedy under section 766.70(5), which permits reimbursement for a nonfamily-purpose obligation satisfied with marital property. *See supra* § 8.36. A remedy may also be available under section 766.70(6)(a) for reimbursement of the amount paid in excess of the gift limits in section 766.53. *See infra* § 8.45.

There may be instances in which the execution, not the enforcement, of a guarantee results in damage to marital property. For example, the existence of the guarantee may make the acquisition of other credit unavailable. If the execution of the guarantee is for a purpose that supports an action for breach of the good-faith duty, and if damage to the other spouse's property can be proved, then the nonguarantor spouse may have a remedy under section 766.70(1). *See supra* § 8.18; *see also supra* § 6.22; *infra* § 8.66 (complaint form).

5. Effect of Decree on Subsequent Creditors [§ 8.42]

Section 766.55(4m) provides that a court decree under section 766.70 (or marital property agreement or unilateral statement under section 766.59) does not adversely affect a creditor's rights unless the creditor had actual knowledge of the adverse provisions in the decree when the obligation was incurred. If a creditor is provided a copy of a decree under section 766.70 before an obligation is incurred, the creditor is bound by any adverse provisions, regardless of whether the creditor read

or understood its provisions. Wis. Stat. §§ 766.56(2)(c), .59(5); *see supra* § 6.81. In the case of an open-end credit plan (e.g., a credit card), *see* Wis. Stat. § 766.555(1)(a), the creditor must have actual knowledge or a copy of the decree when the plan is entered into. Wis. Stat. §§ 766.55(4m) (actual knowledge), .56(2)(c) (copy). If the actual knowledge or disclosure occurs after the obligation is incurred or the plan is entered into, then the decree will not affect the creditor's rights with respect to any subsequent use of the plan or any renewal, extension, or modification of the obligation. Wis. Stat. §§ 766.55(4m), .56(2)(c). The creditor may recover the amount owed from marital property classified as such by law, rather than by the decree, as if the decree did not exist.

Any creditor in a credit transaction governed by chapters 421 to 427 (the Wisconsin Consumer Act) must provide notice on the application that no provision of a marital property agreement, unilateral statement under section 766.59, or court decree concerning an interspousal remedy under section 766.70 is binding on the creditor unless the creditor is provided a copy of the relevant document or has actual knowledge of any adverse provision before or when the obligation is incurred. Wis. Stat. § 766.56(2)(b). The applicant decides whether to provide a copy of the agreement or to provide the creditor with actual knowledge of an adverse provision by other means. If the applicant does not do so, the creditor is not bound and may rely on and collect from property that would have been marital property and that would have been available for recovery by the creditor without the agreement, notice, or decree.

A spouse whose property is recovered by a creditor of the other spouse because the creditor had no notice or knowledge of the decree, or a spouse whose property is used by the other spouse to pay such a creditor in contravention of the provisions of a decree under section 766.70, may have a remedy against the other spouse for breach of the good-faith duty under section 766.70(1). *See also infra* § 8.18. Decrees under section 766.70 should include a provision requiring each spouse to disclose the decree and to provide a copy of the decree to potential creditors. Such a requirement should also make a contempt remedy available if the order is violated. *See* Wis. Stat. §§ 785.01(1)(b), .02.

6. Effect of Decree on Bona Fide Purchaser [§ 8.43]

Section 766.57(3) provides that a bona fide purchaser who buys property from a spouse who has the right to manage and control property takes the property free of claims of the other spouse. *Bona fide purchaser* is defined in section 766.57(1) as a purchaser without notice of a spouse's adverse claim. It appears that a purchaser with no actual notice of a decree issued under section 766.70 takes the property free of the decree's provisions. *See also* Wis. Stat. § 766.70(8); *supra* § 4.66.

IV. Actions by Spouse Against Third Parties and Other Spouse [§ 8.44]

A. Recipient of Gift of Marital Property in Excess of Value Limit [§ 8.45]

A spouse acting alone may make gifts to a third person of marital property over which the donor spouse has management and control. *See* Wis. Stat. § 766.51(4). Such a transfer results in a completed gift, subject to the other spouse's exercise of his or her remedy to recover the gift or to obtain a compensatory judgment for the amount by which the gift exceeds the applicable limit. If aggregated gifts to any one donee in one calendar year exceed \$1,000 or exceed an amount that is reasonable considering the economic position of the spouses, then the nondonor spouse may have such a remedy. *See* Wis. Stat. §§ 766.53, .70(6)(a), .51(4); *see also supra* ch. 4, *infra* ch. 12.

A transfer of marital property to a revocable trust created by the donor spouse or a deposit into a joint or payable-on-death (P.O.D.) account with a spouse and a third party is not a completed gift. The spouse having control generally has not relinquished that control, and the transfer or deposit would not ordinarily result in damage. However, *see* sections 8.47–49; *infra*, concerning such transfers upon the death of the transferring spouse. *See* section 2.102, *supra*, concerning transfers to an irrevocable trust with the donor's retained interest.

The nondonor spouse may bring an action against either the donor spouse, the recipient, or both, either to recover the gift or for a compensatory judgment equal to the amount by which the gift exceeded the limit established under section 766.53. Wis. Stat. § 766.70(6)(a). If

the gift was cash, the recovery would probably be a compensatory amount rather than the cash itself.

Whether a court will require either return of the property or a compensatory judgment against the transferor spouse or the recipient of property who paid less than fair consideration may depend on the equities in each case. *See, e.g., Hall v. Allred*, 385 So. 2d 593 (La. Ct. App. 1980). Factors to be considered may include whether the consideration received by the transferor could be returned, the relationship between the transferor and the transferee, and the property's value and nature. In most community property states, transfers of community property without consideration by one spouse without the other's consent are voidable but not void. *See Reppy & Samuel, supra* § 8.8, at 239–40; *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. Ct. App. 1999); *Harris v. Harris*, 369 P.2d 481, 482 (Cal. 1962); *Novo v. Hotel Del Rio*, 295 P.2d 576 (Cal. Ct. App. 1956).

Questions have been raised concerning gifts of marital property that financially assist relatives to whom a spouse has no legal duty of support. The nonparticipating spouse's right to recover these gifts is uncertain. *See supra* § 4.36. The recipients of these gifts typically are college-age children and elderly parents. It is possible for a spouse to become legally obligated to support children after the age of majority when the spouse agrees to do so incident to a divorce settlement, *see, e.g., Bliwas v. Bliwas*, 47 Wis. 2d 635, 178 N.W.2d 35 (1970); *Honore v. Honore*, 149 Wis. 2d 512, 439 N.W.2d 827 (Ct. App. 1989), but usually this financial assistance is gratuitous. Section 766.70 states only that a spouse may bring an action for recovery of gifts of marital property in which he or she did not act with the donor spouse; it does not mandate that the court order recovery from the donor spouse if such a gift is proved. The fact that the court *may* order recovery implies that equitable considerations may apply. The amount of the gift in relation to the spouses' economic circumstances, the availability of the donor's nonmarital property, and the relationship between the donor and donee, for example, may be relevant to the court's decision. *See also In re Lam*, 364 B.R. 379 (Bankr. N.D. Cal. 2007) (divorce court had found debtor husband liable for using community property to pay child support from prior marriage when separate property had been available).

Section 766.70(6)(a), which provides the remedy for recovery of unauthorized gifts of marital property, states that “[i]f the recovery occurs during marriage, it is marital property. If the recovery occurs

after a dissolution or the death of either spouse, it is limited to 50% of the recovery that would have been available if the recovery had occurred during the marriage.” If the property is recovered during marriage either from the donee or from the donor spouse who has sufficient nonmarital property with which to satisfy the judgment, the recovery is marital property. Wis. Stat. § 766.70(6)(a). The effect of the recovery is to replace the marital property that was given away. It appears, however, that property recovered from the donor spouse during the marriage should be the individual property of the nondonor spouse if the donor has no nonmarital property and must satisfy the judgment out of his or her share of marital property. Otherwise, the nondonor spouse has recovered nothing. Twice as much marital property would be necessary to satisfy the judgment as would be necessary if satisfied by the donor’s nonmarital property. *See supra* § 8.38. This apparent oversight might be addressed by subsequent legislation.

The action for recovery of a gift of marital property must be commenced within one year after the nondonor spouse has notice of the gift, within one year after dissolution, or within the time limit for filing claims after the death of either spouse, whichever is earliest. Wis. Stat. § 766.70(6)(a). When the nondonor spouse dies, his or her personal representative must bring the action within the time for filing claims under section 859.01. There are no provisions for extending this time.

This remedy applies only to gifts of marital property, not to gifts of predetermination date property, even if the predetermination date property would have been marital property if the Act had been in effect when the property was acquired. If recovery of predetermination date property is sought after the death of the donor, section 861.17 (transfers in fraud of a spouse’s rights) may apply in unusual circumstances, or sections 861.018 through .11 (election of the augmented deferred marital property estate, including certain transfers in which the donor has retained an interest or control) may apply.

B. Recipient of Gift by Nonprobate Transfer at Death of Spouse [§ 8.46]

1. Multiple-party Bank Accounts; P.O.D. Arrangements; Dispositive Revocable Trusts [§ 8.47]

a. Transferor Dies First [§ 8.48]

Occasionally, one spouse is a party on a joint account, such as a bank account or similar depository account, with a person other than his or her spouse. Assuming the spouse is the only depositor, there is no gift when the arrangement is made, but the arrangement results in a completed gift when withdrawals are made by the nondepositor during the donor spouse's lifetime or at the death of the spouse who provided the funds in the account. Upon the death of the spouse who is a party, the entire balance passes to the surviving third party. *See* Wis. Stat. § 705.04. If any of the funds deposited by the decedent were marital property, the surviving spouse may recover from the other party one-half of the funds determined to be marital property. Wis. Stat. §§ 766.70(6)(b), 705.04(4).

The issue of a surviving spouse's interest in a multiple-party account held by the decedent spouse arose in *Lloyd v. Lloyd (In re Estate of Lloyd)*, 170 Wis. 2d 240, 487 N.W.2d 647 (Ct. App. 1992). The court of appeals held that certain of the joint bank accounts held by the decedent and his nephew and other third parties were funded with marital property and were subject to recovery under section 766.70(6) by the decedent's surviving spouse. *See also* Wis. Stat. § 705.04(4). The circuit court had held that most of the accounts were entirely funded with marital property because there was insufficient tracing to find otherwise. The circuit court's determination of tracing and commingling were questions of fact, but whether those funds were classified as marital or nonmarital property were questions of law that the court of appeals reviewed *de novo*. *Lloyd*, 170 Wis. 2d at 251–52. The court of appeals reviewed the evidence and held that some of the joint accounts were funded with the decedent's solely owned or predetermination date funds. The court stated that even though the surviving party to an account is presumptively the owner, interest earned on the account and “unexplained” funds added to the account between the date of the marriage and the determination date are deferred marital property, and funds added between the determination

date and date of death are marital property. *Id.* at 266. See also the discussion of deferred marital property elections in chapter 12, *infra*. At least one multiple-party account was funded before the marriage and placed in the names of the decedent and his nephew before the effective date of section 861.05. This account was thus excluded from the augmented estate by section 861.05(4), and the surviving spouse had no right to recover the portion of that account that was traceable to the decedent's nonmarital property. *Lloyd*, 170 Wis. 2d at 266. It was apparently conceded that all the funds deposited to the accounts in question were deposited by the decedent and not by other parties to the accounts.

Section 766.70(6)(b) applies only to deposits made to multiple-party accounts or to other incomplete transfers after the determination date. *See* Wis. Stat. Ann. § 766.70 Legis. Council Notes—1985 Act 37, §§ 89, 130 to 138 (West 2009). Any deposits to such accounts before the determination date that would have been marital property had the Act been in effect are predetermination date property. A surviving spouse's right in such property arises only at the death of the owner spouse and is governed by the surviving spouse's election of the augmented marital property estate. *See* Wis. Stat. § 861.03. If interest is posted to the account after the determination date and may therefore be marital property (if no unilateral statement under section 766.59 has been executed), then the amount attributable to deposits made by the decedent spouse, but not to deposits made by the third party, is subject to the surviving spouse's remedies under section 766.70(6)(b).

If an account is payable at the death of the owner to a designated third party, the surviving spouse has a similar right to recover from the P.O.D. beneficiary one-half the deposits that are marital property and that were made after the determination date. A financial institution is protected upon payment of funds to the surviving individuals who are, according to the institution's records, entitled to such funds at the death of a party. *See* Wis. Stat. § 705.06.

If a spouse acting alone creates a revocable trust during marriage, and marital property is transferred to the trust, there is no completed transfer to a third party. The transfer to the trust "by itself" does not cause property to be reclassified. Wis. Stat. § 766.31(5); *see supra* § 2.101. The trust may, by its terms, become irrevocable at the death of the settlor spouse. If someone other than the spouse of the settlor has an interest in the trust that arises at the settlor's death, and distributions are made to

that person, then the surviving spouse may recover one-half of the former marital property from the recipient who was the trust beneficiary.

If former marital property continues to be held by the trustee after the settlor dies, then the surviving spouse's action under section 766.70(6)(b) is against the trustee to recover his or her one-half interest in the former marital property so held. The 1988 Trailer Bill created section 766.575 to protect a trustee of a trust established by one spouse when the trustee has no knowledge of an adverse claim of the nonsettlor spouse. Section 766.575(3) also establishes the procedure to follow if the trustee receives notice of a claim. The trustee is required to suspend distribution for 14 business days and provide to the trust beneficiaries notice of the claim. Wis. Stat. § 766.575(3)(a). The claimant spouse must provide certain documentation to support the claim within those 14 days, and if such support is provided, the trustee is required to suspend distributions until the claim is resolved. Wis. Stat. § 766.575(3)(b). If the claimant spouse does not provide required documentation supporting the claim, the trustee may administer the trust as if no claim had been asserted. Wis. Stat. § 766.575(3)(c); *see also supra* § 2.100.

The concept of allowing recovery by the surviving spouse of one-half the value of the nonprobate transfer (not the transferred property itself) is consistent with the decedent's ability to manage the property. Thus, a spouse with management and control of marital property can establish an arrangement that will transfer marital property at the spouse's death to a third person, but such a transfer is subject to the other spouse's remedy for one-half the value. The remedy is stated in terms of "value" because the nondonor spouse is divested of the property itself by the arrangement.

An action to recover a nonprobate transfer taking effect at death must be commenced by the surviving spouse no later than one year after the death of the decedent spouse who made the arrangement. Wis. Stat. § 766.70(6)(b)1.; *see Joyce v. Joyce (In re Estate of Joyce)*, 2008 WI App 92, 312 Wis. 2d 745, 754 N.W.2d 515 (review denied).

b. Nontransferor Dies First [§ 8.49]

If the spouse entitled to recover predeceases the transferor, section 766.70(6)(b)2. applies. It appears that the action must be brought no later than one year after the nontransferor's death, although the statute is unclear as to which spouse's death determines when the one year begins

to run. It is logical that the time should begin to run at the death of the spouse having a claim. The marital property that is subject to the arrangement made for a third party is still held by or under the control of the surviving donor spouse, because this remedy applies only to transfers taking effect at the death of the donor. A completed transfer has not taken place because the spouse making the arrangement has not yet died. Because it is due on demand, marital property in a multiple-party account or revocable trust should be treated like any other marital property controlled by the surviving spouse. The nondonor decedent's share of the marital property must be recovered by his or her personal representative, who will administer the property as part of the nondonor's estate. *See, e.g., Bolton v. MacDonald (In re Estate of MacDonald)*, 794 P.2d 911 (Cal. 1990) (holding that estate could recover community property interest in individual retirement accounts (IRAs) held by surviving spouse, because decedent had consented only to designation of trust as beneficiary but did not consent to transmutation of her interest).

An additional provision of section 766.70(6)(b)2. states that recovery is limited to the value of the property at the date of death of the recovering spouse, not at the subsequent death of the surviving donor spouse (when the transfer actually takes place). Therefore, it appears that the recovering nontransferor spouse's estate is not entitled to any increase in the value of the property after the nontransferor's date of death. This is not entirely consistent with the concept of marital property assets in a revocable trust or multiple-party account, although it may be logical with respect to life insurance insuring the life of the survivor.

➤ **Example.** A husband creates a revocable trust holding marital property stock and makes his son from a previous marriage the beneficiary. His wife dies on a date when the stock is worth \$10,000. Six months later, the stock is worth \$50,000. It appears that the wife's estate is entitled to recover only \$5,000 from the husband or his trust, that is, one-half the value on the wife's date of death, even though the husband is still alive and no transfer has taken place. If the husband had not transferred the stock to the trust, the wife's estate would have owned one-half of the stock itself. If the wife's personal representative fails to bring an action to recover marital property controlled by the husband within the one-year limitation, then the wife's heirs or estate cannot later claim an interest in the transferred property after the husband's death. Wis. Stat. § 766.70(6)(b)2.

There may be instances in which the spouse who made the arrangement resulting in a nonprobate transfer at death dies after the death of the spouse entitled to a remedy but before the recovering spouse's personal representative can exercise the remedy. The recovery is the same as if the donor had predeceased the recovering spouse, but the recovery is valued as of the recovering spouse's date of death. Wis. Stat. § 766.70(6)(b)2.

The remedy in section 766.70(6)(b) is consistent with the principle that a spouse may not, by nontestamentary disposition, divest the other spouse of his or her interest in the value of marital property (although the property itself may be divested). *Denoskoff v. Scott (In re Estate of Politoff)*, 674 P.2d 687 (Wash. Ct. App. 1984), illustrates this rule. When the wife died, the husband had approximately \$32,000 in community funds in his sole name. He deposited these funds in a joint bank account with his housekeeper. When he died, the housekeeper received the money as the surviving joint tenant. The wife's heirs recovered the wife's share of the community funds from the housekeeper on the ground that the husband could not divest the wife (or in this case, her estate) of her interest in community property assets by placing them in a joint account with a third person.

2. Beneficiary of Life Insurance Policy Insuring Life of a Spouse [§ 8.50]

a. Insured Dies First [§ 8.51]

Another type of arrangement that transfers property at the death of a spouse is the beneficiary designation on a policy insuring the life of a spouse. The surviving spouse may have a marital property interest in the policy or proceeds. *See supra* ch. 2. The noninsured spouse may also have a marital property interest in a policy owned by a third party and insuring the life of a spouse if the premiums were paid with marital property. Wis. Stat. § 766.61(3)(d); *see supra* §§ 2.158–.183. If someone other than the spouse of the insured is the beneficiary of more than one-half the proceeds classified as marital property, the surviving spouse may recover his or her marital property interest in the proceeds from the beneficiary. Wis. Stat. § 766.70(6)(b)1.; *see also Roselli v. Rio Cmty. Serv. Station, Inc.*, 787 P.2d 428 (N.M. 1990). If the policy is mixed property, the spouse's share is one-half the proceeds determined

to be marital property using the same fraction used to calculate the proportionate interests during the owner's lifetime. Wis. Stat. § 766.61(3); *see supra* ch. 2.

The court in *Socha v. Socha*, 204 Wis. 2d 474, 555 N.W.2d 152 (Ct. App. 1996), determined that section 766.70 was the only remedy available to the wife when her insured husband died during the pendency of their dissolution action. The husband had changed the beneficiary of marital property life insurance and retirement benefits from the wife to their son. The change was done in violation of temporary orders entered in the dissolution action. The circuit court imposed a constructive trust on the insurance proceeds, but the court of appeals held that since a cause of action for divorce terminates when a party dies, and the legislature has fashioned comprehensive remedies for transfers of marital property when no dissolution action is pending, the parties' rights had to be determined under section 766.70. The court of appeals remanded the action for such a determination.

Recovery under section 766.70(6)(b) may be barred if the surviving spouse signed a written consent to the designation of a third-party beneficiary. Wis. Stat. § 766.61(3)(e). While disclosure of assets and financial obligations may be required under section 766.58(6)(c)1. for a marital property agreement, such disclosure is not necessary to make the written consent enforceable. *See supra* § 2.208.

Any action against a beneficiary must be commenced within the limits prescribed for other transfers taking effect at death, that is, not later than one year after the insured's death. Wis. Stat. § 766.70(6)(b)1.

A life-insurance company that pays a third party without knowledge of an adverse claim by the surviving spouse is protected by section 766.61(2). If the company is aware of such a claim, the company should hold the proceeds until the rights of the surviving spouse in the proceeds are decided, or the insurer may wish to commence an interpleader action under section 803.07.

The right of recovery under section 766.70(6)(b) does not reach a policy assigned to or payable to a creditor as security for a loan. Wis. Stat. § 766.61(4). It also does not reach proceeds received by a former spouse or minor children if the decedent was required to maintain the policy by a judgment of divorce or legal separation or by a judgment in a paternity action, regardless of the fact that premiums may have been paid

with marital property during the subsequent marriage. Wis. Stat. § 766.61(5).

b. Noninsured Dies First [§ 8.52]

In addition to any ownership interest in a policy insuring the life of the surviving spouse that is the decedent's nonmarital property, the estate of a deceased noninsured spouse has an ownership interest in the marital property portion of a policy insuring the life of the surviving spouse. *See* Wis. Stat. § 766.70(7). If the surviving spouse does not exercise his or her right to purchase the policy under section 766.70(7), the decedent's marital property interest in the policy passes to the heirs or beneficiaries of the estate. *See infra* § 8.59. How premiums are to be paid, who may designate beneficiaries, and how a policy can be split between owners are matters not addressed by the Act.

Obviously, the estate of the noninsured spouse has no right to recover under section 766.70(6)(b)2. from a third-party beneficiary, because the insured is still alive. However, if the insured dies before the policy is transferred to the new owner (heir or beneficiary) by the deceased noninsured spouse's estate, and a third party is the beneficiary, then the right of recovery is limited to one-half the marital property component of the policy valued on the date of death of the noninsured spouse. Wis. Stat. § 766.70(6)(b)2.

The estate of the predeceasing noninsured spouse is entitled to approximately the same amount of compensation regardless of whether the surviving spouse exercised his or her option under section 766.70(7) to purchase the policy or whether the surviving spouse died before or after having done so. Recovery from the third-party beneficiary is limited to the noninsured spouse's marital property interest in the interpolated terminal reserve of a nonterm policy, which approximates the "cash value," and the unused premium of a term policy. Wis. Stat. § 766.61(7). The estate of the noninsured spouse has no other rights in the policy. *Id.*

A spouse who is neither the policy owner nor the insured may acquire a marital property interest in a policy insuring the life of the other spouse, even though the insured spouse is not the owner. *See* Wis. Stat. § 766.61(3)(d). The amendments to the 1988 Trailer Bill did not address the rights of the noninsured spouse to recover from these policies, but it

is likely that amended section 766.70(6)(b)2. would be interpreted similarly to limit recovery.

3. Beneficiary of Deferred-employment-benefit Plan [§ 8.53]

a. Employee Dies First [§ 8.54]

Section 766.70(6)(b) allows a surviving spouse to recover his or her former marital property interest in a deferred-employment-benefit plan of the deceased employee spouse if someone other than the surviving spouse is named as beneficiary of more than 50% of the marital property component. Even if a beneficiary designation was made before the spouses' determination date, it may be considered an "arrangement during marriage." *Jackson v. Employe Trust Funds Board*, 230 Wis. 2d 677, 690, 602 N.W.2d 543, 550 (Ct. App. 1999) (holding that designation of third-party beneficiary was "arrangement during marriage" because employee spouse received notice of her right to charge beneficiary while she was married but failed to do so). The Act does not provide for spousal consent to another beneficiary. *See supra* ch. 2. If the Employment Retirement Income Security Act (ERISA) applies to a plan, federal preemption may exist. *See supra* ch. 2. A plan administrator who pays a beneficiary other than the spouse, with or without knowledge of an adverse claim, is protected, *cf.* Wis. Stat. § 766.61(2) (life insurance). Wis. Stat. § 766.62(4); *see supra* ch. 2; *see also* Wis. Stat. § 766.70(7); *infra* §§ 8.59, 12.69 (concerning purchase of deceased employee spouse's interest in deferred-employment-benefit plan from estate). The action by a spouse against the beneficiary must be commenced within the same time limits set forth in section 8.45, *supra*, that is, not later than one year after the employee spouse's death. *Jackson*, 230 Wis. 2d at 690.

b. Nonemployee Dies First [§ 8.55]

The nonemployee spouse who dies before the employee spouse has no rights in the deferred-employment-benefit plan of the employee. Such rights terminate at the death of the nonemployee. Wis. Stat. §§ 766.62(5), .31(3); *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding that

ERISA preempted nonemployee decedent spouse's children's claims based on Louisiana's community property laws); *see supra* § 2.216.

C. Third-party Joint Tenant [§ 8.56]

1. At Creation of Joint Tenancy [§ 8.57]

The creation of a joint tenancy with a third party by a spouse acting alone using marital property has unique two-stage treatment under the Act. When the gift is made, the nondonor spouse has a right of reimbursement from the donor spouse, the gift recipient, or both for one-half the value of the marital property transferred to third parties in joint tenancy. Wis. Stat. § 766.70(6)(c)1.; *see also supra* §§ 2.241 (classification of property held by spouse in joint tenancy with third person), 8.47–.49 (relating to multiple-party bank accounts). The value of the recovery is one-half the amount determined by dividing the number of joint tenants other than the donor spouse by the total number of joint tenants including the donor spouse. The application of this fraction to the total value of the property subjects the full value of the shares transferred to third parties to this right of reimbursement.

➤ *Example.* A husband holds a marital property asset valued at \$30,000. He creates a joint tenancy between himself and two of his children. His wife has a right of reimbursement for two-thirds of the value, or \$20,000, the sum of the third parties' interests.

The statute does not state whether the recovery is classified as marital property or as the individual property of the nondonor spouse. However, the recovery under section 766.70(6)(c)1. is similar to the recovery under section 766.70(6)(a) for a gift in excess of the value limits of section 766.53 and should be classified in the same manner (i.e., as marital property. *But see* Wis. Stat. § 766.31(7)(e)). Under section 766.70(6)(a), the recovery is marital property if it takes place during the marriage. The recovery is limited to 50% of the value of the transferred property (\$10,000 in the above example) if the recovery occurs after the marriage terminates. If, on the other hand, the recovery during marriage becomes the individual property of the recovering spouse, the amount should also be one-half the value of the transferred interest in marital property. *See supra* § 8.38. A right to reimbursement, rather than a right to property, leaves the operation of the joint tenancy intact. *See* Wis. Stat. Ann.

§ 766.70 Legis. Council Notes—1985 Act 37, §§ 89, 130 to 138 (West 2009). An amount recovered after the marriage terminates is the solely owned property of the recipient.

Although the creation of a joint tenancy with a third person by a spouse using marital property may represent a completed gift to the third person, the value of the marital property interest transferred does not have minimum allowable levels as do gifts to third parties under section 766.53. The entire value, not the amount in excess of \$1,000 or other reasonable amount, may be recovered. Also, only a compensatory judgment is available; the property itself cannot be recovered, as would be possible under section 766.70(6)(a) from a third-party recipient of an outright gift who became a sole owner or a tenant in common. Because the property cannot be recovered, the income on the property from the date of the gift until the date of recovery, whether distributed or retained in the entity held in joint tenancy, also cannot be recovered. The recovering spouse can recover only one-half the value of the marital property transferred in joint tenancy to the third party (one-half of \$20,000 in the above example) because the donor continues to have a severable interest in the property, which has been retained. Wis. Stat. Ann. § 766.70 Legis. Council Notes—1985 Act 37, §§ 89, 130 to 138 (West 2009). Likewise, the nondonor spouse also continues to have a marital property interest in the fractional share of property retained by the donor (i.e., the husband's \$10,000 share in the above example).

If the third-party joint tenant furnishes a portion of the consideration used to acquire the asset held in joint tenancy with a spouse, the creation of the joint tenancy might not be a gift. In that situation, the other spouse's right to recover would arise only if and when the joint tenant spouse predeceased the third-party joint tenant. Section 766.70(6)(c)2. provides for recovery by the nontenant spouse's estate when the nontenant spouse dies first, but it appears to apply only if the creation of the joint tenancy resulted in a gift. If the creation of the joint tenancy did not result in a gift to the third-party joint tenant, then the creation might be considered "an arrangement during marriage involving marital property by a spouse acting alone [that] is intended to be and becomes a gift to a 3rd person upon the death of the spouse." See Wis. Stat. § 766.70(6)(b). Then if the nontenant spouse dies before the tenant spouse, the nontenant spouse's estate could recover from the third person as if the tenant spouse had predeceased the nontenant (thus completing the gift), but with the recovery valued as of the date of death of the nontenant spouse. Wis. Stat. § 766.70(6)(b)2.; see *supra* § 8.49.

Any action under section 766.70(6)(c)1. must be commenced within the earliest of one year after the nondonor has notice of the gift, one year after a dissolution, or one year after the death of either spouse. Wis. Stat. § 766.70(6)(c)1.

2. At Death of Tenant Spouse [§ 8.58]

If the asset continues to be held in joint tenancy until the death of the tenant spouse, the nontenant spouse has a second opportunity to recover reimbursement (e.g., the \$10,000 interest retained by the donor spouse in the example at section 8.57, *supra*). Wis. Stat. § 766.70(6)(c)2. Recovery may be from the decedent's estate, the surviving joint tenant, or both. *Id.* Recovery is measured by a fraction of the date of death value of the entire asset equal to one-half the quotient resulting from dividing one by the total number of joint tenants immediately before the death of the tenant spouse. Wis. Stat. § 766.70(6)(c)2. Although there is no statutory provision classifying the amount recovered, the amount would of necessity be the solely owned property of the surviving spouse. The purpose of this second recovery is to reimburse a spouse for any appreciation in the retained property that occurred between the date of the gift and the tenant spouse's date of death. *See* Wis. Stat. Ann. § 766.70 Legis. Council Notes—1985 Act 37, §§ 89, 130 to 138 (West 2009).

A recovery after the death of the tenant spouse under section 766.70(6)(c)2. is not reduced by a prior recovery of amounts received during the marriage for the joint tenancy property under subparagraph 1. because the two recoveries are for different property interests. The first recovery under subparagraph 1. is for the portion transferred by the donor spouse. The second recovery under section 766.70(6)(c)2. is for the portion of the property that was marital property retained by the donor until death.

There is no provision for the intervening death of a third-party joint tenant if more than one third party had been given an interest as a joint tenant in marital property.

➤ *Example.* Assume that a husband holds a marital property asset valued at \$30,000 and creates a joint tenancy with *X* and *Y*. The wife may recover \$10,000 each from *X* and *Y* as marital property, thereby reimbursing the marital estate for the \$20,000 transferred. The wife

continues to have a one-half marital property interest in the \$10,000 portion that the husband retained. Then X dies, leaving the husband and Y as joint owners. When the husband dies, assume that the property has increased in value to \$100,000. The wife may again recover from Y, who now owns the entire property. The wife's recovery from Y is one-half of one-half the value of the property, \$25,000. If X had not died before the husband, the wife would have recovered one-half of one-third (one-third being the fractional share owned by the husband at death), \$16,666. The intervening death of X allows the wife to recover from property covered by the first recovery under section 766.70(6)(c)1., which was returned to the husband because of X's death.

An action under section 766.70(6)(c)2. must be commenced by the surviving spouse not later than one year after the death of the "decedent" spouse, apparently referring to the death of the tenant spouse. The property is valued as of the date of the tenant spouse's death, which gives the survivor no right to income or appreciation in value after the tenant spouse's death.

If the nontenant spouse predeceases the tenant spouse, the action must be commenced not later than one year after the "decedent's" death. The statute is not clear whether the term decedent's death refers to the death of the tenant or the nontenant. However, it appears that the one-year period begins to run when the nontenant dies. The portion of the property subject to reimbursement is measured "as if the tenant spouse had predeceased the spouse with the right of reimbursement, but is valued at the date of death of the spouse with the right of reimbursement." Wis. Stat. § 766.70(6)(c)2. Therefore, the nontenant spouse's estate or other successor in interest must commence an action against the tenant spouse (or his or her estate, if the tenant spouse dies within the year after the death of the nontenant spouse), or the other joint tenants, or both, not later than one year after the nontenant spouse's death.

D. Estate Holding Life Insurance Policy or Deferred-employment-benefit Plan [§ 8.59]

The surviving spouse has the right to purchase from the decedent's estate the decedent's interest in any life insurance policy or deferred-employment-benefit plan described in sections 766.61 and .62,

respectively, if all or part of the policy or plan is included in the deceased spouse's estate. Wis. Stat. § 766.70(7). Sections 766.61 and .62 refer to policies insuring a spouse's life or deferred-employment-benefit plans attributable to a spouse's employment. The remedy under section 766.70(7) is necessarily limited to a policy owned by the decedent on the surviving spouse's life or a plan attributable to the decedent's employment. Wis. Stat. §§ 766.61, .62. This right to purchase may be important when the decedent spouse owned a policy on the survivor's life and the survivor wishes to retain the policy because he or she either is no longer insurable or is unable to obtain favorable rates.

In the case of life insurance, the interest of the decedent in a policy must be in one insuring the life of the surviving spouse, since any right the surviving spouse has to recover a marital property interest in a policy insuring the life of the decedent would be transferred to the proceeds in the hands of a third-party beneficiary. *See* Wis. Stat. § 766.70(6)(b). In the case of a deferred-employment-benefit plan, the decedent's interest in a plan attributable to the employment of the survivor terminates at the death of the nonemployee, and the decedent nonemployee's estate or heirs have no rights in the plan. Wis. Stat. § 766.62(5).

The 1988 Trailer Bill clarified the requirement that the estate of a noninsured spouse that has a marital property interest in a life insurance policy owned by and insuring the life of the surviving spouse must sell that interest to the surviving spouse upon the exercise of the surviving spouse's right to purchase under section 766.70(7). Section 766.61(7) clarifies the effect of the surviving spouse's failure to purchase the marital property interest of a decedent spouse. Failure to do so limits the recovery by the noninsured spouse's estate to one-half the noninsured spouse's marital property interest in the interpolated terminal reserve of a nonterm policy and in the unused portion of the premium of a term policy on the date of the noninsured spouse's death. Wis. Stat. § 766.61(7); *see also supra* § 8.52.

Under section 766.61(3)(d), a spouse acquires an interest in a policy that insures a spouse's life but that is owned by another person or entity if premiums are paid with marital property. It appears that the surviving spouse may also purchase the decedent's interest in this type of policy.

The cost to the surviving spouse is the fair market value of the policy or plan. The purchase must be made within 90 days after the earlier of

either receiving a copy of the inventory listing the policy or plan or discovering the existence of the policy or plan. Wis. Stat. § 766.70(7).

V. Procedure [§ 8.60]

A. In General [§ 8.61]

The Act does not specify the procedures governing actions under section 766.70. Therefore, the general rules of civil procedure apply, *see* Wis. Stat. chs. 801–807, including the right to trial by jury. Wis. Stat. § 801.01(2).

Actions affecting the family have special procedural rules outlined in chapter 767. Unlike a divorce, an interspousal action under section 766.70 is commenced with a summons and complaint, not a petition, and the parties are plaintiff and defendant, not petitioner and respondent. An action for an interspousal remedy cannot be combined initially with an action for divorce because actions affecting the family, set forth in section 767.001(1), do not include interspousal remedies. *See also* Wis. Stat. § 805.05 (describing requirements for consolidation of actions and for separate trials). Also, the contents of the petition are specified by statute in an action affecting the family, *see* Wis. Stat. § 767.215(2), and there are no provisions for allegations appropriate for an interspousal remedy. Nevertheless, in some cases, if not most, the same issues and the same fact situations may be involved in the dissolution action and in the action for an interspousal remedy. It appears to be appropriate to assign both cases to the same judge, even if the actions are not consolidated.

Once an action for dissolution is filed, no action under section 766.70 may be commenced, and any such action that is pending may be consolidated with the dissolution action. Wis. Stat. § 767.331; *see also* Wis. Stat. § 805.05. The constitutionality of section 767.05(7) (now section 767.331) was considered in *Haack v. Haack*, 149 Wis. 2d 243, 440 N.W.2d 794 (Ct. App. 1989). The wife argued that this provision was unconstitutional on the grounds that the bar to a section 766.70 claim violated her right to jury trial, was gender biased, and denied her equal protection of the law. The court noted that because of her pending divorce, the wife had no statutory cause of action under section 766.70; therefore, she had no right to a jury trial. Furthermore, even though the Act was an outgrowth of the women's rights movement, it was gender

neutral because it created rights for both spouses. Finally, the court found that there was no denial of equal protection because there is a rational basis for treating an ongoing marriage and a dissolving marriage differently. Property rights can be of primary concern in an ongoing marriage; hence the protections of section 766.70 were provided by the Act. In a dissolving marriage, however, other interests arise, such as equitable distribution of property and support of children. Since a state may place reasonable limits on the rights of parties, the court of appeals concluded that section 767.05(7) (now section 767.331) is constitutional. 149 Wis. 2d at 250–56; *see also Gardner v. Gardner*, 175 Wis. 2d 420, 432–33, 499 N.W.2d 266 (Ct. App. 1993) (applying holding from *Haack*).

The pendency of a dissolution action is not necessarily an impediment to an action between spouses that is unrelated to an interspousal remedy. In *Knafelc v. Dain Bosworth, Inc.*, 224 Wis. 2d 346, 591 N.W.2d 611 (Ct. App. 1999), the wife brought an action against her husband and his brokerage firm alleging securities fraud, vicarious liability, and negligent supervision in connection with the management of a securities account in her name that was funded with the couple's marital property. Even though the dissolution action had been filed earlier, the court held that the action was based on a relationship independent of the marriage and could be maintained.

To the extent that procedural and substantive rights under chapters 766 and 767 conflict in an action for an interspousal remedy, chapter 767 controls. Wis. Stat. § 767.331. Except for the fact that there is no right to a jury trial at divorce, there do not appear to be conflicts since the rights conferred in the two chapters are not mutually exclusive. The facts of particular cases may warrant the commencement of both actions. See section 11.4, *infra*, for examples of such instances.

The circumstances under which an interspousal remedy is appropriate during the pendency of a dissolution, provided the interspousal action is commenced before the dissolution, are different from the circumstances under which a temporary order under section 767.225 is appropriate. An interspousal remedy involves the classification and control of property, *see* Wis. Stat. § 766.70, whereas the relief that may be requested in a proceeding before the court is primarily related to temporary custody and support, *see* Wis. Stat. § 767.225. The court is not authorized to grant relief enumerated under section 766.70 pending the divorce. Section 766.70 has no provision for temporary relief, other than the temporary

limitation of management and control on the grounds specified in section 766.70(4); such temporary limitation under section 766.70(4) is relief ordered by the final decree, not relief pending the final decree. However, a temporary injunction under section 813.02 may sometimes be appropriate.

B. Incompetent Spouse [§ 8.62]

If a spouse subject to guardianship has a claim against the other spouse, the effect of the various statutes of limitation is not clear. The general rule is that a statute of limitation is tolled for the period of a plaintiff's disability, and that the action may be commenced within two years after the disability ceases. Wis. Stat. § 893.16(1). However, if the disability is a result of mental illness, the time limit cannot be extended by more than five years. *Id.*

The appointment of a guardian usually has no effect on a statute of limitation that has been suspended. 51 Am. Jur. 2d *Limitation of Actions* § 233 (West, WESTLAW current through March 2010). An exception applies if the statute conferring authority on the guardian directs that all necessary actions regarding the ward's estate be brought by the guardian. *Id.* Section 54.19 enumerates the duties of the guardian of the estate, cautioning that he or she must act "to provide a ward with the greatest amount of independence and self-determination with respect to property management in light of the ward's functional level, understanding, and appreciation of his or her functional limitations and the ward's personal wishes and preferences with regard to managing the activities of daily living." Even though a guardian may not be required to bring an action, he or she should not be prohibited from doing so. *See Young v. State*, 401 N.Y.S.2d 955 (Ct. Cl. 1978). The provision limiting the extension of the limitation to five years, section 893.16(1), may impose a duty on the guardian to commence an action against the ward's spouse if it appears that more than five years will pass before the disability ceases or before the ward's death results in the cause of action passing to the ward's personal representative, *see* Wis. Stat. § 893.22 (limitation in case of death).

VI. Sample Forms [§ 8.63]

➤ *Note.* Additional forms for interspousal remedies appear in Leonard L. Loeb et al., *System Book for Family Law* (State Bar of Wisconsin CLE Books 6th ed. 2007 & Supp.).

A. Sample Complaint for Breach of Good-faith Duty [§ 8.64]

1. Introduction [§ 8.65]

The following is a sample complaint for breach of the good-faith duty under the Act. It is a sample only and does not purport to be all-inclusive. Each pleading must be tailored to the parties' circumstances.

5. On November 13, 2009, defendant co-signed a note to First National Bank in the amount of \$100,000 for the purpose of inducing the bank to make a loan to XYZ Enterprises, Inc., a corporation solely owned and operated by Jeff Smith, defendant's brother. Defendant also signed a separate statement that the loan was being incurred for a family purpose. Defendant received no consideration for executing the note. Plaintiff did not consent to defendant's co-signing the note and strenuously objected when informed of his plan to execute the note.

6. The note of XYZ Enterprises, Inc. is not in default.

7. Plaintiff is the sole proprietor of a business known as Jane's Café. The business was commenced in July 1996 and is marital property. Plaintiff's one location has been successful, and she wishes to expand to two additional locations.

8. Plaintiff requires a loan of \$30,000 for the cost of opening such additional locations and for initial operations. Because of the nature of the assets of the business, the loan would be largely unsecured. Before execution of the note of XYZ Enterprises, Inc., defendant knew that plaintiff planned to expand the business and that she would need credit to do so.

9. Plaintiff has been denied credit for such purpose at three lending institutions, causing damage to plaintiff's business. Plaintiff is informed and believes that such credit would not have been denied absent defendant's co-signing the note of XYZ Enterprises, Inc.

WHEREFORE, plaintiff requests that the court:

1. Find that defendant's execution of the \$100,000 note to First National Bank in consideration for a loan granted to XYZ Enterprises, Inc., constitutes a violation of the good-faith duty between spouses;

2. Award plaintiff \$30,000 compensatory damages or the expected amount of lost profits caused by defendant's impairment of her creditworthiness, or require defendant to take such action as is necessary to qualify plaintiff for a loan of \$30,000;

3. Classify any such recovery in accordance with its findings;

4. Enjoin defendant from incurring any further extensions of credit that may subject the parties' marital property to satisfaction of said obligations;

5. Order the defendant to provide anyone from whom he requests an extension of credit with a copy of the judgment in this action; and

6. Grant such other relief as it determines to be equitable under the circumstances.

[Add jury demand if desired]

JURY DEMAND

Plaintiff demands a trial by a jury of *(six) (twelve)*.

Dated: _____

Attorney for Plaintiff
Jones Law Offices
808 Oak Street
Milwaukee, WI 53299
State Bar # 000007

B. Sample Complaint to Add a Name to Marital Property [§ 8.67]

1. Introduction [§ 8.68]

The following is a sample complaint to add a name to marital property. It is a sample only and does not purport to be all inclusive. Each pleading must be tailored to the parties' circumstances.

5. Defendant is the holder of a certificate of deposit with ABC Bank, #862-519, in the principal amount of approximately \$50,000. Upon information and belief, all or part of the account is marital property.

6. Real estate located at 456 Maple Lane, Milwaukee, Wisconsin, is held in the defendant's name and is more fully described as:

Lot 1, Block 2, Jones Subdivision, City of Milwaukee, County of Milwaukee, State of Wisconsin.

Upon information and belief, all or part of the real estate is marital property.

7. No party other than plaintiff and defendant has an interest in either asset.

8. Neither asset is the type of property described in Wis. Stat. § 766.70(3)(a)–(d).

9. Plaintiff is a co-owner of the property and wishes to participate equally in the management and control of the property.

WHEREFORE, plaintiff requests that the court enter an order adding his name in the conjunctive form to the record ownership of the above marital property.

[Add jury demand if desired]

JURY DEMAND

Plaintiff demands a trial by a jury of *(six) (twelve)*.

Dated: _____

Attorney for Plaintiff
Jones Law Offices
808 Oak Street
Milwaukee, WI 53299
State Bar # 000007

C. Sample Complaint to Limit Management and Control, to Divide Current and Future Obligations, and to Classify Future Acquisitions of Property [§ 8.70]

1. Introduction [§ 8.71]

The following is a sample complaint to limit management and control, to divide current and future obligations, and to classify future acquisitions of property. It is a sample only and does not purport to be all-inclusive. Each pleading must be tailored to the parties' circumstances.

4. The parties have not entered into any marital property agreement or any other marriage agreement affecting the economic incidents of their marriage.

5. A money market account with ABC Bank, #862-519, in the principal amount of approximately \$50,000, is held in the defendant's name. Upon information and belief, all or part of the account is marital property.

6. Real estate located at 456 Maple Lane, Milwaukee, Wisconsin, which is held in the defendant's name, is more fully described as:

Lot 1, Block 2, Jones Subdivision, City of Milwaukee, County of Milwaukee, State of Wisconsin.

Upon information and belief, all or part of the real estate is marital property.

7. No party other than plaintiff and defendant has an interest in either asset.

8. Neither asset is the type of property described in Wis. Stat. § 766.70(3)(a)–(d).

9. Since December 2009, defendant has failed to collect rent for, make repairs to, and purchase insurance for the property at 456 Maple Lane. The final mortgage payment of \$25,000 on the real estate is due April 1, 2010. It will be necessary to use funds from the money market account to pay the mortgage and avoid a default.

10. Plaintiff has received numerous telephone calls from creditors relating to obligations incurred by defendant since he moved out of the family home in December 2009.

11. Defendant has made large withdrawals from the parties' money market account held in his name and has incurred an unreasonable amount of indebtedness. Plaintiff fears that he will continue to do so in the future.

12. The foregoing acts and omissions constitute gross mismanagement of the parties' marital property.

13. Plaintiff wishes to have management and control of the above mentioned marital property assets transferred to her so that such assets may be conserved.

14. Plaintiff fears that her wages may be garnished by creditors of the defendant, and she wishes to protect those wages to better enable her to support herself and the parties' minor children.

WHEREFORE, plaintiff requests that the court:

1. Order that plaintiff have management and control of marital property held by defendant;
2. Divide the existing obligations of the parties;
3. Declare that future obligations are the responsibility of the incurring spouse;
4. Declare that property acquired in the future by either party is the individual property of the acquiring spouse;
5. Require both parties to disclose the order of the court in this case to any future creditor before an obligation is incurred; and
6. Grant the plaintiff such other relief as is appropriate under the circumstances.

[Add jury demand if desired]

JURY DEMAND

Plaintiff demands a trial by a jury of *(six) (twelve)*.

Dated _____

Attorney for Plaintiff
Jones Law Offices
808 Oak Street
Milwaukee, WI 53299
State Bar # 000007

9

Income and Transfer Taxes

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I. Scope of Chapter [§ 9.1]

This chapter is not intended to be a comprehensive treatise on the ways that federal and Wisconsin income, estate and gift taxes affect married couples generally nor is it intended to be a complete guide to all of the tax issues involved with divorce. Rather, this chapter focuses for the most part on some of the specific tax issues resulting from the Wisconsin Marital Property Act, 1983 Wisconsin Act 186 (codified at chapter 766 and scattered sections of the Wisconsin Statutes) [hereinafter the Act or the Wisconsin Marital Property Act] and Wisconsin’s adoption of a system of community property.¹

Wisconsin’s status as a community property state for federal tax purposes was confirmed in 1987, when the IRS issued Revenue Ruling

¹ 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 19, 2010); and all references to the Code of Federal Regulations (C.F.R.) and Treasury regulations (Treas. Reg.) are current through 75 Fed. Reg. 27,140 (May 13, 2010). Textual references to the Wisconsin Statutes are indicated as “chapter xxx” or “section xxx.xx,” without the designation “of the Wisconsin Statutes.”

87-13, 1987-1 C.B. 20 (1987). In this ruling, the IRS formally recognized that the property rights of spouses under the Marital Property Act are community property rights and should be treated as such for purposes of applying federal tax laws.

II. Income Tax Considerations [§ 9.2]

A. Federal Income Tax: Joint Return Filing and the “Innocent-spouse” Rules [§ 9.3]

Many married taxpayers choose to file joint income tax returns because of certain benefits this filing status allows. A husband and wife may generally file a joint return in which they aggregate income and deductions, even if one of the spouses has neither gross income nor deductions. The tax on the joint return is determined under a rate schedule that computes the tax at the usual rate on one-half of the aggregate taxable income and doubles that amount. This, in effect, gives the spouses the same tax treatment that they would have under a community property system if all the income were community and each spouse owned half. It also partially blunts the progressivity of the income tax rates. *Compare* I.R.C. § 1(a) with § 1(d). A joint return may not be filed, however, if either spouse was at any time during the taxable year a nonresident alien (unless a special election is filed under I.R.C. § 6013(g)) or if one spouse dies and the surviving spouse remarries before the close of the taxable year. I.R.C. § 6013(a).

A potential downside to filing a joint return is that both spouses are jointly and severally liable for any taxes and interest or penalties due, even if they later divorce. I.R.C. § 6013(d)(3). This is true even if the divorce decree states that one spouse will be responsible for any amounts due with respect to previously filed joint returns. *Pesch v. Commissioner*, 78 T.C. 100 (1982). Moreover, a spouse may be held responsible for the entire amount due, even if the other spouse earned all of the income or claimed improper deductions or credits.

Joint and several liability can lead to significant hardship for individuals who are divorced or widowed when, unbeknownst to them, there are tax deficiencies as a result of undisclosed income or unwarranted overstatements of a deduction, credit, or basis by a former spouse from whom collection is impossible because of death,

disappearance, or insolvency. Although such situations cry out for equitable relief for spouses who were unaware of the transactions that resulted in the deficiency, the federal tax laws for many years were not especially sympathetic to “innocent spouses.” See I.R.C. § 6013(e) (repealed by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685). In July 1998, however, relief for such aggrieved spouses came in the form of I.R.C. § 6015, which provides three potential avenues of relief:

1. Innocent-spouse relief. The traditional (though now more lenient) form of innocent-spouse relief remains available if (a) a joint return was filed, (b) there is an understatement attributable to erroneous items of one spouse, (c) the other spouse did not know or have reason to know of the understatement, and (d) taking into account all facts and circumstances, it would be inequitable to hold the other spouse liable. Partial relief is available if the innocent spouse knew of some, but not all, of the understatements attributable to the other spouse. See I.R.C. § 6015(b).

In issuing final regulations for I.R.C. § 6015, the IRS clarified that the standards for *knowledge or reason to know* that were developed under former I.R.C. § 6013(e) should continue to be used in determining whether a spouse requesting relief had knowledge or a reason to know that would result in the denial of a request for innocent-spouse relief. Relief from Joint and Several Liability, 67 Fed. Reg. 47,278, 47,288 (July 18, 2002). Under the regulations, a requesting spouse knows or has reason to know of an understatement if he or she actually knew of the understatement or if a reasonable person in similar circumstances would have known of the understatement. All of the facts and circumstances are considered when determining whether the requesting spouse had reason to know, including the following: the nature and amount of the erroneous item relative to the other items; the couple’s financial situation; the requesting spouse’s educational background and business experience; the extent of the requesting spouse’s participation in the activity that resulted in the erroneous item; whether the spouse failed to inquire about reported or omitted items that a reasonable person would question; and whether the item represented a departure from a recurring pattern reflected in returns filed in prior years. See Treas. Reg. § 1.6015-2(c).

2. Separate-liability election. Spouses who are divorced, legally separated, or living apart may make a separate-liability election with

respect to a joint return filed by them that gives rise to a deficiency. Such an election limits a spouse's allocable portion of a deficiency to the amount attributable to the income and deductions of that spouse. With certain exceptions, the election accomplishes this result by allocating income and deductions to the spouse responsible for earning the income or creating the deduction. The burden of proof with respect to establishing the portion allocable is on the electing spouse. The election does not apply with respect to a deficiency, however, if (a) the spouse received a tax benefit from an item otherwise allocable to the other spouse, (b) the electing spouse had actual knowledge of any item resulting in a deficiency, or (c) assets are transferred between the spouses with a tax avoidance motive. *See* I.R.C. § 6015(c).

The standard of actual knowledge set forth in I.R.C. § 6015(c) is much narrower than the "know or had reason to know" test used in determining eligibility for innocent-spouse relief. Moreover, the IRS has the burden of demonstrating actual knowledge by a preponderance of the evidence. Treas. Reg. § 1.6015-3(c)(2)(i). For purposes of determining when the requesting spouse has actual knowledge, the regulations set forth tests to be used in specific circumstances, such as the omission of income or an erroneous deduction or credit. One factor that can be relied on by the IRS in establishing actual knowledge, however, is whether the requesting spouse made a deliberate effort to avoid learning about the erroneous item so as to be shielded from liability. Joint ownership of the property that resulted in the erroneous reporting of an item is another factor supporting a finding of actual knowledge, but joint ownership by mere application of community property laws is not sufficient. Rather, a requesting spouse who resided in a community property state at the time the return was signed will be considered to have had an ownership interest in an item only if the requesting spouse's name appeared on the ownership documents or if there is otherwise an indication that the requesting spouse asserted dominion and control over the item. Treas. Reg. § 1.6015-3(c)(2)(iv). *But see* *Rowe v. Commissioner*, T.C.M. (CCH) 1020 (2001) (husband established and then withdrew funds from an individual retirement account (IRA) opened in wife's name without her knowledge; court allocated taxable distribution to husband reasoning that wife's only connection to the account was use of her name).

➤ **Example.** H and W are Wisconsin residents. H opens a bank account, in his name only, in which he deposits a portion of his paychecks. H fails to report interest earned on the account on the

couple's joint tax return. Under section 766.34, W owns one-half of the bank account. Because W is not named as an owner on the account, however, she will not be considered as having an ownership interest in the account for purposes of applying Treasury Regulation § 1.6015-3(c)(2)(iv), unless there is some other indication that she asserted dominion and control over the account.

The Tax Court has also articulated standards for what constitutes *actual knowledge* for purposes of I.R.C. § 6015(c). In *Cheshire v. Commissioner*, 115 T.C. 183 (2000), *aff'd*, 282 F.3d 326 (5th Cir. 2002), the Tax Court held that actual knowledge means an "actual and clear awareness" of the item and does not require specific knowledge of the tax consequences arising from the item. In this case, the husband received a distribution from his retirement account but failed to include a portion of it on the couple's joint return. When questioned by his wife about the tax consequences of the distribution, he falsely told her that it was not taxable. The Tax Court, however, found that this misinformation was not relevant to the actual knowledge inquiry. Instead, the court found that since the wife had actual knowledge that the omitted income existed and she knew the amount of the income, she was not entitled to relief under I.R.C. § 6015(c). *See also Wiksell v. Commissioner*, 90 F.3d 1459 (9th Cir. 2000) (holding that actual-knowledge inquiry focuses on whether taxpayer had knowledge of any item giving rise to deficiency, not on tax deficiency itself); Treas. Reg. § 1.6015-3(c)(2)(i)(A). But see *Menendez v. Commissioner*, 94 T.C.M. (CCH) 707 (2007), in which the Tax Court rejected the ex-husband's argument that the taxpayer wife must have known of an IRA distribution because of a reference in the marital inventory list to the IRA's zero balance. The court said the list was based on information existing as of the list-signing date, which postdated the tax year at issue and did not specify when the withdrawal was made; there was no other evidence that the wife had any actual knowledge of the withdrawal in the subject year.

3. Equitable relief. If the spouse is not eligible to make the innocent-spouse or separate-liability election, relief may still be available if, taking into account all facts and circumstances, it would be inequitable to hold the spouse responsible for the joint tax return deficiency. *See* I.R.C. § 6015(f). The IRS has issued Rev. Proc. 2003-61, 2003-32 I.R.B. 296 (superseding Rev. Proc. 2000-15, 2000-1 C.B. 447), which provides guidance on the circumstances under which equitable relief will be granted under I.R.C. § 6015(f). *See*

also *Innocent Spouse Relief*, IRS Publ'n 971, available at <http://www.irs.gov/pub/irs-pdf/p971.pdf> (revised Apr. 2008).

In determining whether relief is available under I.R.C. § 6015, items of income, credits, and deductions are generally allocated to the spouses without regard to community property laws. Instead, an erroneous item is attributed to the individual whose activity gave rise to such item. I.R.C. § 6015(a); *see also* Treas. Reg. § 1.6015-1(a)(1). For example, if a Wisconsin married couple is assessed with an income tax deficiency as a result of the husband understating his wages on a jointly filed return, the deficiency will be allocated to the husband even though such income would be considered marital property. Similarly, if an income tax deficiency is assessed as a result of both spouses underreporting their income, the deficiency will be allocated to the spouses pro rata, in accordance with their respective underreported amounts.

➤ *Example.* On April 15, 2010, H and W, a Wisconsin married couple, file a joint income tax return for the 2009 taxable year. In August 2011, the IRS proposes a deficiency with respect to the 2009 joint return. A portion of the deficiency is attributable to \$50,000 of H's unreported income from his dental practice. The remainder of the deficiency is attributable to \$30,000 of unreported income from W's consulting business. This income is considered marital property under section 766.31(4).

In November 2011, H and W file for divorce and W timely elects to allocate the deficiency under I.R.C. § 6015(c). Although under Wisconsin's marital property laws one-half of H's income from his dental practice is W's and one-half of W's consulting income is H's, for purposes of determining relief under I.R.C. § 6015 the marital property classification of such income is ignored and the \$50,000 of H's unreported income from his dental practice is allocated to him and the \$30,000 of unreported income from W's consulting business is allocated to her.

Community property laws are not disregarded, however, with respect to the attribution of gross income derived from property. For example, rental income (when neither spouse renders substantial services in managing the rental property) will be deemed to be the income of both spouses in equal shares.

An election or request for relief under I.R.C. § 6015 is made by filing Form 8857 (Request for Innocent Spouse Relief (and Separation of Liability and Equitable Relief)) no later than two years after collection activity is initiated by the IRS. A spouse requesting relief may elect to be considered under all three categories for relief provided by I.R.C. § 6015. A statement signed under penalties of perjury must be attached to the form, explaining the grounds for relief under each category requested. Only one Form 8857 needs to be filed even if relief is sought for more than one tax year. A personal representative can make the election for innocent-spouse relief or allocation of liability on behalf of a deceased taxpayer. Rev. Rul. 2003-36, 2003-18 I.R.B. 849. The Tax Court, however, has held that the death of a spouse does not satisfy the “not married” condition for purposes of making the separate-liability election and that a personal representative can elect innocent-spouse or separate-liability relief only if the deceased spouse satisfied the eligibility requirements before death. *Jonson v. Commissioner*, 118 T.C. 106 (2002), *abrogated on other grounds by Porter v. Commissioner*, 132 T.C. 203 (2009).

➤ **Practice Tip.** As a safeguard in the event that the client fails to qualify for innocent-spouse relief or is found ineligible to elect a separate allocation of liability, a detailed statement should be attached to Form 8857 also, as support for a claim for equitable relief.

Upon receipt of a spouse’s Form 8857 requesting relief, the IRS must send a notice of the election to the nonrequesting spouse and give him or her an opportunity to submit information relevant to its determination. See Rev. Proc. 2003-19, 2003-5 I.R.B. 371 (providing guidance on the administrative appeal rights of both the requesting spouse and nonrequesting spouse). The IRS will generally share any information submitted by one spouse that is requested by the other spouse unless “it would impair tax administration.” Treas. Reg. § 1.6015-6(a)(1).

➤ **Practice Tip.** These notification provisions could prove disconcerting for aggrieved spouses who fear that filing a claim for relief will result in possible retaliation from a former spouse and who do not want their whereabouts revealed. The IRS *Internal Revenue Manual* provides that the IRS will omit from shared documents any information that could reasonably identify a spouse’s location. The IRS further recommends that spouses concerned about retaliation write the term “Potential Domestic Abuse Case” on the top of their

Form 8857 and attach a supporting statement with relevant details. These steps will alert IRS personnel to the sensitivity of the requesting spouse's situation and the information provided.

Historically, it has been unclear whether an innocent spouse is entitled to a refund under I.R.C. § 6015(g) for community property assets used to pay the other spouse's federal tax liabilities. In a case of first impression, however, the Tax Court held in *Ordlock v. Comm'r*, 126 T.C. 47 (2006), *aff'd*, 533 F.3d 1136 (9th Cir. 2008), that a taxpayer who had been granted innocent-spouse relief was not entitled to a refund for tax payments made from community property.

The taxpayer and her husband were California residents and filed joint income tax returns. The IRS made a number of assessments for additional taxes, penalties, and interest attributable to underreporting of income by the husband on such returns. The IRS granted innocent spouse relief to the taxpayer under I.R.C. § 6015(b), relieving her from joint and several liability for the outstanding tax due, but applied numerous tax payments made by the couple to the husband's understatements. All but one of these tax payments were from the couple's community property assets, with the other coming from the taxpayer's separate property.

The wife sought a refund from the IRS, asserting that the statutory language under I.R.C. § 6015(g) providing that a refund must be allowed to an innocent spouse "notwithstanding any other law or rule of law" took precedence over California's community property laws. The IRS agreed that the taxpayer was entitled to a refund for the one payment made from her separate property. The IRS, however, asserted that the taxpayer was not entitled to a refund of community property assets because, under I.R.C. § 6321, the IRS's tax lien attached to the entire amount of the couple's community property.

The court denied the refund request, holding that I.R.C. § 6015(g) should not be read to ignore or trump state property laws. The court instructed that under I.R.C. § 6015 only the finding that a spouse is innocent and entitled to relief shall be determined without regard to community property laws, not the right for refunds or the ability of the IRS to attach liens to community property. Ruling otherwise, the court reasoned, would lead to the complex administrative problem of trying to determine whether tax payments were made from community or separate property. Additionally, the court explained that allowing an innocent

spouse a refund for his or her portion of the tax payments would create the potential for abuse in which a couple could recoup their payments by having the innocent spouse make the payments.

In Revenue Ruling 2004-71, 2004-30 I.R.B. 74, the IRS provided guidance regarding the amount of an overpayment from a joint income tax return that the IRS may offset against one spouse's separate tax liability for married taxpayers domiciled in Wisconsin.

The ruling provides that the IRS will use a five-step process to determine the amount of a joint overpayment that it may offset against the separate federal tax liability of one spouse. Specifically, in making this determination, the IRS will do the following:

1. Identify the underlying source of the overpayment;
2. Characterize the underlying source of the overpayment as either separate or marital property;
3. Offset the liable spouse's share of the overpayment from a marital property source against the liable spouse's separate tax liability;
4. Determine whether Wisconsin law permits the IRS to reach the nonliable spouse's share of the overpayment from a marital property source; and
5. Determine whether Wisconsin law permits the IRS to reach a portion of the overpayment from a separate property source of the liable spouse or the nonliable spouse.

The ruling applies this five-step process to three specific fact situations involving Wisconsin married couples.

➤ **Note.** An innocent spouse may have a remedy against his or her spouse under section 766.70(5) if the IRS recovers marital property not available to a creditor under state law because the tax debt is not a family-purpose debt. *See supra* § 8.36. Equitable factors such as whether the spouses are separated may be considered in determining whether the innocent spouse has a right of reimbursement. A remedy under section 766.70(1) for a breach of the duty of good faith may also be available to an innocent spouse for the recovery of taxes paid as a result of the actions of his or her spouse. *See supra* § 8.18.

B. Federal Income Tax: Allocation of Community Income If Spouses File Separate Returns [§ 9.4]

1. Spouses Living Apart; Innocent-spouse Provisions [§ 9.5]

Normally, it is advantageous for spouses to file a joint federal income tax return. It may be impossible to do so, however, if a couple is estranged but not yet divorced and cannot agree on filing a joint return. In a community property state, this can result in serious inequity to a spouse who is not generating significant income. Under state community property laws, each spouse has a present vested interest in community income and property, and the federal gross income of each spouse includes one-half of the community income, so each spouse is liable for income taxes on that share. *United States v. Mitchell*, 403 U.S. 190, 196–97 (1971); *Poe v. Seaborn*, 282 U.S. 101 (1930). Therefore, if one spouse in a community property jurisdiction generates nearly all of the family income but turns over none or only a small share of it to the other spouse, the filing of a separate return may provide a significant advantage to the earning spouse. Specifically, the earning spouse is required to report only one-half of the income and pay tax on that amount. The spouse who is not generating the income, on the other hand, ends up with both a reporting burden (for one-half of the spouses' total community income) and a significant tax liability (the tax on that half of the income). The affected spouse, however, often has none of the income (and generally no other assets) with which to pay the tax liability.

To address this inequity, Congress enacted I.R.C. § 66, which provides three separate means by which a spouse in a community property state can be relieved from income tax liability on his or her community property share of the other spouse's income. The first of these relief provisions is narrow in scope and applies only to spouses who live apart for the entire taxable year and who also meet the following requirements of I.R.C. § 66(a):

1. They must be married to each other at some time during the calendar year.
2. They must not file a joint return with each other for a taxable year beginning or ending in the calendar year.

3. One or both of the spouses must have earned income (as defined in I.R.C. § 911(d)(2)) that is community income as defined under applicable community property laws.
4. No portion of the earned income may be transferred directly or indirectly between the spouses before the close of the calendar year.

To satisfy the “living apart” requirement necessary for relief under I.R.C. § 66(a), the spouses must maintain separate residences. Spouses who maintain separate residences because of a temporary absence, such as military service, will not be considered to be living apart for purposes of I.R.C. § 66(a). Treas. Reg. § 1.66-2(b).

A transfer of a de minimis amount of earned income between spouses will not be considered a violation of the requirements of I.R.C. § 66(a). Treas. Reg. § 1.66-2(c). In addition, transfers between the spouses for the benefit of their dependent children will not be considered a transfer of earned income for purposes of I.R.C. § 66(a). *Id.* In *Rutledge v. Commissioner*, 63 T.C.M. (CCH) 1926 (1992), *aff’d without op.* (5th Cir. 1993), the Tax Court also determined that there is no transfer of earned income deposited in a joint account over which the earning spouse had sole control and from which the other spouse did not make any withdrawals. Relief under I.R.C. § 66(a) was denied, however, in a case in which the spouse seeking relief had ready access to and withdrew her husband’s earned income from a joint account. *Drummer v. Commissioner*, 67 T.C.M. (CCH) 2963 (1994).

If all the requirements of I.R.C. § 66(a) are satisfied, then any community income for the calendar year is treated in accordance with the allocation rules in I.R.C. § 879(a). These rules override usual community property allocations, with the following results:

1. Earned income is treated as the income of the spouse who rendered the personal services.
2. Trade or business income is treated as the income of the person exercising substantially all the management and control of the trade or business.
3. A partner’s distributive share of partnership income is treated as the income of the partner.

4. Income derived from separate property is treated as the income of the spouse who owns the property.
5. All other community income is treated as provided in the applicable state community property law.

If the requirements of I.R.C. § 66(a) cannot be satisfied because, for example, the couple did not live apart for the entire taxable year, a spouse may be relieved of liability with respect to an item of community income under I.R.C. § 66(b). This provision permits the IRS to disallow the income-splitting benefits of community property law to a spouse for any income, if the spouse acted as if he or she were solely entitled to the income and failed to notify his or her spouse of the nature and amount of the income before the due date (including extensions) for filing a return for the taxable year in which such income was reportable. Whether a spouse has acted as if solely entitled to the income is a determination based on the facts and circumstances, with the focus on whether the income was used or made available by the spouse for the benefit of the marriage. Treas. Reg. § 1.66-3. If I.R.C. § 66(b) applies, such income will be included entirely in the gross income of the spouse who acted as if he or she were solely entitled to such income. Treas. Reg. § 1.66-3.

If a spouse does not otherwise qualify for relief under I.R.C. § 66(a) or (b), the IRS is authorized to provide equitable relief under I.R.C. § 66(c), which is the separate-return counterpart to the joint-return innocent-spouse relief provision (discussed in section 9.3, *supra*). For a requesting spouse to be eligible for such equitable relief, I.R.C. § 66(c) generally requires all the following:

1. The requesting spouse did not file a joint return for the taxable year for which relief is requested.
2. The requesting spouse did not include in his or her gross income for the taxable year an item of community income otherwise properly includible, which under the rules of I.R.C. § 879(a) would be treated as the income of the nonrequesting spouse.
3. The requesting spouse establishes that he or she did not know of, and had no reason to know of, the item of community income.

4. Taking into account all facts and circumstances, it would be inequitable to include the item of community income in the requesting spouse's gross income for reporting purposes.

I.R.C. § 66(c); Treas. Reg. § 1.66-4.

If all these conditions are satisfied, then the item of community income will be included in the gross income of the nonrequesting spouse and not in the gross income of the requesting spouse. Moreover, even if all the conditions cannot be met because, for example, the requesting spouse knew of the income, I.R.C. § 66(c) authorizes the IRS to provide equitable relief if, taking into account all the facts and circumstances, it would be inequitable to hold the requesting spouse liable.

The key distinctions between I.R.C. § 66(c) and I.R.C. § 66(a) are that I.R.C. § 66(c) eliminates the requirements that the spouses live apart, that at least one of the spouses have earned income, and that there be no transfers of such earned income between the spouses. In addition, I.R.C. § 66(c) adds a general requirement that the spouse requesting relief not know—or have reason to know—of the unreported item of community income (although the IRS is authorized to provide equitable relief even if the requesting spouse had knowledge of such income). The regulations under I.R.C. § 66 set forth similar factors for assessing a requesting spouse's knowledge of unreported income as the regulations that apply to innocent spouse cases. *See* Treas. Reg. § 1.66-4(a)(2); *supra* § 9.3.

The regulations under I.R.C. § 66 also make clear that in evaluating whether it is inequitable to include the unreported community income in the gross income of the spouse seeking relief, relevance will be attached to whether the requesting spouse significantly benefitted, directly or indirectly, from the unreported income. For these purposes, a *significant benefit* means any benefit received by the requesting spouse in excess of normal support. Treas. Reg. § 1.66-4(a)(3). Additional guidance on the circumstances under which equitable relief will be granted under I.R.C. § 66(c) is provided in Revenue Procedure 2003-61, 2003-32 I.R.B. 296. *See also Innocent Spouse Relief*, IRS Publ'n 971, available at <http://www.irs.gov/pub/irs-pdf/p971.pdf> (revised Apr. 2008).

The ability of the IRS to provide equitable relief under I.R.C. § 66(c), even in cases in which the requesting spouse may have had some knowledge of the unreported income, is especially important in a community property state because a concerned spouse cannot be

protected by simply filing a separate return. This is because, in a community property state, a spouse who files a separate return is still liable for the tax on one-half of the other spouse's community income. Therefore, I.R.C. § 66(c) serves to shield innocent spouses in community property states from being unfairly penalized for improper reporting on the part of a spouse.

In contrast to I.R.C. § 66(a) and (c), I.R.C. § 66(b) applies when a spouse is denied all information about the nature and amount of the other spouse's income and the uncooperative spouse also acts as if he or she were solely entitled to that income. If the uncooperative spouse files a return reporting only half of the community income, it may be possible for the aggrieved spouse to invoke I.R.C. § 66(b), in effect denying the uncooperative spouse the benefits of community property income reporting, particularly income splitting. The result is that the uncooperative spouse alone would be taxed on all the income earned or received. The problem, of course, is that the spouse earning or receiving the income can avoid tax liability on half the income merely by notifying the other spouse of the nature and amount of the income in a timely manner. There is no requirement that the income be shared with the nonearning or nonrecipient spouse. Consequently, the nonearning or nonrecipient spouse might receive notice of the community income but receive no funds with which to pay the resulting tax on his or her one-half share.

In Wisconsin, the nonearning or nonrecipient spouse may have remedies to deal with these problems. For example, a spouse in this position may have a claim against the other spouse for breach of the section 766.15 duty of good faith. Wis. Stat. § 766.70(1). Alternatively, the spouse may request an order for an accounting of the couple's property (including marital property income) and obligations, and may obtain a court order with respect to his or her ownership rights in, and access to, the marital property income. Wis. Stat. § 766.70(2). See sections 8.18 and 8.20, *supra*, for a detailed discussion of these remedies.

Separated spouses who are in the process of a divorce and are filing separate tax returns are particularly prone to fail to communicate important information needed to prepare their tax returns. Each spouse, however, is obligated to report one-half of all items of marital property income, absent a marital property agreement to the contrary. Increasingly, divorce courts are ordering spouses to share information about their income and deductions so that both can prepare accurate and

complete income tax returns. Without such an order, however, the tax law provides a spouse who is denied information no means to obtain the necessary information from payors, tax authorities, or tax return preparers.

Under I.R.C. § 6051(a), every employer who pays for services performed by an employee, or who is required to deduct and withhold FICA and income taxes from an employee, must furnish the employee with a statement (Form W-2) on the remuneration and withholding. In addition, payors of remuneration for services, dividends, corporate earnings and profits, gross proceeds received on behalf of a customer by a broker, interest, royalties, qualified-plan benefits, and a host of other items are required to file information returns (Form 1099 or a variant) about the payment of such amounts to any person. *See* I.R.C. §§ 6041–6050N. Similar information disclosure (Schedule K-1 or its equivalent) is required for distributions to partners, beneficiaries of estates and trusts, and shareholders of an S corporation. *See* I.R.C. §§ 6031, 6034A, 6037. Thus, in theory, ample documentation exists to permit a spouse who has been denied information by the income recipient to prepare his or her income tax return.

The difficulty lies in the fact that stringent confidentiality rules preclude disclosure of the necessary information. For example, I.R.C. § 6103(a) generally provides that returns and return information are confidential. The term *return information* clearly encompasses all the information required on a form W-2, Form 1099, Schedule K-1, or the like. *See* I.R.C. § 6103(b)(2). I.R.C. § 6103(a) prohibits the disclosure of return information by officers or employees of the United States, state and certain local agencies, and other persons who have obtained this information from a federal, state, or local agency, or an officer or employee of such an agency. While I.R.C. § 6103(e) does, for an individual income tax return, permit disclosure to persons having a “material interest,” the statutory list of such persons does not include the spouse or former spouse of a person filing separately. In addition, I.R.C. § 7216 makes it a misdemeanor for a tax-return preparer to unlawfully disclose return information. Therefore, it is clear that the IRS, the Wisconsin Department of Revenue (DOR), and tax-return preparers should not disclose to an inquiring spouse any information about the other spouse’s earnings, withholdings, or other income. Because no federal statute authorizes or compels an employer or payor to disclose income information to anyone other than the employee, payee, or beneficiary, no authority allows an employer or payor to furnish this

information directly to a separated spouse or a former spouse without the employee or payee's consent.

➤ **Practice Tip.** An individual who is not receiving cooperation from his or her estranged or former spouse in preparing an accurate income tax return should consider filing a separate return reporting all the income he or she has actually received and attaching a statement to the return advising the IRS that he or she is subject to community income reporting, but is unable to obtain information about his or her spouse's income. Such a disclosure may help establish the spouse's claim for innocent spouse relief under I.R.C. § 66(b) or (c). The disclosure may also help mitigate penalties in the event such relief is denied by the IRS.

A spouse seeking relief under I.R.C. § 66 must file Form 8857 within two years of the first collection activity by the IRS. Treas. Reg. § 1.66-4(j). Similar to the relief provisions under I.R.C. § 6015 for joint returns (*see supra* § 9.3), the IRS must send a notice upon its receipt of Form 8857 to the nonrequesting spouse informing him or her of the requesting spouse's request for relief. Treas. Reg. § 1.66-4(k).

From a procedural standpoint, it is important to note that the Tax Court has concluded that it does not have the jurisdiction to review a "stand alone" challenge to a denial for relief under I.R.C. § 66(c) in cases in which the requesting spouse failed to timely seek a review of the underlying deficiency determination. *Bernal v. Commissioner*, 120 T.C. No.6 (2003). In reaching its decision, the court pointed out that I.R.C. § 6015(e) specifically provides for a stand-alone proceeding, whereby an individual can petition the Tax Court in response to an adverse determination from the IRS for equitable relief with respect to a joint return without having to timely challenge the underlying deficiency. Conversely, I.R.C. § 66 does not specifically grant the Tax Court jurisdiction over the denial of equitable relief for a spouse filing a separate return in a community property state. Therefore, because the taxpayer in *Bernal* did not timely challenge the IRS's deficiency determination, the Tax Court had no jurisdiction to consider the denial of relief under I.R.C. § 66. The Tax Court did confirm, however, that it may review the denial of a spouse's request for relief under I.R.C. § 66 as part of a timely commenced deficiency proceeding.

2. Filing Separate Returns [§ 9.6]

When spouses file a joint federal income tax return, the characterization of income as marital or separate is usually unimportant. If the spouses file separate income tax returns, however, the characterization and classification of income becomes an important issue.

The IRS has published instructions explaining how income and deductions are to be allocated when spouses residing in a community property state file separate tax returns. See *Community Property*, IRS Publ'n 555, at <http://www.irs.gov/pub/irs-pdf/p555.pdf>. The DOR has also published guidance on how Wisconsin's marital property law affects married persons who file separate returns. See *Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 2009*, Wisconsin Department of Revenue Publ'n 109 [hereinafter DOR Publ'n 109], available at <http://www.dor.state.wi.us/pubs/pb109.pdf>. The general rule is that income is allocated between spouses in accordance with applicable state law. One notable exception is that state community property laws will not apply to IRA distributions, which are instead taxable solely to the IRA owner and reported only on his or her separate tax return. I.R.C. § 408(d); *Morris v. Commissioner*, 83 T.C.M. 1104 (2002); *Bunney v. Commissioner*, 114 T.C. 259 (2000).

In Wisconsin, all income from marital property assets, and all income from individual property and predetermination date property assets for which no unilateral statement under section 766.59 has been executed, is classified as marital property pursuant to section 766.31(4). This income should be divided equally between the spouses for purposes of filing separate income tax returns. Deductions relating to the production of marital property income also should be divided equally between the spouses. Presumably, this rule also holds true for expenses incurred to produce income from individual property or predetermination date property assets for which no unilateral statement has been executed, since that income also is treated as marital property. Deductions relating to the production of separate (nonmarital property) income are deductible by the spouse who owns the income, provided that the deductions are paid from his or her nonmarital property funds. Expenses that are not attributable to any specific income, such as medical expenses, are deductible by the spouse who pays them unless they are paid with marital property funds, in which case they are divided equally between the spouses. Capital gains and losses on individual property or

predetermination date property assets, as well as expenses attributable to such assets, ordinarily are allocable to the spouse who owns the asset that gives rise to the gain or loss. If there is a marital property component to the gain by virtue of section 766.63(2), then apportionment of the gain may be required. *See supra* ch. 3. Each spouse may claim one-half of income taxes withheld on income that is classified as marital property. Treas. Reg. § 1.31-1(a).

Revenue Ruling 87-13, 1987-1 C.B. 20, holds that, in the absence of a marital property agreement, Wisconsin spouses filing separate returns each must report 50% of the marital property income received by either spouse as long as they are married. The only other possible exception to the requirement of community property reporting would be the innocent-spouse provisions of I.R.C. § 66(a), (b), or (c), discussed in section 9.4, *supra*, if applicable to one of the spouses. These rules provide equitable relief from community property reporting requirements in certain instances to achieve fairness.

One practical problem that arises when spouses file separate tax returns is that the one-half of their combined wages and other marital property income reported on their respective separate returns will not corroborate with the Form W-2 and Form 1099 information reported to the IRS with respect to such income. To forestall an inquiry from the IRS, spouses filing separate tax returns should attach an allocation worksheet to their respective returns showing how they calculated the income, deductions and income tax withheld reported by each of them. Examples of such allocation worksheets are included in IRS Community Property Publication 555, at <http://www.irs.gov/pub/irs-pdf/p555.pdf>, and in DOR Publication 109, *supra*. The allocation worksheet should be attached to each spouse's separate return and should document both what the spouse is reporting on the return and what will be reported by the other spouse. In addition, the worksheet should include an explanation that the filer is domiciled in Wisconsin and is reporting income under the community property rules.

Spouses filing separate tax returns need to exercise particular care in claiming estimated tax payments. Specifically, if estimated tax payments are filed in the name and tax identification number of only one spouse, the other spouse cannot receive credit for any part of the payment if the spouses file separate tax returns. *Janus v. United States*, 557 F.2d 1268 (9th Cir. 1977). This is true even if marital property funds are used for the estimated tax payments. This treatment of estimated tax payments

potentially could have harsh results, because a spouse may be required to report half the couple's marital property income and yet be unable to claim half the estimated tax payments made with respect to such income.

If spouses file a joint declaration of estimated tax and file separate returns, they may allocate the payments in any consistent manner that they may agree upon. If they cannot agree, the payment should be allocated in proportion to the tax liability reported on the returns as follows:

$$\frac{\text{Separate tax liability}}{\text{Both tax liabilities}} \times \text{Estimated Tax Payment}$$

Rev. Rul. 80-7, 1980-1 C.B. 296, *amplified by* Rev. Rul. 87-52, 1987-1 C.B. 347.

Revenue Ruling 87-13, 1987-1 C.B. 20, recognizes that the Act permits Wisconsin spouses to alter their property rights by marital property agreement, with at least prospective consequences for the tax treatment of their income if they file separate returns. For example, the IRS will recognize for federal income tax reporting purposes the validity of a marital property agreement that provides that any future income earned by either spouse for personal services will be the individual property of the earning spouse, rather than the marital property income of both spouses. It is even possible for a marital property agreement to provide that a percentage of what otherwise would be marital property income will be considered individual property. The IRS, however, does not permit allocation of more than one-half of the marital property income to the nonearning spouse. The IRS also will not recognize retroactive reclassification agreements, meaning that a marital property agreement will not be effective to change the character of income that has already been received or earned from marital property to individual property. *See Federal and Wisconsin Income Tax Reporting Under the Marital Property Act*, Wisconsin Dep't of Revenue Publ'n No. 113, at 15 [hereinafter DOR Publ'n 113].

➤ **Note.** Although published by the DOR, the content of DOR Publication 113 is a joint effort by the DOR and the Milwaukee office of the IRS. Specifically, in the publication the "federal treatment" reflects the interpretation of the Act by the IRS Milwaukee office, and therefore should be regarded as an authoritative statement of the

position of the IRS. The publication is available online at <http://www.dor.state.wi.us/pubs/pb113.pdf>.

As a general rule, divorcing spouses separately report one-half of the community property income for the portion of the year of the divorce during which they are still married. *See supra* § 9.4; *see also* I.R.C. § 6013(d)(2). A detailed discussion of the income-reporting rules for divorcing spouses is found in *Tax Information for Divorced or Separate Individuals*, IRS Publ'n 504. For a discussion of using marital property agreements and related planning techniques to avoid income allocation problems in the year when the divorce becomes final, see section 9.7, *infra*.

C. Federal Income Tax: Gain or Loss Transactions Between Spouses [§ 9.7]

Generally, the transfer of property between spouses during marriage or incident to a divorce is a nontaxable event under I.R.C. § 1041. If a transfer is within the scope of I.R.C. § 1041(a), nonrecognition treatment is mandatory, even if the parties are acting at arms' length and the transferee spouse gives full consideration for the transferred property. Temp. Treas. Reg. § 1.1041-1T(a), Q&A-2 (1984). Therefore, spouses cannot sell property to each other to generate a taxable gain. The converse is also true under I.R.C. § 267(a), which prohibits claiming a taxable loss from the sale or exchange of property between spouses.

The rules under I.R.C. § 1041(a) are relatively straightforward. Specifically, gain or loss generally is not recognized on a transfer of property from an individual to, or in trust for, a spouse or a former spouse if the transfer is incident to a divorce. I.R.C. § 1041(a). The statute defines a transfer to be incident to a divorce if made within one year after the date the marriage ceases or if related to the cessation of the marriage. I.R.C. § 1041(c).

According to Temporary Treasury Regulation § 1.1041-1T(a), Q&A-5, a transfer of property between former spouses occurring not more than one year after the marriage ceases is subject to section 1041 treatment, even if the property transferred was acquired by the transferor after the divorce. Moreover, as long as the transfer between the former spouses occurs not more than one year after the marriage ceases, it does not have to be related to the cessation of the marriage. Temp. Treas. Reg.

§ 1.1041-1T(a), Q&A-6. A transfer of property between former spouses will be treated as related to a cessation of the marriage, however, only if the transfer is pursuant to a divorce or separation instrument and occurs not more than six years after the date on which the marriage ceases. Temp. Treas. Reg. § 1.1041-1T(b), Q&A-7. If the transfer occurs more than six years after the marriage ceases, section 1041 treatment will apply only if it can be shown that the transfer was made to effect the division of property owned by the parties at the time of the divorce and the delay was caused by factors impeding an earlier transfer, such as a valuation dispute or business impediment. *Id.*; *see* Priv. Ltr. Rul. 200221021 (May 24, 2002) (holding that court-ordered transfer of stock that took place more than six years after divorce is related to cessation of the marriage because delay resulted from compelling business reasons, including desire to maintain investor confidence, enhance stock value, and facilitate future growth).

Since a transfer of property between spouses or former spouses incident to divorce is a nonrecognition transaction, the property in the hands of the transferee is treated as if acquired by gift, with the result that the basis of the transferee is the adjusted basis of the transferor. I.R.C. § 1041(b). Under I.R.C. § 1223(2), the transferee of any carry-over basis property (including property transfers subject to I.R.C. § 1041) includes in his or her holding period the period during which the transferor spouse held the property. Because the disposition of property by gift does not trigger depreciation recapture under I.R.C. §§ 1245 and 1250, a transfer of property subject to I.R.C. § 1041 will not result in recapture. The transferee, however, will step into the transferor's shoes with respect to the recapture potential of the transferred property and could trigger a recapture by changing the use of the transferred property (for example, a change from business to personal use). *See* Temp. Treas. Reg. § 1.1041-1T(d), Q&A-13.

The nonrecognition rule of I.R.C. § 1041(a) does not apply if the spouse or former spouse of the transferor is a nonresident alien. I.R.C. § 1041(d). In addition, I.R.C. § 1041(e) provides for the recognition of gain on a transfer that would otherwise be nontaxable under I.R.C. § 1041(a) if the transfer is in trust for the transferee spouse and the liabilities assumed by the trust or encumbering the transferred property exceed its adjusted basis. Any gain recognized under I.R.C. § 1041(e) is added to the transferee trust's carry-over basis in the property transferred. Similarly, I.R.C. § 453B(g) requires the acceleration and recognition of gain on a section 1041 transfer of an installment

obligation into a trust. A direct transfer of an installment obligation between spouses or former spouses incident to divorce, however, will not be a taxable event under I.R.C. § 453B(g).

The nonrecognition rule of section 1041 has been construed to cover certain transfers of property made by one spouse (the *transferor spouse*) on behalf of a former spouse (the *nontransferor spouse*) to a third party. Specifically, Temporary Treasury Regulation § 1.1041-1T(c), Q&A-9, provides that there are three situations in which a transfer of property to a third party on behalf of a former spouse will qualify under section 1041 (provided all other requirements of the statute are met): (1) if the transfer to the third party is required by the qualified divorce or separation instrument; (2) if the transfer is pursuant to the written request of the nontransferor spouse; or (3) if the transferor spouse receives a written consent or ratification of the third party transfer from the nontransferor spouse. Under Q&A-9, a transfer of property made to a third party on behalf of a spouse is treated first as a deemed transfer of the property made directly to the nontransferor spouse in a transfer to which section 1041 applies, and then as a deemed transfer of the property from the nontransferor spouse to the third party in a taxable transaction to which section 1041 does not apply.

Uncertainty over what criteria should apply in determining the *on behalf of* standard in Q&A-9 has generated considerable litigation and confusion over how a corporate redemption of a spouse's stock in a transaction incident to a divorce should be treated for tax purposes. *See Read v. Commissioner*, 114 T.C. 14 (2000) (holding that stock redemption in connection with divorce will be nontaxable to the transferring spouse if (1) the transfer satisfied an obligation of the nontransferor spouse; (2) the transfer was *in the interest of* the nontransferor spouse; or (3) in making the transfer, the transferor spouse was acting as representative of the nontransferor spouse); *Craven v. United States*, 215 F.3d 1201 (11th Cir. 2000), *aff'g* 70 F. Supp. 2d 1323 (N.D. Ga. 1999) (holding that wife's transfer of her stock was on behalf of husband, because (1) wife was redeeming stock pursuant to couple's divorce settlement, (2) husband guaranteed the corporation's note to the wife, and (3) in guarantee, husband acknowledged terms were of direct interest, benefit, and advantage to him); *Arnes v. United States*, 981 F.2d 456 (9th Cir. 1992) (holding that wife not required to recognize gain on corporation's redemption of her half of community property stock pursuant to divorce agreement, because transfer was really on behalf of husband, who was required to bear burden of tax on gain recognized as

result of redemption). In general, if a corporation buys stock from a spouse in a transaction incident to a divorce, the payment of the redemption proceeds will be considered a constructive distribution to the nontransferor spouse if the corporation is deemed to be satisfying a legal obligation of the nontransferor spouse to the transferor spouse. In such situations, the gain realized on the redemption is taxable to the nontransferor spouse as if he or she had received the redemption proceeds (rather than to the transferor spouse who actually received the payment from the corporation)

In 2003, the IRS issued final regulations designed to provide greater certainty and flexibility to divorcing spouses regarding the tax treatment of stock redemptions incident to divorce. Treas. Reg. § 1.1041-2. These regulations provide that divorcing spouses can agree in their divorce agreement as to which spouse should bear the tax consequences of the redemption. Specifically, the divorcing spouses have the option of treating the redemption as resulting in a constructive distribution to the nontransferor spouse, and therefore, taxable to the nontransferor spouse. Conversely, the spouses can agree in their divorce agreement that the redemption will be taxable to the transferor spouse who actually receives the redemption proceeds, even though under applicable tax law the redemption would otherwise result in a constructive distribution to the nontransferor spouse whose legal obligation has been satisfied. The spouses can elect to use these special rules by specifying their mutual intent in a divorce agreement concerning whether the redemption should be treated as a distribution to the transferor spouse or the nontransferor spouse. The divorce agreement must also document the spouses' agreement to file their income tax returns in a manner consistent with such intent. In addition, the divorce agreement must expressly supersede any other agreement between the spouses concerning the redemption of the stock.

➤ ***Practice Tip.*** To avoid any uncertainty or unintended consequences with respect to the redemption of stock incident to a divorce, the spouses' divorce agreement should specify which spouse will bear the tax consequences of the redemption. The agreement should be drafted to comply with the requirements of Treasury Regulation § 1.1041-2. Absent such an agreement, a stock redemption incident to divorce could trigger an unintended and unexpected constructive dividend to the nontransferor spouse.

Because transfers of property between former spouses incident to a divorce are nontaxable carry-over basis events under I.R.C. § 1041, the impact of future capital gains taxes should be considered in the context of the parties' negotiations over property division. Specifically, if one spouse receives mostly assets with significant unrealized appreciation and a low carry-over basis and the other spouse receives mostly assets with a high carry-over basis, the negative impact of capital gains taxes on the first spouse when the assets are ultimately disposed of may be substantial. Under section 767.61(3)(k), a Wisconsin divorce court may consider the tax consequences to each party as one of the factors that may permit deviation from the statutory presumption of equal division of property upon divorce.

Although I.R.C. § 1041(a) provides that no gain or loss is recognized on a transfer of property between spouses and former spouses incident to a divorce, it may not operate to prevent the taxability of income that is assigned by reason of a transfer of the underlying asset (for example, accrued interest on transferred bonds and certificates of deposits or dividends on transferred stock). Until recently, the IRS had taken the position that although I.R.C. § 1041(a) shields gains that would ordinarily be recognized on a transfer of property from recognition, it does not shield income that is ordinarily recognized upon the assignment of that income to another taxpayer. Instead, the historic position of the IRS has been that such income remains taxable to the transferor spouse without regard to I.R.C. § 1041.

The IRS first stated its position on the assignment-of-income doctrine in the context of transfers incident to a divorce in Revenue Ruling 87-112, 1987-2 C.B. 207. In this ruling, the IRS concluded that I.R.C. § 1041 did not apply and that under assignment-of-income principles the transferor spouse must include the deferred accrued interest on Series E and EE bonds in gross income under I.R.C. § 454 in the year such bonds were transferred to the transferor's former spouse incident to their divorce. Under I.R.C. § 454 and Treasury Regulation § 1.454-1(a), the accrued interest on Series E and EE bonds is not includible in gross income until the taxable year in which the bond matures, is redeemed, or is disposed of, whichever is earlier, unless the taxpayer elects to report the interest income as it accrues. The ruling also provided that the nontransferor spouse's basis in the bonds must be increased by the amount of accrued interest recognized by the transferor spouse.

Until recently, the IRS had also taken the position that retirement benefits and deferred compensation arrangements not covered by specific statutory exceptions, such as nonqualified deferred-compensation plans, were taxable to the transferor spouse under assignment-of-income principles. *See* Field Serv. Advisory, FSA 200005006 (Feb. 4, 2000) (contradicted by Rev. Rul. 2002-22, 2002-1 C.B. 849). In Revenue Ruling 2002-22, 2002-1 C.B. 849, however, the IRS reversed its position on the assignment of income doctrine versus the applicability of I.R.C. § 1041. According to Revenue Ruling 2002-22, a spouse who transfers interests in nonstatutory stock options and nonqualified deferred compensation to his or her former spouse incident to divorce does not recognize income on the transfer by reason of I.R.C. § 1041. Instead, the nontransferor spouse must include an amount in gross income when he or she exercises the stock options or when the deferred compensation is paid or made available to that spouse. The IRS restricted the ruling, however, so that it does not apply to transfers of nonstatutory stock options, unfunded deferred-compensation rights, or other future income rights to the extent that such options or rights are not vested at the time of transfer or to the extent that the transferor spouse's rights to the income are subject to substantial contingencies at the time of transfer.

The IRS expanded upon Revenue Ruling 2002-22 in Revenue Ruling 2004-60, 2004-24 I.R.B. 1, in which it ruled that the transfer of interests in nonstatutory stock options and in nonqualified deferred compensation from the employee spouse to the nonemployee spouse incident to a divorce does not result in payment of wages for FICA and FUTA tax purposes. These interests are, however, subject to FICA and FUTA tax when exercised by the nonemployee spouse to the same extent as if the options or right to compensation had been retained and exercised by the employee spouse.

The IRS has clarified the scope of Revenue Ruling 2002-22 in several private letter rulings. Specifically, in Private Letter Ruling 200646003 (Aug. 7, 2006), the IRS ruled that income attributable to the exercise of nonstatutory stock options that were transferred by an employee to his former spouse pursuant to a property settlement agreement incident to a divorce in a community property state was includible in the gross income of the nonemployee spouse. The employee continued to hold the options after the divorce but was legally required to comply with his former spouse's written instructions to exercise the options. When he received such instructions, he exercised the options, immediately sold the stock, and forwarded the proceeds to his former spouse. The IRS ruled that all

income realized from the exercise of the options and the subsequent sale of the stock was reportable by the former spouse, notwithstanding the fact that the employee earned the options in connection with his performance of services. This ruling is significant because it specifically extends the holdings in Revenue Rulings 2002-22 and 2004-60 to taxpayers in community property states.

In Private Letter Ruling 200519011 (Jan. 13, 2005), the IRS, citing Revenue Ruling 2002-22, concluded that the division of nonstatutory and statutory stock options between divorcing spouses pursuant to a property settlement agreement is made for full and adequate consideration and is not taxable as a gift.

In Private Letter Ruling 200442003 (June 22, 2004), the IRS concluded that the assignment-of-income doctrine did not apply to a husband's lump-sum payment to his ex-wife in return for her transferring to him her community property interest in his supplemental executive retirement plan (SERP), a nonqualified employee-benefit plan. Accordingly, neither husband nor wife was required to include any amount in their gross income with respect to the transfer.

Under the facts of this ruling, the divorce judgment awarded the wife a one-half community property interest in the husband's SERP and she was to receive a pro rata portion of each payment made to husband from the SERP after his retirement. Several years after the divorce judgment, the husband reached the age of eligibility for retirement at his company, but elected not to retire. Accordingly, no amounts were yet payable under the SERP. The wife wanted to start receiving her one-half share of the benefits under the SERP and filed an action seeking an order requiring husband to buy out her interest in the SERP. The parties eventually reached a settlement, and the husband agreed to pay the wife a lump sum in return for her release of her rights under the SERP.

The IRS, citing Revenue Ruling 2002-22, ruled that the transfers constituted transfers between spouses incident to divorce within the meaning of I.R.C. § 1041 and that the assignment-of-income doctrine did not apply. The IRS further ruled that the transfers were for full and adequate consideration and did not result in a taxable gift by either the husband or wife to the other.

Revenue Ruling 2002-22 directly addresses the question of assignment of income versus section 1041, and signaled a dramatic

reversal of the historic position of the IRS on this issue. The ruling contains a section entitled “Prospective Application” and appears to have an impact beyond the taxation of nonqualified stock options and deferred compensation. Specifically, the ruling includes a statement that Revenue Ruling 87-112, *supra*, “is clarified by eliminating references to assignment of income principals” (Revenue Ruling 87-112 was reaffirmed, however, respecting the application of I.R.C. § 454 to the transfer and the determination of the nontransferor spouse’s basis).

➤ **Note.** Surprisingly, the IRS limited Revenue Ruling 2002-22 to divorce transactions and specifically stated that the ruling does not apply to transfers of property between spouses not in connection with a divorce. This position is puzzling, because I.R.C. § 1041 makes no such distinction and applies to both marital transfers and transfers in connection with divorce.

In addition to Revenue Ruling 2002-22, the Internal Revenue Code includes a number of provisions specifically addressing the tax treatment of divorce-related transfers and distributions of qualified plan benefits and other deferred retirement benefits to nonowner and nonparticipant spouses that have the effect of superseding both I.R.C. § 1041 and the assignment-of-income rules. For example, I.R.C. § 408(d)(6) provides that the transfer of an individual’s interest in an IRA to a former spouse under a divorce agreement is not treated as a taxable transfer and the nontransferor spouse is to be considered the owner of the account for tax purposes. *See* Treas. Reg. § 1.408-4(g)(1). *But see* *Bunney v. Commissioner*, 114 T.C. 259 (2000) (holding that distribution from IRA funded with community funds to account-holder husband, who subsequently transferred portion of distributed funds to former wife pursuant to community property division, was taxable to husband); *Czepiel v. Commissioner*, 78 T.C.M. (CCH) 378 (1999) (holding that taxpayer who took distributions from his IRA to pay ex-wife amounts owed to her under divorce agreement was not considered to have transferred an “interest” in the IRA under I.R.C. § 408(d)(6), because divorce agreement only required that money be paid to wife, not that an interest in IRA be transferred to her).

➤ **Note.** A complex set of rules, the discussion of which is beyond the scope of this chapter, also applies to the assignment and taxation of qualified plan benefits at divorce. *See, e.g.*, I.R.C. §§ 401(a)(13),

414(p) (setting forth statutory requirements for qualified domestic relations orders (QDROs) assigning qualified plan benefits).

The nonrecognition rule of I.R.C. § 1041 also does not apply to certain property received by the transferee spouse that represents the right to receive income, such as accounts receivable and interest on installment obligations. The nontransferor spouse generally cannot invoke I.R.C. § 1041 to avoid the recognition of income upon receipt of such payments. For example, in *Cipriano v. Commissioner*, 81 T.C.M. (CCH) 1856 (2001), the Tax Court rejected the taxpayer's contention that installment payments denominated as interest represented postdivorce appreciation in the value of her former husband's law practice and should be treated as nontaxable transfers of property under I.R.C. § 1041. The ex-wife had been awarded a lump-sum amount, payable in installments, plus interest, for her equitable interest in her ex-husband's law practice. The Tax Court concluded that the payments designated as interest compensated the ex-wife for the delay in her receipt of her share of the marital assets to which she was entitled as of the day of the divorce, and therefore constituted interest income. *See also Gibbs v. Commissioner*, 73 T.C. Memo. (CCH) 2669 (1997) (rejecting ex-wife's argument that interest portion of cash settlement paid to her in installments was excludable under I.R.C. § 1041 as received in exchange for property transferred to ex-husband incident to divorce).

In *Balding v. Commissioner*, 98 T.C. 368 (1992), however, the IRS unsuccessfully argued that a series of settlement payments received by an ex-wife pursuant to a divorce decree modification in exchange for the release of her claim to a possible community property interest in her ex-husband's retirement pay gave rise to taxable income. The Tax Court rejected the IRS's contention that receipt of the settlement payments should be characterized as income, rather than as a nontaxable event under I.R.C. § 1041. *See also Newell v. Commissioner*, T.C. Summary Op. 2003-1, 2003 WL 57921 (U.S. Tax Court Jan. 7, 2003) (payments taxpayer received from her former spouse's military retirement plan were excludable from her gross income as a property settlement.).

➤ **Practice Tip.** In many cases, the most valuable assets acquired during a marriage are IRAs, deferred compensation, qualified retirement benefits, and other employment benefits. The impact of future income taxes on these assets must be considered in the context of the spouses' negotiations over property division. In addition, a spouse who receives payments under an installment note in

connection with the property division should be advised that the interest received on the note will be taxable as ordinary income and will not be excludable under I.R.C. § 1041.

D. Federal Income Tax: Payment of Maintenance or Alimony from Community Earnings [§ 9.8]

Payments constituting alimony or separate maintenance are included in the gross income of the payee spouse under I.R.C. § 61(a)(8) and I.R.C. § 71(a) and are deductible under I.R.C. § 215(a) in computing the payor spouse's adjusted gross income. Because alimony and maintenance payments are deducted in computing adjusted gross income (i.e., an above-the-line deduction), the payor spouse can claim the alimony deduction even if he or she uses the standard deduction. Under I.R.C. § 71(b), a payment constitutes alimony or separate maintenance when: (1) the payment is made in cash; (2) the payment is received by or on behalf of the payee spouse under a divorce or written separation agreement; (3) the spouses are divorced or legally separated and they reside in separate households when the payment is made; (4) payments to a third party on behalf of the payee spouse are evidenced by a timely writing; (5) the payor spouse's liability to make the payment does not continue for any period after the payee spouse's death; (6) the payor and payee (if married) do not file a joint return; and (7) the divorce or separation agreement does not designate nonalimony treatment.

A potential problem has long existed in community property states with respect to decrees of separate maintenance or written separation agreements requiring that payments be made by one spouse to the other spouse during the period between their separation (but while they are still married) and the entry of the divorce judgment. The problem is essentially one of double taxation. Under I.R.C. § 61, one-half of community earned income is taxable to each spouse, even though the nonearner spouse may receive none or only a small part of that income. At the same time, I.R.C. § 71 requires the spouse who has no earned income to include alimony or separate maintenance payments in his or her gross income. The Tax Court has prevented double taxation under these circumstances by not applying I.R.C. § 71 to separate maintenance payments that were significantly less than the nonearning spouse's taxable share of community earnings. On the other hand, the nonearning spouse must report one-half of the community income on his or her separate return, even though the alimony or separate maintenance

payments he or she receives are significantly less than his or her share of the community income. *Id.* If the alimony or separate maintenance payments exceed the payee spouse's share of current community income, such amounts are taxable to the payee spouse as alimony and deductible by the payor spouse. *Furgatch v. Commissioner*, 74 T.C. 1205 (1980); *see also* Rev. Rul. 62-115, 1962-2 C.B. 23; Rev. Rul. 74-393, 1974-2 C.B. 28.

E. Federal Income Tax: Special Provisions Regarding Community Income or Community Property [§ 9.9]

1. In General [§ 9.10]

A number of specific provisions in the Internal Revenue Code deal with community property. These provisions generally negate the income-splitting consequences of community ownership and, particularly in the case of earned income, attribute it to the party who performs the services or activities that generate the income. Among the areas affected are those discussed in section 9.11–.16, *infra*.

2. Earned Income Credit [§ 9.11]

Under I.R.C. § 32(c)(2)(B)(i), a person's earned income is computed without regard to any community property laws in determining the availability of the earned income credit. In this manner, income is ascribed to its earner rather than divided equally between the earner and the earner's spouse.

3. IRAs [§ 9.12]

Under I.R.C. § 219(f)(2), community property laws are disregarded for purposes of administering maximum contribution rules for IRAs. Similarly, under I.R.C. § 408(g), community property laws are disregarded for purposes of determining the tax treatment of IRA distributions.

Despite I.R.C. § 408(g), state community property laws are given effect when classifying or partitioning IRAs. In several private letter

rulings involving Wisconsin taxpayers, the IRS has ruled that the reclassification by marital property agreement of one spouse's IRA as marital property, and the partition by agreement of one spouse's marital property IRA into equal shares thereafter held by the spouses as separate property, would not cause a taxable distribution from the IRA pursuant to I.R.C. § 408(d)(1). Significantly, in each case, no part of the IRA balance was actually transferred from the spouse holding the account into an IRA maintained on behalf of the other spouse during the account-holder spouse's lifetime, and no distributions from the IRA were made to the nonaccount-holder spouse during the account-holder spouse's lifetime. Instead, the transfer was accomplished strictly by reclassification of the IRA under a marital property agreement. Priv. Ltr. Rul. 9419036 (May 13, 1994); Priv. Ltr. Rul. 9439020 (Sept. 30, 1994).

The postdeath partition of a Wisconsin marital property IRA also has been held not to constitute a taxable distribution under I.R.C. § 408(d)(1). Priv. Ltr. Rul. 9427035 (July 8, 1994). Under the facts of this ruling, the decedent's IRA account had been classified as marital property by the terms of a marital property agreement. The decedent designated his revocable trust as the beneficiary of the IRA. The trust allocated the surviving spouse's marital property interest in the IRA to a survivor's trust created under the decedent's revocable trust. The survivor's trust was fully revocable by the surviving spouse, and the surviving spouse did in fact revoke the trust shortly after the decedent's death. Because of the intervention of the two trusts (the decedent's revocable trust and the survivor's trust), there was a concern that the distribution of the surviving spouse's marital property share of the IRA through the survivor's trust to the surviving spouse would not qualify for tax-free rollover treatment under I.R.C. § 408(d)(3). The specific question was whether the surviving spouse would be treated as having acquired the IRA distribution from a third party, rather than from the decedent, the consequence of which would be to deprive the surviving spouse of the ability to accomplish a tax-free rollover of the distribution into her own IRA. The ruling (and a number of others that have followed) is significant in its holding that in situations in which the surviving spouse has the power to revoke the trust receiving the survivor's share of a marital property IRA, the general rule about IRA distributions in trust will not apply, and the IRS will treat the surviving spouse as having acquired the IRA directly from the decedent and not from the trust. Accordingly, the surviving spouse will be treated as a direct beneficiary of a 50% interest in the decedent's IRA, thereby permitting the surviving spouse to roll over such interest tax-free into an

IRA in his or her own name. *See also* Priv. Ltr. Rul. 200304037 (Jan. 24, 2003); Priv. Ltr. Rul. 199925033 (June 25, 1999).

The IRS reached a much different result in Private Letter Ruling 199937055 (Sept. 17, 1999). Under the facts of this ruling, a Wisconsin married couple proposed to sever the husband's IRA, which was classified as marital property pursuant to a marital property agreement, into two separate equal shares and, during the husband's lifetime, actually transfer one-half of the IRA to a new IRA established by the wife in a direct custodian-to-custodian transfer. This new IRA would be classified as the wife's individual property pursuant to the couple's marital property agreement, and her children would be named primary beneficiaries. Moreover, it was proposed that distributions from the new IRA would be made to the wife during her lifetime based on her and her oldest child's joint life expectancies, and that distributions would commence on the date specified in the agreement.

The primary question posed by the taxpayers in Private Letter Ruling 199937055 was whether the actual severance of the husband's IRA and distribution of the wife's one-half share in the IRA to her own separate IRA during the husband's lifetime would be considered a taxable distribution. Unfortunately for the taxpayers, the IRS emphatically answered this question in the affirmative. Before reaching this decision, the IRS first confirmed that I.R.C. § 408(g) does not abrogate any of a spouse's substantive rights under state law and agreed that a spouse may have a marital property interest in an IRA to the extent the existence of that interest is consistent with state law. The IRS also confirmed that the reclassification of an IRA as marital property pursuant to a marital property agreement is not considered a taxable distribution for purposes of I.R.C. § 408(d)(1), because such reclassification alone is not tantamount to an actual distribution or payment from the IRA. The IRS ruled, however, that an actual transfer of the wife's marital property interest in the husband's IRA to her own IRA would constitute a taxable distribution under I.R.C. § 408(d)(1). In reaching this conclusion, the IRS stated as follows:

The owner of an IRA account is deemed to be the individual in whose name the account was established. This conclusion is not affected by state law. In any event, even if title does not determine ownership under applicable state law, and even if the IRA owner's spouse's property interests in the IRA are identical to the owner's under applicable state law, distributions from the IRA are to be taxed as if the owner is the sole owner of the IRA.

Based on Private Letter Ruling 199937055, the clear position of the IRS is that, even if a spouse is considered the owner of one-half of an IRA under state community or marital property laws, distributions from the IRA are to be taxed pursuant to I.R.C. § 408(d) to the account holder as if the account holder is the sole owner of the IRA. Two recent U.S. Tax Court decisions appear to support this result. *See Morris v. Commissioner*, 83 T.C.M. (CCH) 1104 (2002); *Bunney v. Commissioner*, 114 T.C. 259 (2000) (holding that state community property laws will not apply to IRA distributions taxable to IRA owner under I.R.C. § 408(d) and reported only on his or her separate tax return).

4. Self-employment Taxes [§ 9.13]

There are no unique problems created for Wisconsin spouses with regard to self-employment taxes if joint returns are filed. When separate returns are filed, however, a determination must be made as to which spouse is liable for the self-employment tax.

Even though the income that generates a self-employment tax liability may be classified as marital property, and therefore should be split by the spouses, the attendant self-employment tax is imposed on only one of the spouses. Under I.R.C. § 1402(a)(5)(A), in determining the net earnings from self employment that are subject to the self-employment tax, community income from a trade or business is treated as follows: all the gross income and deductions attributable to a trade or business (other than a trade or business carried on as a partnership) are generally treated as belonging 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. If the self-employment tax liability is generated by income from a partnership, the spouse who is the partner is liable for the self-employment tax, even if a portion of the partner's distributive share of income or loss is marital property and is taxable to the other spouse. I.R.C. § 1402(a)(5)(B); Treas. Reg. § 1.1402(a)-8(b).

If both spouses are partners, the self-employment tax is allocated based on their distributive share. Treas. Reg. § 1.1402(a)-8(b).

5. S Corporation Election [§ 9.14]

The election by the shareholders of a qualifying small business corporation to be an S corporation under I.R.C. §§ 1361–1379 requires the consent of all shareholders. I.R.C. § 1362(a). When S corporation stock is owned by a husband and wife as community property, or when the income from the stock is community property, both spouses must consent to the election. Treas. Reg. § 1.1362-6(b)(2)(i). A husband and wife, however, are treated as one shareholder under I.R.C. § 1361 for purposes of the rule limiting the number of shareholders in an S corporation to 100. I.R.C. § 1361(c)(1). This rule applies whether the stock is held by each spouse individually or in some form of joint ownership. Treas. Reg. § 1.1361-1(e)(2).

The income rule in section 766.31(4) classifies the income from individual property and predetermination date property as marital property (i.e., community property), at least when no unilateral statement under section 766.59 has been executed. Accordingly, the previously discussed S corporation election requirements have particular significance in Wisconsin for S corporation stock holdings that are the individual property or predetermination date property of one spouse. Unless the owner spouse has executed a unilateral statement classifying the income from the stock as his or her individual property, both spouses must join in the execution of an S corporation election.

The courts have upheld the two-signature requirement for S corporation elections involving S corporation stock owned as community property, despite contrary state management and control rules. In *Seely v. Commissioner*, 51 T.C.M. (CCH) 1087 (1986), the husband alone had signed the S corporation election form, allegedly relying on his wife's oral consent to act on her behalf. Even though the signatures of both spouses were not required by California law for management and control of community property, the court rejected the idea that the husband alone could act for the couple in making an S corporation election, stating that the two-signature requirement was one of federal tax law and not state property law. *See also Clemens v. Commissioner*, 453 F.2d 869 (9th Cir. 1971), *aff'd* 28 T.C.M. (CCH) 1225 (1969); *Forrester v. Commissioner*, 49 T.C. 499 (1968) (involving a separate, but untimely, election by the second spouse).

Under Revenue Procedure 2004-35, I.R.B. 2004-23, automatic relief is given for late filing of shareholder consents for spouses of S

corporation shareholders in community property states if the S corporation election is invalid solely because (1) Form 2553 (Election by a Small Business Corporation) failed to include the signature of a community property spouse who is a shareholder solely pursuant to state community property law, and (2) both spouses have reported all items of income, gain, loss, deduction, or credit consistent with the S corporation election on all affected income tax returns.

An S corporation election by a United States resident spouse was ineffective in a situation in which the other spouse was a nonresident alien and had a community property interest in the corporation's stock under the laws of Mexico, which disqualified the corporation from S corporation eligibility because, under I.R.C. § 1361, nonresident aliens are not permitted to be shareholders in an S corporation. *Ward v. United States*, 661 F.2d 226 (Ct. Cl. 1981).

If a shareholder dies before consenting to an S corporation election, the personal representative of the deceased shareholder's estate may file the necessary consents on behalf of both the deceased shareholder and his or her estate. Rev. Rul. 92-82, 1992-2 C.B. 238. Presumably, the reasoning of Revenue Ruling 92-82 also applies in cases in which S corporation stock is owned as community property and would permit the personal representative of a spouse who dies before signing the required consent to execute the consent on the deceased spouse's behalf.

6. Disregarded Entities [§ 9.15]

A single-member limited liability company (LLC) that does not elect to be taxed as a corporation will be treated as a sole proprietorship for tax purposes if the member is an individual. Treas. Reg. § 301.7701-2(a). The ability to disregard the LLC as a separate entity for tax purposes provides the opportunity for the owner of the LLC to achieve nontax objectives, such as liability protection, without the added burden of having to prepare and file separate partnership tax returns as would normally be required for an LLC. Instead, the member can simply report the LLC's income, losses, and other tax items on the member's individual income tax return.

The IRS has ruled that an LLC that is owned solely by a husband and wife as community property may be treated as having a single owner and disregarded as a separate entity for tax purposes. Rev. Proc. 2002-69,

2002-2 C.B. 831. Under Revenue Procedure 2002-69, a general partnership or limited partnership that is owned solely by a husband and wife as community property may also be treated as having only a single owner and be disregarded as a separate entity for tax purposes. Alternatively, Revenue Procedure 2002-69 provides that if for some reason spouses who are the sole owners of an LLC or partnership elect to treat the entity as a partnership for federal tax purposes and file appropriate partnership tax returns, the IRS will accept that the entity is a partnership for tax purposes.

In Private Letter Ruling 200339026 (June 23, 2003), the IRS also ruled that an LLC that is wholly owned under state law by a revocable trust established by spouses residing in a community property state will be treated as a disregarded entity for federal tax purposes.

7. Distributions in Complete Redemption of Stock Owned as Community Property [§ 9.16]

Under certain circumstances, spouses owning corporate stock as community property may partition their holdings and have one of the spouses subsequently make a redemption of his or her stock under I.R.C. § 302. Under I.R.C. § 302(a), if a corporation redeems its stock and if subsection (1), (2), (3), or (4) of I.R.C. § 302(b) applies to the redemption, the redemption is treated as a distribution in part or full payment in exchange for the stock, thus avoiding treatment of the distribution as a dividend. Under I.R.C. § 302(b)(3), exchange treatment under I.R.C. § 302(a) applies to a redemption if it is a complete redemption of all the corporation's stock owned by the shareholder. Under I.R.C. § 302(c)(1), the constructive ownership rules of I.R.C. § 318(a) are made applicable to transactions under I.R.C. § 302, with the result that an individual is considered as owning stock owned by or for his or her spouse or child. *See* I.R.C. § 318(a)(1).

Under certain conditions, spelled out in I.R.C. § 302(c)(2)(A), the constructive ownership rules of I.R.C. § 318(a)(1) are deemed not to apply in determining whether a redemption completely terminates a shareholder's interest. These conditions are that (1) immediately after the distribution the distributee has no interest in the corporation (including an interest as an officer, director, or employee) other than an interest as a creditor, (2) the distributee does not acquire any such interest (other than stock acquired by bequest or inheritance) within 10

years from the date of such distributions, and (3) the distributee files an agreement to notify the IRS of any acquisition described in clause (2) above and to retain necessary records. Further qualifications of these exceptions are found in I.R.C. § 302(c)(2)(B). These qualifications generally nullify the I.R.C. § 302(c)(2)(A) three-point exception to the constructive ownership rules if, within the 10-year period preceding the date of distribution, the distributee acquired any part of the redeemed stock from a person whose ownership of stock would be attributable to the distributee, or if the distributee transferred stock to such a person within the 10-year period. The purpose of these provisions is to prevent shifts in proportionate stock ownership between redeeming and nonredeeming family members immediately before a complete redemption of stock is carried out.

In the context of such a complete redemption, it was held that the partition of a husband and wife's community property stock into separate, equal holdings in the names of the husband and of the wife, followed by redemption of only the husband's shares, met the requirements of a complete termination of interest under I.R.C. § 302(b)(3). Rev. Rul. 82-129, 1982-2 C.B. 76. Revenue Ruling 82-129 specifically held that the partition did not result in an acquisition (or transfer) of stock for purposes of I.R.C. § 302(c)(2)(B), because neither spouse owned any more stock after the partition than they owned before.

In Wisconsin, a "partition" of the sort described in Revenue Ruling 82-129 apparently would have to be accomplished by a marital property agreement reclassifying one-half of the total number of marital property shares as the individual property of each spouse and by having new certificates issued for the reclassified shares. *See* Wis. Stat. § 766.31(10). This is because no specific judicial procedure exists for partition of marital property between the spouses during the marriage, absent extraordinary circumstances. *See, e.g.,* Wis. Stat. § 766.70.

In another ruling that involved a complete termination of interest, Rev. Rul. 71-138, 1971-1 C.B. 109, it was held that in a situation in which 50% of the stock in the corporation was owned by a husband and wife as community property, and the remaining 50% was owned by their son, a redemption of the community property stock of the husband and wife would meet the requirements of a complete termination of interest under I.R.C. § 302(b)(3) and the attribution rules of I.R.C. § 318(a)(1) would not apply if both the husband and wife filed the distributee

agreement with the IRS as required by clause (iii) of I.R.C. § 302(c)(2)(A).

More recently, in Private Letter Ruling 199942018 (Oct. 22, 1999) the husband's entire stock ownership interest was redeemed. Following the husband's redemption, his wife continued her employment with the corporation. The couple resided in a community property state and, to prevent the wife's salary from being considered a prohibited retained interest of the husband for purposes of I.R.C. § 302, the couple entered into a property agreement that provided that all consideration paid to the wife in her capacity as an employee of the corporation would be classified as her sole and separate property. The IRS ruled that a complete redemption of the husband's interest in the corporation had occurred, subject to the validity of the property agreement that all earnings paid to his wife will be her sole and separate property.

➤ **Note.** At least for the moment, the distinction between dividend and exchange treatment for stock redemptions is largely moot, because the Jobs and Growth Tax Relief Reconciliation Act of 2003, (JGTRRA), Pub. L. No. 108-27, 117 Stat. 752, effectively reduced the tax rate on dividends to be the same as the tax rate applicable to capital gains. Specifically, JGTRRA added I.R.C. § 1(h)(11), which taxes an individual's "qualified dividend income" as net capital gain. *Qualified dividend income* generally refers to dividends received from domestic corporations and from certain foreign corporations. There has been considerable speculation that the qualified dividends rules may eventually be repealed and that the ordinary income tax treatment applicable to dividends in effect before JGTRRA will again apply. But such repeal has not yet occurred.

F. Federal Income Tax: Income Tax Issues Following Death [§ 9.17]

1. Treatment of Income from Community Property [§ 9.18]

The long-standing rule of federal income taxation is that following the death of one of the spouses, one-half of the income from the community property is taxed to the decedent's estate, and the other half to the surviving spouse. *United States v. Merrill*, 211 F.2d 297 (9th Cir.

1954); *Grimm v. Commissioner*, 89 T.C. 747 (1987), *aff'd*, 894 F.2d 1165 (10th Cir. 1990). Under sections 861.01 and 857.01, a personal representative in Wisconsin succeeds to ownership of only the decedent's undivided one-half interest in marital property assets at the time of death, and thus the aforementioned rule applies for purposes of allocating income between the decedent's estate and the surviving spouse. In the case of survivorship marital property assets, however, which pass at the death of one spouse by operation of law to the surviving spouse through a nontestamentary disposition, all the postmortem income from the property is taxed to the surviving spouse.

The personal representative of a decedent's estate may elect to file a joint return with the surviving spouse covering the decedent's income during the portion of the year preceding the date of death. I.R.C. § 6013(a)(3). A joint return may not be filed, however, if the surviving spouse has remarried before the close of the taxable year in which the death occurred or if the surviving spouse is a nonresident alien. I.R.C. § 6013(a). If the personal representative is concerned about avoiding the joint and several liability that results under I.R.C. § 6013(d)(3) from filing a joint return, a separate final return should be filed for the decedent. Regardless of whether a joint or a separate return is chosen, income in respect of a decedent cannot be reported on the decedent's final return, but must be reported on the income tax return of the estate, entity, or person receiving the income. I.R.C. § 691(a). Deductions in respect of a decedent are handled similarly. I.R.C. § 691(b).

Difficult questions arise following the death of one of the spouses concerning the treatment of postmortem income from marital property assets held by a revocable trust created by only one of the spouses. The property classification and management and control aspects of this situation are discussed in sections 10.60–.63, *infra*. Although there is no authority on the subject, it appears that if the settlor spouse dies first, the trustee should report the income attributable to the decedent's interest in property as the income of an irrevocable trust, and treat the income attributable to the surviving spouse's interest in former marital property assets as the income of a grantor trust, at least until expiration of the limitation period for the surviving spouse to commence an action to recover his or her share of former marital property assets under section 766.70(6)(b)1. Conversely, if the nonsettlor spouse dies first, the trustee should continue to treat the income from the settlor's property interests as the income of a grantor trust and treat the income from the former

marital property interest of the deceased nonsettlor spouse as income payable to that spouse's estate.

2. Forced and Voluntary Estate Planning Elections

[§ 9.19]

A decedent spouse may attempt to dispose of both halves of community property via a testamentary forced-election estate plan. If the surviving spouse acquiesces and permits all the community property to be subject to probate administration (or permits its transfer to a revocable trust) so that both halves pass in conjunction with the forced-election estate plan, the surviving spouse nevertheless will continue to be taxed on the income attributable to his or her share of marital property assets during the period of administration. *Wells Fargo Bank & Union Trust Co. v. United States*, 245 F.2d 524 (9th Cir. 1957).

Other important postmortem income tax consequences follow from a surviving spouse's acquiescence to a forced election that subjects his or her half of community assets to the estate plan under the decedent spouse's will. In such cases, the courts have treated the election as an exchange by the surviving spouse of a remainder interest in his or her half of the community property for an income interest in the decedent's half of the community property. *Estate of Christ v. Commissioner*, 480 F.2d 171 (9th Cir. 1973), *aff'g* 54 T.C. 493 (1970); *Gist v. United States*, 423 F.2d 1118 (9th Cir. 1970); *Kuhn v. United States*, 392 F. Supp. 1229 (S.D. Tex. 1975). Because in a forced election the survivor has in effect purchased a wasting asset (i.e., a life estate in the decedent's half of the community property), the survivor was historically entitled to amortize the cost basis over his or her life expectancy. *Estate of Christ*, 480 F.2d 171; *Gist*, 423 F.2d 1118. The amortization deduction is now barred, however, by I.R.C. § 167(e) unless the remaindermen are not related to the survivor. To the extent that the amortization deduction is available, it effectively offsets the amount of income received from the deceased spouse's half of the community assets, rendering that part of the trust income tax-free to the survivor for all intents and purposes.

It should be noted that the IRS has not taken a formal position on the income tax consequences of the forced spousal election to the deceased spouse's estate or trust, although an exchange of property of some sort has taken place. It has been suggested that the receipt of a remainder interest in the surviving spouse's share of community property in

exchange for an income interest in the decedent's share of community property might be deemed to be a one-time assignment of ordinary income subject to tax. *Kuhn v. United States*, 392 F. Supp. 1229, 1238 (S.D. Tex. 1975); *see also Commissioner v. P.G. Lake, Inc.*, 356 U.S. 260 (1958).

Another problem is presented by I.R.C. § 1001(e), which provides that if a life estate in property, an interest in property for a term of years, or an income interest in trust is sold or otherwise disposed of, the portion of the adjusted basis of the interest acquired by inheritance, gift, or nonrecognition interspousal transfer is disregarded in determining gain or loss. If this section applies in the context of a forced election, the deceased spouse's estate or trust may have no basis in the life estate it transfers in exchange for the remainder interest of the surviving spouse and thus may be forced to recognize gain on the consideration received from the surviving spouse. The amount realized is probably limited to the lesser of the actuarial value of the remainder interest received from the surviving spouse or the actuarial value of the life estate transferred to the surviving spouse.

The serious income tax consequences that attend a forced-election estate plan contrast with the general absence of such problems in a voluntary election estate plan. In a voluntary election estate plan, because the surviving spouse is entitled to an income interest in the deceased spouse's half of the community property, regardless of whether the surviving spouse places his or her half of the community property in trust, there is no sale or exchange.

Both forced-election and voluntary-election estate plans involve federal estate tax and federal gift tax issues. *See infra* §§ 9.63, .73, .96; *see also infra* ch. 10.

3. Exchanges of Former Marital Property Assets After Death of One Spouse [§ 9.20]

For probate purposes, the Act uses the item-by-item rule instead of the aggregate rule. Wis. Stat. § 861.01. Under the item-by-item rule, after the death of one spouse the surviving spouse owns an undivided one-half interest in each item of former marital property. Therefore, after the death of one spouse the surviving spouse and the beneficiaries

of the deceased spouse will own the former marital property assets as tenants in common.

In many cases, the surviving spouse and the beneficiaries will want to exchange their undivided interests among themselves so that each person owns an entire asset. If so, the question arises whether such a transaction is a taxable exchange for federal and Wisconsin income tax purposes. Of course, if marital property assets receive a full adjustment in basis under I.R.C. § 1014(b)(6), any gain recognized on an exchange after the death of one spouse would be limited to appreciation occurring after the spouse's death. Therefore, I.R.C. § 1014(b)(6) may mitigate, but not eliminate, the capital-gains consequences of a taxable exchange.

In Revenue Ruling 69-486, 1969-2 C.B. 159, the IRS held that a taxable exchange occurred between two beneficiaries of a trust. In that ruling, the terms of the trust instrument required the trustee to distribute one-half of the trust assets to A and the other one-half to B. At the time of termination, the trust owned notes with a value of 300x dollars and common stock with a value of 300x dollars. Although the notes and common stock had the same fair market value, the trust's basis in the notes was different from its basis in the stock. At the request of the beneficiaries, the trustee distributed the notes to A and the common stock to B. At the time of distribution, A and B received assets of equal value. The IRS ruled that there was a taxable exchange between the beneficiaries, stating the following:

Since the trustee was not authorized to make a non-pro rata distribution of property in kind, but did so as a result of the mutual agreement between A and B, the non-pro rata distribution by the trustee to A and B is equivalent to a distribution to A and B of the notes and common stock pro rata by the trustee, followed by an exchange between A and B of A's pro rata share of common stock for B's pro rata share of notes.

In subsequent rulings, the IRS has confirmed that Revenue Ruling 69-486 requires gain recognition when a trustee makes a non-pro rata distribution to beneficiaries based upon their agreement and no independent authority to do so exists under state law or the governing trust instrument. *See* Priv. Ltr. Rul. 9429012 (July 22, 1994); Priv. Ltr. Rul. 9424026 (June 17, 1994). *But see* Priv. Ltr. Rul. 200334030 (May 19, 2003) (no gain recognized as a result of non-pro rata distributions of property under plan of termination when will was silent on whether non-pro rata distributions could be made, but such distributions were

permitted under state law). These rulings, however, did not involve a division of community property with a surviving spouse.

In Revenue Ruling 76-83, 1976-1 C.B. 213, the IRS ruled that an equal, but non-pro rata, division of community property by two spouses under a divorce property settlement agreement was not a taxable exchange. In subsequent rulings outside of the divorce context, the IRS has confirmed that an equal non-pro rata division of community property between living spouses is not an income taxable event. *See* Priv. Ltr. Rul. 8003109 (Oct. 26, 1979); Priv. Ltr. Rul. 8037124 (June 23, 1980). In several rulings, the IRS has extended the holding of Revenue Ruling 76-83 to the equal non-pro rata division of community property after the death of one spouse. *See* Priv. Ltr. Rul. 199925033 (June 25, 1999); Priv. Ltr. Rul. 199912040 (Mar. 26, 1999); Tech. Adv. Mem. 8505006 (Oct. 19, 1984); Priv. Ltr. Rul. 8016050 (Jan. 23, 1980). Perhaps significantly, however, in each of the rulings involving the division of community property after the death of one spouse, either the terms of the governing trust instrument or applicable state law expressly authorized the trustee to make non-pro rata distributions of property.

The IRS has not ruled on whether it would extend the holding of Revenue Ruling 76-83 to a non-pro rata division of community property after the death of one spouse in cases in which neither the applicable state law nor the deceased spouse's estate planning documents expressly authorize such a non-pro rata division. Previously this created some uncertainty for Wisconsin attorneys, because Wisconsin law formerly did not expressly grant a personal representative or trustee the power to make non-pro rata distributions amongst beneficiaries.

In response to this uncertainty, 2005 Wisconsin Act 216 created new section 766.31(3)(b), which now allows spouses to provide in a marital property agreement that at the death of the first spouse to die some or all their marital property may be divided based on aggregate value rather than item by item. Wis. Stat. § 766.31(3)(b)1. In addition, a surviving spouse and the successor in interest to the deceased spouse's share of marital property may enter into an agreement that provides 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. Wis. Stat. § 766.31(3)(b)2. For this purpose, a *successor in interest* includes any person or entity that succeeds to the marital property interest of the deceased spouse including, for example, a personal representative, a trustee, or the beneficiary of a nonprobate transfer. Committee Note to

2005 Wis. Act 216, § 42. (For details about the Committee Notes, see section 2.22, *supra*.) In the absence of such a provision in a marital property agreement or in an agreement between a surviving spouse and a successor in interest, the item-by-item system will apply.

Under section 766.31(3)(b)3., 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 marital property authorized by an agreement described in subdivision 766.31(3)(b)1. or 2. Court approval of the exchange, however, is not required for such an agreement to be effective.

An exchange of former marital property interests between a surviving spouse and a distributee of the decedent spouse under section 766.31(3)(b) will be treated as a nontaxable exchange for Wisconsin income tax purposes. *See* Wis. Stat. § 71.05(6)(a)16., (b)(12).

➤ **Practice Tip.** It is good practice to specify in a married couple's estate planning documents that the personal representative and trustee have the authority to make non-pro rata distributions of marital property after the death of the first spouse to die. The couple's estate planning documents should also specifically provide that the personal representative and the trustee have the authority to enter into agreements with the surviving spouse providing for the non-pro rata division of marital property.

4. Depreciation, Depletion, and Amortization of Former Marital Property Following Death of One Spouse [§ 9.21]

As a general rule, under I.R.C. § 167(a) a depreciation deduction is allowed for exhaustion and wear and tear of property used in a trade or business or of property held for the production of income. The modified accelerated cost recovery system (MACRS) depreciation rules of I.R.C. § 168 apply to certain types of property. I.R.C. § 167(b).

For I.R.C. § 167 depreciation purposes, the basis upon which the exhaustion, wear and tear, and obsolescence is to be measured is the adjusted basis of the property under I.R.C. § 1011 for purposes of determining the gain or loss on sale or disposition of the property. I.R.C.

§ 167(c). In turn, I.R.C. § 1011 refers to the cost or other basis of property, determined under I.R.C. § 1012 “or other applicable sections of this subchapter.” This would include the provisions of I.R.C. § 1014(b)(6), which, following the death of one of the spouses, grants both the decedent’s and the surviving spouse’s halves of community property a full adjustment in basis. *See infra* § 9.24. Accordingly, following the death of one of the spouses, both halves of former marital property assets should qualify for depreciation using their newly adjusted basis for property depreciable under I.R.C. § 167. *See, e.g.*, Priv. Ltr. Rul. 9326043 (July 2, 1993) (giving basis adjustments under I.R.C. § 1014(b)(6) to both decedent’s and surviving spouse’s community property interests in literary copyrights and permitting interests to be depreciated under I.R.C. § 167 over remaining useful life of copyrights).

Similar rules also apply to community property consisting of working and royalty interests in oil and gas property following the death of one spouse for which cost (but not percentage) depletion is allowable under I.R.C. §§ 611–612. *See* Rev. Rul. 92-37, 1992-1 C.B. 195 (on joint return covering decedent’s short taxable year and surviving spouse’s 12-month taxable year, surviving spouse’s cost-depletion allowance attributable to her share of former community property oil and gas interests was calculated using her basis at end of taxable year, which included basis adjustment under I.R.C. § 1014(b)(6)).

If former marital property is depreciable under I.R.C. § 168 using the MACRS, the depreciation method applicable to the surviving spouse’s adjusted basis depends on when the property was originally placed in service. Theoretically, this could result in the one-half interest in the former marital property acquired by the surviving spouse from the deceased spouse and the surviving spouse’s own one-half interest in such property being subject to different depreciation methods, because the MACRS is applicable only to property placed in service after 1986 (property placed in service after 1980 and before 1987 is depreciable under the former accelerated cost recovery system (ACRS) and property placed in service before 1981 is not eligible for accelerated cost recovery). Specifically, for MACRS depreciation purposes, the one-half interest in the former marital property received by the surviving spouse from the deceased spouse will be deemed to have been placed in service as of the date of the deceased spouse’s death, but the one-half interest in the property already owned by the surviving spouse will be deemed to have been placed in service as of the date the property was originally placed in service by the couple. Therefore, the one-half interest owned

by the surviving spouse in the former marital property will not be eligible for MACRS treatment if the property was placed in service before 1987. *See Estate of Grasser v. Commissioner*, 93 T.C. 236 (1989) (holding, in case in which married couple placed depreciable community property assets in service before 1981, because each spouse had present equal interests in property from time it was acquired and had placed property in service before 1981, the surviving spouse's one-half interest was not eligible to use ACRS).

➤ *Example.* Husband and wife acquire and place in service depreciable property in 1986. The property is held as survivorship marital property. The husband dies in 2003. Although the entire property will receive a new basis under I.R.C. § 1014(b)(6), the depreciation method applicable to each half of the property will be different. The half of the property that the wife inherits from her husband is considered to be placed in service in 2003 and is eligible for the MACRS. However, the half of the property that the wife owned when the property was acquired is treated as being placed in service in 1986. This half is not eligible for the MACRS, but can be depreciated using the ACRS. *See* DOR Publ'n 113, *supra* § 9.6, at 31.

Similar rules apply to the amortization of intangible property under I.R.C. § 197, which permits certain intangibles such as goodwill and going-concern value acquired after August 10, 1993, to be amortized over a 15-year period. Specifically, for I.R.C. § 197 amortization purposes, the one-half interest in intangible property received by the surviving spouse from the deceased spouse will be deemed to have been acquired as of the date of the deceased spouse's death and will be amortizable regardless of whether the property was acquired by the couple before August 10, 1993, but the one-half interest in the intangible property already owned by the surviving spouse as his or her marital property share will be deemed to have been acquired as of the date the intangible property was originally acquired by the couple. Therefore, the one-half interest owned by the surviving spouse in the intangible property will not be amortizable under I.R.C. § 197 if the property was acquired by the couple before August 10, 1993. *See* Priv. Ltr. Rul. 199949037 (Dec. 10, 1999) (holding that because married couple acquired intangible property before August 10, 1993, interest in such property acquired by surviving spouse from her husband as result of his death was amortizable under I.R.C. 197, but her own one-half

community property interest in such intangible property was not amortizable).

5. Treatment of Proceeds of Life Insurance Policies Owned by Deferred-employment-benefit Plans [§ 9.22]

Under section 766.61(8), the various time-based apportionment rules in section 766.61 for determining the property law classification of life insurance policies are made inapplicable to a policy held by a deferred-employment-benefit plan. The statute further provides that the classification of deferred employment benefits, regardless of the nature of the assets held by the deferred-employment-benefit plan, is determined under section 766.62, which contains its own set of time-based apportionment rules for classifying deferred employment benefits and differs in a number of significant respects from section 766.61. *Compare* §§ 2.170, .197, *supra*.

It is significant that although the property law rules in Wisconsin treat life insurance contracts owned by deferred-employment-benefit plans the same as other assets of the plan are treated, the proceeds of life insurance policies are afforded special treatment for federal income and estate tax purposes. If the plan participant dies before retirement, and if the death benefit under the plan is payable from the proceeds of a life insurance policy, the difference between the cash surrender value and the face amount of the policy is treated as life insurance death proceeds for income tax purposes and is exempt from income taxation under I.R.C. § 101(a) to the extent that the cost of the insurance has been paid with nondeductible employee contributions or has been taxable to the employee. *See* Treas. Reg. § 1.72-16(c)(4). The balance of the proceeds, representing the cash surrender value of the policy, will be treated as a distribution from the plan and taxed accordingly. I.R.C. § 72(m)(3)(C); Treas. Reg. § 1.72-16(c). If the employee did not pay the cost of the life insurance protection and was not taxed on the cost of the life insurance protection, no part of the proceeds paid to the beneficiary is excludable under I.R.C. § 101(a).

With respect to death taxes, the proceeds of policies insuring the life of a deceased plan participant typically are includible in the participant's gross estate under I.R.C. § 2042 if the participant held any incidents of

ownership (such as the right to designate the beneficiary) at the time of death or if the proceeds are payable to the participant's estate.

G. Federal Income Tax: Basis-adjustment Rules for Community Property [§ 9.23]

1. In General [§ 9.24]

An important federal tax rule applicable to community property jurisdictions is the full adjustment to basis accorded to community property acquired from a decedent under I.R.C. § 1014(b)(6). That provision states that the surviving spouse's one-half share of community property held by the decedent and the surviving spouse "under the community property laws of any state" is considered to have been acquired from the decedent, if at least one-half of the whole of the community interest in the property was includible in determining the value of the decedent's gross estate for federal estate tax purposes. Because property acquired from a decedent takes either the fair market value as of the date of death or an alternate value under I.R.C. § 2032 as its basis under I.R.C. § 1014(a), this is an extremely significant provision that permits both spouses' halves of former community property to receive a basis adjustment at death. Significantly, this full-adjustment-to-basis rule is not accorded to common law forms of co-ownership such as joint tenancy with right of survivorship, tenancy by the entirety, or tenancy in common. Only one-half of property held in those forms of co-ownership is includible in the estate of a deceased cotenant; correspondingly, only that half is entitled to a basis adjustment under the rules of I.R.C. § 1014(a) and (b)(9). Pursuant to Treasury Regulation § 1.1014-2(a)(5), the filing of a federal estate tax return, or the payment of federal estate tax, is not necessary to obtain the special community property basis treatment.

It should be noted that I.R.C. § 1223(11) contains a companion rule on the holding period of assets acquired from a decedent. The statute accords long-term capital-gains treatment to both halves of community property receiving a basis adjustment under I.R.C. § 1014(b)(6), regardless of whether the property is disposed of within one year following a spouse's death.

Even though the full-basis-adjustment rule of I.R.C. § 1014(b)(6) is relatively simply stated, in application it has produced some interesting results in community property states. These are reviewed below.

2. No Basis Adjustment for Income in Respect of a Decedent [§ 9.25]

Pursuant to I.R.C. § 1014(c), the general basis-adjustment rule of I.R.C. § 1014 does not apply to property that consists of the right to receive items of income in respect of a decedent (IRD) under I.R.C. § 691. As a result, it has been held that no adjustment to basis is available to a surviving spouse for an interest in an installment obligation attributable to a predeath sale of community property, because the installment obligation constitutes IRD. *Holt v. United States*, 39 Fed. Cl. 525 (1997); *Stanley v. Commissioner*, 338 F.2d 434 (9th Cir. 1964), *aff'g* 40 T.C. 851 (1963); Rev. Rul. 76-100, 1976-1 C.B. 123; *see also Estate of Cartwright v. Commissioner*, 71 T.C.M. (CCH) 3200 (1996) (holding that payments made by decedent's law firm to his estate for work in process were not paid solely to redeem his stock in the firm and were instead IRD that was not eligible for a basis step-up); Rev. Rul. 68-506, 1968-2 C.B. 332 (holding that benefits received by employee from an exempt employee's trust, half of which had been includible for estate tax purposes in deceased nonemployee spouse's estate, is IRD and not eligible for a basis step-up); Priv. Ltr. Rul. 20034-5026 (Nov. 7, 2003) (holding that neither deceased spouse's nor surviving spouse's interest in annuity contract held as community property was entitled to a stepped-up basis). Thus, at least one type of community property interest—namely, items that constitute IRD—is excluded from the full-adjustment-to-basis rule.

An approach related to the application of the I.R.C. § 1014(b)(6) full adjustment to basis is found in *Willging v. United States*, 474 F.2d 12 (9th Cir. 1973). In *Willging*, a husband and wife owned a grain farm as community property and had elected to report their income on the accrual basis. This involved adding to the sales price of products sold during the year the value of their closing inventory and subtracting the value of their opening inventory. During the taxable year of the husband's death, the opening inventory was small; on the date of his death, it was large. The court found that the husband's death constituted an event of realization that fixed the value of the closing-grain inventory for his half of the operation as of his date of death. The court rejected

the wife's argument that her share of the small opening-grain inventory should be adjusted to its date-of-death value so that she could escape ordinary income taxation on the difference between the value of the opening inventory and the comparatively large value at the time of death. Instead, the court held that the date of death was an event of realization under the accrual method of accounting for her as well as her deceased husband. Accordingly, the I.R.C. § 1014(b)(6) adjustment to basis simply was unavailable to the surviving spouse to shelter her half of the farm's ordinary income. It is not clear why the government did not choose to pursue this case as an IRD question under I.R.C. § 691, but the result seems correct and consistent with the installment obligation cases decided under I.R.C. § 1014(c). It is interesting to note that the result would have been different if the farm operation had been conducted on a cash basis, since the court made clear that both halves of the inventory would then have received a basis adjustment to their value on the date of death.

A full I.R.C. § 1014(b)(6) basis adjustment was granted in Private Letter Ruling 9829025 (July 17, 1998), which involved a married couple who entered into an exchange agreement and sold a parcel of community property real estate in a transaction that was intended to qualify for nonrecognition treatment as a like-kind exchange under I.R.C. § 1031. Before the replacement property could be identified, however, the husband died. Later, the replacement property was identified, and the exchange was completed. The IRS ruled that the exchange of properties qualified for nonrecognition treatment under I.R.C. § 1031, and therefore, the proceeds from the exchange attributable to the husband's interest in the property did not constitute IRD. The IRS further ruled that the deceased husband should be treated as owning one-half of the replacement property as of his date of death. Accordingly, his surviving wife was entitled to a full basis adjustment for the replacement property under I.R.C. § 1014(b)(6).

3. Basis Adjustment for Assets Characterized as Community Property by Agreement [§ 9.26]

It appears well settled that state law determines the extent to which the spouses may use agreements to classify their property. The two decided cases on point—*Massaglia v. Commissioner*, 286 F.2d 258 (10th Cir. 1961), *aff'd* 33 T.C. 379 (1959), and *Crosby v. Commissioner*, 20 T.C.M. (CCH) 1422 (1961)—both involved taxpayers who had entered

into prior agreements converting their community property to separate property. These agreements were held to control under state law, thus denying the surviving spouse the benefit of the full adjustment in basis under I.R.C. § 1014(b)(6).

A number of revenue rulings issued by the IRS have specifically acknowledged that agreements valid under state law were effective to reclassify property and, at least prospectively, income. *See* Rev. Rul. 77-359, 1977-2 C.B. 24; Rev. Rul. 73-390, 1973-2 C.B. 12; Rev. Rul. 73-391, 1973-2 C.B. 12 (discussed in section 9.35, *infra*). While these revenue rulings purport to respect classifications by agreement for federal income tax purposes, none of them deal with or specifically mention the full-basis-adjustment rule of I.R.C. § 1014(b)(6). It should follow, however, that if the property laws of a state permit a reclassification of other property to community property (or to marital property in Wisconsin), then the reclassification should be given effect by the IRS for all relevant tax law purposes. The reclassification of property by marital property agreement, by gift, by conveyance, by life insurance consent (under section 766.61(3)(e)), or by unilateral statement (under section 766.59) is specifically authorized under section 766.31(10). It follows that a reclassification by any of these methods changing individual property or “other” property to marital property should control for federal tax purposes.

Decisions denying tax effect to the classification of community property by agreement under an elective system of community property appear to be inapplicable in Wisconsin, because the Act creates a system of community property dictated by state policy as an incident of matrimony. *See, e.g.,* Wis. Stat. § 766.001(2). The problem with agreements entered into under an elective system of community property is illustrated by *Commissioner v. Harmon*, 323 U.S. 44 (1944), in which the Supreme Court refused to permit the splitting of income between spouses who had elected to be governed by Oklahoma’s elective community property system (now repealed). The court distinguished between a legal (i.e., mandatory) system of community property, which automatically vests half of the income and assets of the community during marriage in each spouse, and an elective community property system, which is essentially consensual in nature. In holding that Oklahoma’s elective community property system was ineffective in splitting incomes for purposes of filing separate income tax returns, the Court grounded its decision in the underlying *nature* of the community

property system, rather than on the mere ability to alter property classifications by agreement.

In contrast to an elective system of community property, Wisconsin's system of marital property is a legal system of community property. *See supra* ch. 2. Under the Supreme Court's rationale in *Harmon*, the tax consequences of that characterization must be given effect.

In 1998, the state of Alaska enacted an elective community property system that purports to be available to both Alaska residents and out-of-state residents who contribute property to an Alaska community property trust. *See* Alaska Community Property Act, Alaska Stat. ch. 34.77 (West, WESTLAW current through legislation effective May 17, 2010 passed during the 2010 Second Regular Session of the 26th Legislature). The drafters of the Alaska community property legislation stated that property that is classified by a married couple as community property under Alaska's elective community property law will qualify for a full basis adjustment under I.R.C. § 1014(b)(6) upon the death of one spouse. The proponents of the legislation believed that the Supreme Court's distinction in *Harmon* between elective and legal systems of community property has largely been rendered moot since the filing of joint returns by married couples was authorized in 1948. They also argued that the expansion of the *Harmon* doctrine to the basis-adjustment area was unwarranted, and that the elective versus legal distinction should be limited to the assignment-of-income context.

The drafters of the Alaska community property law did not seek an official opinion from the IRS as to whether the proposed legislation would be respected as creating a community property interest for federal tax purposes, and the IRS has yet to rule on the issue. Therefore, it remains uncertain whether property classified as "community property" under Alaska's elective community property law will be treated as community property for federal tax purposes. Several comprehensive articles have been written describing Alaska's elective community property system. *See* David G. Shaftel & Stephen E. Greer, *Obtaining a Full Stepped-Up Basis Under Alaska's New Community Property System*, *Estate Planning*, Mar./Apr. 1999, at 109; Jonathan G. Blattmachr et al., *Tax Planning with Consensual Community Property: Alaska's New Community Property Law*, 33 *Real Prop., Prob. & Trust J.* 615 (1999).

4. Basis Adjustment for Deferred Marital Property Assets [§ 9.27]

The nature of each spouse's interest in deferred marital property is discussed in chapter 2, *supra*. Because the augmented deferred marital property election in section 861.02 operates only upon deferred marital property owned or retained at death by a deceased spouse, the interests of a spouse who owns deferred marital property at death will be completely different from the interests of a spouse who does not own such property.

With respect to the interest of the owner of probate assets that meet the definition of deferred marital property under section 851.055, that interest is a full ownership interest that extends up to and including the moment of death. It has been held that quasi-community property under the former California quasi-community property statute, section 201.5 of the California Probate Code, is fully includible in the decedent owner's gross estate for federal estate tax purposes, and that the interest of the surviving spouse is a mere expectancy. *Estate of Sbicca*, 35 T.C. 96 (1960). It follows that all of such property will receive a fully adjusted basis for federal income tax purposes under I.R.C. § 1014(b)(1). The former California quasi-community property statute bore considerable substantive similarity to section 851.055 and the former Wisconsin deferred marital property election under the prior version of section 861.02, and thus the same treatment should apply for deferred marital property that is probate property and is elected by the surviving spouse under the augmented deferred marital property election in section 861.02.

With respect to the interest of the owner of retained property rights in nonprobate deferred marital property assets that are included in the augmented deferred marital property estate for purposes of the election in section 861.02, no federal tax cases have been decided under the analogous provisions of California's revised quasi-community property statute, section 102 of the California Probate Code (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. 21 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot). The deferred marital property interests included in the augmented deferred marital property estate under section 861.03(2), however, all appear to be includible in the federal gross estate of a deceased spouse under one or more of I.R.C. §§ 2036 to 2042. To the extent that such property

interests are includible in the gross estate of the deceased spouse under those provisions, they should receive a full adjustment in basis for federal income tax purposes under I.R.C. § 1014(b).

Viewed from the standpoint of the spouse who is not the owner, the deferred marital property interest has two aspects. Until the death of the owner, the interest of the surviving spouse in deferred marital property is at most a nonvested future elective right to take property, and not a vested property interest. The owner spouse continues to have the exclusive right of management and control of the property (consistent with the nature of his or her ownership interest) while both spouses are living. *See* Wis. Stat. § 766.51(6). If the owner spouse dies, the elective rights ripen and may be exercised by the surviving spouse, provided that the right to elect ceases with the subsequent death of the surviving spouse. Wis. Stat. § 861.09. If the nonowner spouse dies first, no elective rights exist. Accordingly, no deferred marital property interest would be includible in the gross estate of a predeceasing nonowner spouse for federal estate tax purposes, and no basis adjustment under I.R.C. § 1014(b)(6) would result.

5. Basis Adjustment for Community Property Converted to Other Forms of Ownership [§ 9.28]

a. Joint Tenancy and Tenancy in Common Assets [§ 9.29]

Only one-half of the value of joint-tenancy or tenancy-in-common assets owned by spouses is includible in the gross estate of the first spouse to die under I.R.C. § 2040(b). As a result, only the includible one-half interest, and not the entire property, is entitled to a basis adjustment at death under I.R.C. § 1014(b)(9). Conflicts over the availability of the full adjustment to basis under I.R.C. § 1014(b)(6) have arisen in cases in which marital property assets are intentionally reclassified by the agreement of the spouses into common law property, such as joint tenancy or tenancy in common.

In several instances, courts have held that the conversion of community property to common law property renders the property something other than “community property held by the decedent and the surviving spouse,” and the full adjustment in basis to both halves of the

property consequently has been denied. *Estate of Young v. Commissioner*, 110 T.C. 297 (1998) (holding that California real estate held in joint tenancy was not community property, despite determination by a local California probate court that it should be classified as community property); *Murphy v. Commissioner*, 342 F.2d 356 (9th Cir. 1965), *aff'g* 41 T.C. 608 (1964) (holding that California community property real estate converted to joint tenancy and then to tenancy in common was not community property for purposes of I.R.C. § 1014(b)(6)); *Bordenave v. United States*, 150 F. Supp. 820 (N.D. Cal. 1957) (holding that California real estate purchased with community property, but titled in joint tenancy, was rebuttably presumed to be joint tenancy under California law); Rev. Rul. 68-80, 1968-1 C.B. 348 (holding that New Mexico community property converted to Virginia tenancy in common was not entitled to basis step-up under I.R.C. § 1014(b)(6)).

In cases in which there are no state property law rules concerning the classification of property held in joint tenancy, the result may be different. In *McCullum v. United States*, 58-2 U.S.T.C. (CCH) ¶ 9,957 (N.D. Okla. 1958), a married couple had elected to come under the 1939 Oklahoma elective community property law and subsequently acquired property as joint tenants. The 1945 Oklahoma statute establishing a mandatory system of community property provided that all married couples who had elected under the earlier law held their property as community property from the effective date of the election. Following the husband's death in 1948, one-half of the property was reported on the federal estate tax return as community property. The court held that the wife was entitled to the I.R.C. § 1014(b)(6) step-up in basis for her half of the property despite the joint tenancy form of the title, since that form of title did not prevent the property from being classified as community property under Oklahoma law.

Another decision bearing on this subject is *Estate of Chaddock v. Commissioner*, 54 T.C. 1667 (1970), in which the court held that, under Texas law, a husband and wife's taking title to certain community property stock as joint tenants with right of survivorship was ineffectual as a contract to create a joint tenancy out of their community property. Thus, when the husband died intestate, his community property interest in the stock immediately vested in his son as heir at law. Since the joint tenancy was not recognized, it follows that a full adjustment to the basis of both halves of the community property would be allowable under I.R.C. § 1014(b)(6), although that precise issue was not before the court.

Revenue Ruling 68-80, 1968-1 C.B. 348, held intent to be an issue when the reclassification occurred in the context of removing community property to a common law state. The ruling involved New Mexico community property that was converted into a Virginia tenancy in common. It appears that both interests in the property did not receive a full adjustment in basis at the death of the first cotenant, because the spouses intended to reclassify their community property as a common law tenancy. Absent that intent, it appears that the source or tracing principles discussed in chapter 13, *infra*, apply, and that the property does not lose its character as community property merely because a common law property form of holding title was adopted when the property was removed to a common law state. For federal tax purposes, it has been recognized that transportation of community property from a community property jurisdiction to a common law property jurisdiction does not cause the community property to lose its character. See *Johnson v. Commissioner*, 105 F.2d 454 (8th Cir. 1939); Rev. Rul. 63-169, 1963-2 C.B. 14, *obsoleted by* Rev. Rul. 80-325, 1980-2 C.B. 5; Field Serv. Advisory 19931609164 (ruling that Oregon residence held in joint tenancy that was purchased by couple with proceeds from sale of their California community property residence was community property for purposes of I.R.C. § 1014(b)(6), because under Oregon Uniform Disposition of Community Property Rights at Death Act, sales proceeds retained their character as community property).

Revenue Ruling 87-98, 1987-2 C.B. 206, permitted use of extrinsic evidence to determine the actual classification of property held by spouses in a common law joint tenancy with right of survivorship. The spouses affected by the ruling resided in an unidentified community property state. Under the law of the domiciliary state, spouses could hold property in joint tenancy with right of survivorship or in other common law estates. If title was taken to property in a common law form of ownership, a presumption was raised that the spouses intended to terminate any community property interest and transmute it into a separate property form of ownership. This presumption could be overcome by evidence that the spouses intended that the property not be transmuted into separate property. The law of the domiciliary state provided that an express statement of such intent in joint wills was effective to prevent a transmutation from occurring. The spouses' wills contained such a declaration at the time of the first spouse's death. Under these circumstances, the IRS ruled that when property held in a common law form of ownership is determined to be community property under applicable state law, it will be regarded as community property for

purposes of I.R.C. § 1014(b)(6) and will be allowed a full adjustment to basis.

A different result was reached in *Estate of Young*, 110 T.C. 297 (1998), in which the Tax Court held that California real estate held by a couple as joint tenants was joint tenancy property and not community property for purposes of I.R.C. § 1014(b)(6), notwithstanding a determination by the local California probate court that the property should be classified as community property. The couple acquired five parcels of real estate, in each case taking title as joint tenants with right of survivorship. In reviewing the case, the court began by stating that under California law joint tenancy and community property are mutually exclusive forms of property ownership and, while there is a strong presumption that property acquired during marriage is community property, there is a rebuttable presumption that the character of the property is as set forth in the deed. The court then noted that no evidence of either an oral or written transmutation of the real estate to community property was submitted in the probate court hearing, and therefore, the probate court's determination was not controlling. The court also found unpersuasive the testimony of the surviving spouse that a real estate broker recommended the joint tenancy to avoid probate and that she thought she owned one-half of the properties as her community property share. Noting that the surviving spouse did not speak, write, or understand English, the court found that there was no mutual agreement between the couple that the real estate was community property.

Based on the rulings and cases involving joint tenancies, it appears clear that regardless of the form in which title is taken, if the property would be treated as community property under state law, the IRS will follow that result and not attempt to apply a separate federal test to determine whether the property qualifies as community property for purposes of the full basis adjustment under I.R.C. § 1014(b)(6). Conversely, if taking title to property as joint tenants or tenants in common effectively transmutes the property's character from community to separate property under applicable state law, then the property will not be considered community property for purposes of I.R.C. § 1014(b)(6).

The Tax Court's decision in *Young* may well be unique to California, which does not permit any form of survivorship community property. By contrast, in Wisconsin, section 766.60(4) operates to virtually preclude the creation of common law joint tenancies and tenancies in common after the determination date in the absence of a marital property

agreement. Section 766.60(4)(b) specifically provides that 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; if it evidences an intent to establish a tenancy in common exclusively between spouses, the property is marital property. Because of this, the rules in *McCullum* and *Estate of Chaddock* (discussed above), that community property prevails over an attempt to hold property in a common law form of ownership, should apply to post-determination date joint tenancies exclusively between spouses, unless the tenancies were specifically created by marital property agreement.

On the other hand, the incidents of joint tenancy or tenancy in common will apply to marital property added to spousal joint tenancies or tenancies in common established before the determination date if there is a conflict. Wis. Stat. § 766.60(4)(a). The proper analysis appears to be that the addition or contribution of marital property to preexisting common law property will remain a marital property component, subject to the incidents of the joint tenancy or the tenancy in common only in the event of conflict. The Legislative Council Note to section 71.05(10)(e) (the Wisconsin basis-adjustment statute) supports the view that the marital property component of a joint tenancy does not lose its character as such for purposes of a full basis adjustment for Wisconsin income tax purposes. Tax Provisions of the Marital Property Implementation Law: Supplemental Explanatory Notes (1985 Wisconsin Acts 29 and 37), Wisconsin Legislative Council Staff Information Memorandum 85-7, Part II at 8. It should be noted, however, that the DOR, without citing any specific authority, takes the position that a marital property component in a joint tenancy or tenancy in common asset will not receive a full basis adjustment for Wisconsin income tax purposes. See DOR Pub'n 113, *supra* § 9.6, at 3.

b. Survivorship Marital Property Assets [§ 9.30]

Closely related questions arise with respect to assets held as survivorship marital property, another optional form of holding property permitted by section 766.60(5). Again, the issue is whether the survivorship feature, a device intended primarily to avoid probate, will cause the survivorship marital property to be regarded as something other than community property for purposes of application of I.R.C. § 1014(b)(6).

The *Tax Practitioner Newsletter* (Apr. 1988) of the District Director of the IRS, Milwaukee District, stated the following: “Based upon advice received from the National Office, survivorship marital property will definitely be considered community property for federal income tax basis purposes. This means, upon the death of the first spouse, a full step up in basis will be received under I.R.C. section 1014.” *See also* DOR Publ’n 113, *supra* § 9.6, at 30.

Survivorship marital property is materially unlike joint tenancy with right of survivorship or common law tenancy by the entireties. This lack of similarity stems from the inability to unilaterally destroy the attributes of marital property, the preservation of creditors’ rights during the marriage in the same manner as other marital property, and the structuring of the survivorship marital property statute to clarify that it is marital property (with all the incidents of that classification) passing by a statutory nontestamentary disposition at death. Thus, for purposes of I.R.C. § 1014(b)(6), treating survivorship marital property in the same manner as marital property without the survivorship feature is clearly appropriate.

6. Basis Adjustment for Marital Property Partnerships [§ 9.31]

If marital property assets are used in a family business that is treated by the spouses as a partnership for tax purposes, it may be necessary for the partnership to make elections under I.R.C. §§ 743 and 754 to obtain a full basis adjustment for the surviving spouse’s one-half interest in the marital property assets held by the partnership. This is because, in a two-member partnership, the Internal Revenue Code and Treasury regulations specifically provide that the partnership is not considered terminated upon the death of one partner if the estate or other successor in interest of the deceased partner “continues to share in the profits or losses of the partnership business.” Treas. Reg. § 1.708-1(b)(1)(i)(a); *see also* I.R.C. § 708(b)(1)(A).

The foregoing result will be extremely difficult to avoid if a husband and wife operate a business as a family partnership using assets that originally were marital property. Once the assets are contributed to the partnership, the marital property classification is transferred to the spouses’ respective partnership interests. As a result, the basis-election provisions of I.R.C. §§ 743 and 754 may be required to preserve basis

adjustment benefits inside the partnership regardless of whether the partnership is continued or wound up. Of course, the full adjustment to the basis of the partnership interests themselves is likely to ameliorate adverse capital-gains consequences when the partnership is finally liquidated and its assets are distributed to the surviving spouse and the deceased spouse's estate.

Estate of Skaggs v. Commissioner, 75 T.C. 191(1980), *aff'd*, 672 F.2d 756 (9th Cir. 1982), illustrates the potential problem if an effective election is not made under I.R.C. §§ 743 and 754. In *Estate of Skaggs*, a California husband and wife operated a ranch as partners under a written agreement. Their respective partnership interests were community property. The husband died on the last day of the calendar year. In the following year, his estate and the surviving spouse treated the partnership as terminated and assigned a stepped-up basis under I.R.C. § 1014(b)(6) to crops sold and depreciable assets for both halves of the farm operation. Because the partnership was viewed as terminated, no election was made under I.R.C. §§ 743 and 754 to make an internal adjustment in the basis of the partnership assets to match the external basis of the partnership interests owned by the estate and the surviving spouse.

Because the partnership did not terminate on the husband's date of death and because the estate and the surviving spouse continued to share the income from the ranching operation, the Tax Court held that an election under I.R.C. §§ 743 and 754 was necessary. Accordingly, the step-up in value of the partnership assets (as opposed to the partnership interests of the spouses) was denied, with major adverse tax consequences.

This problem can now be avoided by married couples operating a business as an LLC or partnership by electing to treat the business as a disregarded entity for tax purposes. *See supra* § 9.15. If such an election is made, the assets of the LLC or partnership will be deemed to be owned directly by the spouses and will qualify for a full basis adjustment under I.R.C. § 1014(b)(6).

7. Special Basis-adjustment Rule for Transfers of Appreciated Property Acquired Within One Year of Death [§ 9.32]

A special rule under I.R.C. § 1014(e) denies a basis adjustment at death to certain transfers of appreciated property that were acquired by the decedent by gift during the one-year period preceding his or her death. The rule applies to transfers in which the appreciated property is retransferred to the original donor (or that person's spouse) by the decedent. The policy behind the rule is to prevent "gifts" of property to terminally ill persons that are then retransferred to the donor at death with a stepped-up basis.

This provision may have implications under the Act. For example, if spouses enter into a marital property agreement reclassifying the individual or predetermination date property assets of one spouse as marital property under circumstances in which there is no consideration for the reclassification, a "gift" of one-half of the former individual or predetermination date property assets may be considered to have been made to the other spouse. If the donee spouse then dies within one year of executing the agreement, leaving his or her one-half share of the newly classified marital property assets to the surviving donor spouse, will such share receive a basis adjustment under I.R.C. § 1014(b)?

The answer depends on whether a reclassification of individual or predetermination date property assets by marital property agreement (or otherwise) constitutes a transfer by gift within the meaning of I.R.C. § 1014(e). If the reclassification does constitute a gift, a basis adjustment will likely be denied to the deceased donee spouse's one-half interest if such interest is retransferred to the surviving donor spouse. On the other hand, if the deceased donee spouse transfers the marital property interest received by virtue of the agreement to a third person at death, the basis adjustment should be allowed. For example, if the deceased donee spouse transfers the marital property interest to a credit-shelter bypass trust in which the surviving donor spouse has only a discretionary interest, there is a strong argument that I.R.C. § 1014(e) does not apply because the surviving spouse has not directly received the transferred property back. It is less certain whether I.R.C. § 1014(e) will be avoided if the deceased donee spouse's marital property interest is transferred to a qualified terminable interest property (QTIP) marital trust in which the donor surviving spouse will have a mandatory income interest. Although

there is no authority on the issue, it appears that at least the portion of the QTIP trust allocable to the surviving donor spouse's lifetime income interest will be subject to I.R.C. § 1014(e) and will not receive a basis adjustment.

Revenue Ruling 77-359, 1977-2 C.B. 24, involving a Washington community property classification agreement, may support the view that transmutation of separate (i.e., individual or predetermination date) property into community (i.e., marital) property by a classification agreement constitutes a gift to the extent that there is inadequate consideration for the transfer. *See also* Priv. Ltr. Rul. 8929046 (July 21, 1989) (holding that agreement transmuted parties' community property into separate property and allocating it unequally between them constitutes gift to extent that value of separate property received by one spouse exceeds value of that received by the other).

DOR Publication 113 states that the IRS takes the position that the surviving donor spouse who reacquires his or her one-half share in former marital property assets from the deceased spouse within one year after execution of the marital property agreement is not entitled to a basis adjustment on the interest received from the decedent through application of I.R.C. § 1014(e). DOR Publ'n 113, *supra* § 9.6, at 31. DOR Publication 113 also states that the IRS takes the position that although a formal ruling has not been rendered, the denial of a basis adjustment to the decedent's one-half share of the former marital property assets would also appear to foreclose a similar adjustment under I.R.C. § 1014(b)(6) to the surviving donor spouse's retained one-half interest. *Id.*

It can be argued that the application of I.R.C. § 1014(e) cannot be avoided even by transferring assets under a marital property agreement in such a way that there is adequate consideration for the transfer. The applicability of I.R.C. § 1014(e) depends on the acquisition of appreciated property by the decedent "by gift" during the one-year period ending on the date of his or her death. Normally, transfers for adequate consideration are not gifts. However, I.R.C. § 1041(b) treats all transfers of property from one spouse to the other spouse as acquisitions by gift, without any exception for transfers for full or partial consideration. I.R.C. § 1041(b)(1); *see supra* § 9.7. The rule that any transfer of property from one spouse to the other spouse is treated as a gift is applied "for purposes of this subtitle." I.R.C. § 1041(b)(1). This refers to all

provisions of the Internal Revenue Code dealing with income taxes, including I.R.C. § 1014(e).

The denial of a basis adjustment under I.R.C. § 1014(e) should not apply to either (1) the reclassification as marital property of tenancy-in-common assets owned in equal shares by the spouses, or (2) the reclassification as survivorship marital property of joint-tenancy assets owned exclusively by the spouses, because the shares of ownership would remain unchanged and no gift would occur as a result of such reclassification.

It appears that I.R.C. § 1014(e) also does not apply if the donor spouse is the first to die. This is because the deceased donor spouse's one-half interest is includible in his or her gross estate directly under I.R.C. § 2033. Moreover, the decedent did not receive his or her one-half interest in the newly created marital property assets by gift during the one-year period preceding his or her death but retained it from the individual property assets that were the original subject of the gift. This will be true even if the deceased donor spouse's interest passes to the surviving donee spouse. The surviving donee spouse should be entitled to a full basis adjustment for his or her one-half interest in the newly created marital property assets received by way of the gift, since this interest is not one that is reacquired from a decedent by the original donor but is already owned by the donee spouse before the death of the donor spouse. In short, the death of the donor spouse in the foregoing example should not bring I.R.C. § 1014(e) into play at all. This result is appropriate, given that if the reclassification of the individual property to marital property had never occurred in the first place, the entire value of the property would have been included in the deceased spouse's estate and qualified for a full basis adjustment.

8. Basis Adjustment for Assets Held in Revocable Trusts [§ 9.33]

The IRS has ruled that community property assets held in a trust that was fully revocable by either or both spouses during their joint lifetimes were entitled to a full basis adjustment under I.R.C. § 1014(b)(6). Rev. Rul. 66-283, 1966-2 C.B. 297.

Even if a Wisconsin revocable trust is funded after the determination date with marital property assets held by one spouse, and that spouse

retains the sole power to amend or revoke the trust, the benefits of the full basis adjustment should be available. This is because section 766.31(5) provides that the transfer of property to a trust does not by itself change the classification of the property. Accordingly, marital property assets transferred to a revocable trust should remain classified as marital property, and the full basis adjustment under I.R.C. § 1014(b)(6) should be available.

H. Federal Income Tax: Grantor Trust Issues Raised by Transfers of Marital Property [§ 9.34]

The grantor trust rules of I.R.C. §§ 671 to 679 are familiar features in the tax planning landscape. These sections cause the income and, with some exceptions, the capital gains of a trust (or a portion of a trust) over which the grantor exercises or retains certain enumerated rights or powers to be taxed to the grantor of the trust, on the theory that the grantor has not given up significant dominion and control over the assets. Among the offensive rights or powers are a reversionary interest in the grantor that is worth more than five percent of the value of the trust assets to which it applies at the inception of the trust (I.R.C. § 673); retention by the grantor of the direct or indirect power to control the beneficial enjoyment of income or principal of the trust (I.R.C. § 674); retention by the grantor of the power to borrow from or deal with the trust assets on terms more favorable than those available in the marketplace (I.R.C. § 675); reservation by the grantor of the power to revoke the trust (I.R.C. § 676); and the right of the grantor or the grantor's spouse to receive income from a trust, to have trust income accumulated for future distribution to one or both of them, to have trust income used to pay the premiums on life insurance policies on one or both of their lives, or to have trust income used to satisfy the grantor's legal obligation of support (I.R.C. § 677). In a number of these provisions, exercise of the right or power is permissible if approval or consent is required from a person having a substantial beneficial interest in the trust that would be adversely affected by the exercise or nonexercise of the power. In addition, certain I.R.C. § 674 powers to control beneficial enjoyment will not be taxed to the grantor if exercised solely by an independent trustee. I.R.C. § 674(c).

The grantor-trust rules may apply in a number of situations in which marital property assets are intentionally or unintentionally transferred to a revocable or irrevocable trust. Some examples follow, in the same

numerical sequence as the applicable sections of the Internal Revenue Code:

➤ *Example 1.* Wife transfers assets that she believes to be individual property, but that in fact contain a significant marital property component, to an irrevocable trust for the benefit of her children by a prior marriage. She names the controller of the corporation owned and operated by her husband as the trustee, because he is financially experienced and she believes he will be an independent trustee under I.R.C. § 674(c). The trust contains broad powers to accumulate or distribute income and to invade principal for the benefit of the beneficiaries.

Under these facts, the husband is an unintended grantor of one-half the marital property component of the assets transferred to the trust. Because of the husband's ownership and control of the corporation of which the trustee is an employee, the trustee is not independent of the husband. I.R.C. § 674(c). Accordingly, the income and gains from the portion of the trust attributable to the husband's one-half marital property interest apparently are includible on the husband and wife's joint return by virtue of I.R.C. § 674.

➤ *Example 2.* Husband establishes an irrevocable trust for the benefit of his and his wife's children with property consisting of certain inherited stock in a closely held family business that he believes to be his individual property. The income of the trust is payable to the children, but during the wife's lifetime the trustee is authorized to invade principal for her benefit in the event of an emergency. Unknown to the husband and wife, a portion of the individual property assets is marital property as a result of substantial appreciation through the husband's substantial uncompensated efforts. The terms of the trust permit the family business corporation to repurchase the stock from the trust at a formula price that is substantially below market value, provided that the wife consents.

Because of the presence of a marital property interest in the assets of the trust, the wife may be an unintended grantor and thus unable to act as an adverse party for purposes of agreeing to the buyout of the closely held shares at a below-market formula price. The trust apparently will be treated as a grantor trust under I.R.C. § 675 and the

capital gains will be taxable to the husband and wife, rather than to the trust.

➤ **Example 3.** Wife creates an irrevocable trust funded with marital property assets over which she exercises exclusive management and control. The income of the trust is distributable to the husband and wife during their lifetimes. Following their deaths, the remainder interest passes to their children.

This trust will be a grantor trust under I.R.C. § 677 because of the right of the grantor and her husband to receive the income.

➤ **Example 4.** Husband, who has sole management and control of certain marital property assets, transfers the assets to a revocable trust. The trust provides for distribution of income to the husband and his wife during their joint lifetimes, and then to the survivor, with a remainder to the children upon the survivor's death. The trust grants the trustee powers to invade principal for the benefit of the beneficiaries, limited by an ascertainable standard. The husband alone retains the power to revoke the entire trust during his lifetime.

Because of the husband's retained power to revoke the entire trust, all its income and capital gains will be deemed taxable to him during his lifetime under I.R.C. § 676. If the husband dies before the wife, his power to revoke the trust is no longer exercisable. However, one-half of the trust is likely to be treated as a grantor trust as to the wife for as long as she has the right to recover her half of the marital property assets under section 766.70(6)(a). *See supra* §§ 9.18, .20. When that right of recovery expires, thus completing a gift of a remainder interest in the wife's one-half of the marital property to the children, the trust will no longer be considered a grantor trust as to the wife under I.R.C. § 676, but it may continue to be a grantor trust under the receipt-of-income rule of I.R.C. § 677.

These examples illustrate that a number of unexpected results can occur if marital property assets are used in the funding of trusts. An appreciation of these consequences is an important consideration in drafting trust documents. *See infra* ch. 10. The examples also underscore the desirability of clarifying the classification of assets by marital property agreement before their transfer into an irrevocable trust.

I. Federal Income Tax: Effect of Marriage Agreements [§ 9.35]

Several revenue rulings have recognized that it is possible to reclassify property interests by agreement under state law. Revenue Ruling 77-359, 1977-2 C.B. 24, *obsolete in part* by Revenue Ruling 88-85, 1988-2 C.B. 333), specifically recognized that under Washington law a husband and wife may reclassify their presently owned or future acquired separate property as community property and indicated that such reclassification would be binding for income tax purposes. The ruling states as follows:

[W]here a husband and wife residing in the State of Washington agree in writing that all presently owned property and all property to be acquired thereafter, both real and personal, will be community property, such agreement changes the status of presently owned separate property and subsequently acquired separate property to community property.

In the same ruling, however, the IRS advised that to the extent an agreement purports to convert the income from separate property into community property without reclassifying the separate property itself into community property, the spouses will not be permitted to split that income for federal income tax purposes if they file separate income tax returns. This ruling seems sound because, as the ruling indicates, an attempt to convert the income from separate property to community property without a reclassification of the property that produces the income is an assignment of income.

In a revenue ruling involving the question of prospective reclassification of earned income by agreement from community property to the separate property of the earner, the IRS again recognized that because such a reclassification by agreement was valid under California law, it would be respected for federal income tax purposes. Rev. Rul. 73-390, 1973-2 C.B. 12. In a companion ruling, Rev. Rul. 73-391, 1973-2 C.B. 12, the IRS intimated that the same treatment would be accorded to income from an investment asset if a valid agreement existed as to the property law characterization of the investment. *See also Fleming v. Commissioner*, 47 T.C.M. (CCH) 1281 (1984) (holding that valid agreement between spouses under New Mexico law had effect of reclassifying the husband's community property income from personal services into his separate income for tax purposes). Note, however, that the IRS apparently will not allow more than 50% of marital property

income to be allocated to the nonearner spouse by marital property agreement. DOR Publ'n 113, *supra* § 9.6, at 15.

Revenue Ruling 87-13, 1987-1 C.B. 20, recognizes that under the Act, Wisconsin spouses may alter their property rights by marital property agreement and, by implication, change the tax treatment of their income, at least prospectively.

While the IRS recognizes that spouses may enter into a valid marital property agreement recharacterizing their earned or investment income as the individual income of the earning or recipient spouse, historically the IRS has resisted attempts to retroactively reclassify income (as distinguished from the property in which the income was invested) once it has been earned or received. In effect, all the events that fix the amount of income tax and determine the liability of the taxpayer to pay it must occur in advance of assessment and during the taxable year in question. See *United States v. Anderson*, 269 U.S. 422, 441(1926); see also *United States v. Mitchell*, 403 U.S. 190 (1971). In *Mitchell*, a wife who was separated from her husband was not permitted to avoid federal income tax obligations on her share of community income for years in which the community income had not been disclosed by the husband and no returns had been filed by either spouse. The wife had exercised her statutory option under the Louisiana Code to exonerate herself from debts contracted during marriage by renouncing her community property rights. The Court observed that this state law did not enable the wife to avoid her federal tax liability. These cases arguably preclude after-the-fact efforts by the spouses to attribute income from one to the other, or to allocate income as between themselves, to achieve perceived tax benefits.

The IRS does not prescribe any specific notification requirements with respect to a marital property agreement reclassifying income. The IRS will accept marital property agreements at the time of taxpayer contact for income-reporting purposes. DOR Publ'n 113, *supra* § 9.6, at 16. The IRS suggests that it is appropriate to furnish a copy of the marital property agreement to the IRS at the time it is executed. *Id.* Agreements should be mailed to the following address:

Internal Revenue Service
SB/SE Advisory, Stop 5303 MIL
211 W. Wisconsin Avenue
Milwaukee, WI 53203

The Act itself might preclude a retroactive reclassification that adversely affects a tax liability owed to the IRS. Section 766.55(4m) states that no provision of a marital property agreement (or of a decree under section 766.70 for interspousal remedies) adversely affects the interest of a creditor unless the creditor had actual knowledge of that provision when the obligation was incurred. For purposes of section 766.55(4m), the term *creditor* broadly refers to any person to whom an obligation is owed. Thus, a retroactive attempt to reclassify income by marital property agreement that would adversely affect the interest of the IRS may be prohibited under section 766.55(4m). See section 9.52, *infra*, for a discussion of the effect of marital property agreements and unilateral statements for Wisconsin income tax purposes.

Some attorneys have attempted to use a marital property agreement or a divorce property settlement agreement to retroactively characterize the income or deductions of the spouses during the period before the entry of the judgment of dissolution. As indicated above, it is the position of the IRS that such an attempted retroactive reclassification of income by agreement will not be binding for federal income tax purposes. DOR Publ'n 113, *supra* § 9.6, at 15.

The courts have supported the position of the IRS that state court judgments that purport to retroactively recharacterize or reallocate items of income will not be determinative for federal tax purposes. See *Brent v. Commissioner*, 630 F.2d 356 (5th Cir. 1980) (holding that although divorce decree was given retroactive effect for state law purposes, it did not alter federal tax treatment of income earned in prior year); *Daine v. Commissioner*, 168 F.2d 449 (2d Cir. 1948) (not giving effect, for tax purposes, of retroactive judgment affecting treatment of alimony payments in prior year); *West v. Commissioner*, 131 F.2d 46 (9th Cir. 1942) (not recognizing, for tax purposes, retroactive dissolution of divorce decree and reinstatement of marital community).

Attempts to legislate retroactive application of divorce decrees to affect the income tax consequences for the spouses have been met with similar skepticism by the IRS. For example, Revenue Ruling 74-393, 1974-2 C.B. 28, examined the income tax effect of article 155 of the Louisiana Civil Code, which made the final judgment of divorce or separation retroactive to the date of filing of the original action. This was intended to permit each spouse to report the income he or she received during the pendency of the dissolution proceedings as if he or she were unmarried. The IRS concluded that under Louisiana law the

marital community continues in existence after the suit for divorce has been filed and up to the time the final judgment in the suit has been rendered, despite the statute giving retroactive effect to the judgment. Accordingly, if either spouse receives community income while the divorce is pending, each spouse has equal ownership rights in the income and corresponding federal income tax liability for his or her one-half share of it. Revenue Ruling 74-393 should apply with equal force in Wisconsin. *See* Rev. Rul. 87-13, 1987-1 C.B. 20.

Two approaches are available to avoid having to report income as part community property and part separate property in the year in which a divorce judgment is entered, and to avoid the related problem of ineffective retroactive income reclassification by agreement. First, the spouses may execute a marital property agreement during the pendency of the divorce to take effect at the beginning of what the parties anticipate will be their final tax year as spouses. Thus, each spouse may separately report only the income earned or received by him or her. Second, the spouses may arrange for the judgment of dissolution to be entered on December 31 of the year so that the entire year is subject to community income reporting. DOR Publ'n 113, *supra* § 9.6, at 17. Attorneys should avoid drafting agreements stating that "in the year a divorce judgment is entered" the income received by each spouse will be his or her respective individual property, since it is usually impossible to know with certainty what tax year will be affected until the judgment is entered. The tax authorities reviewing such agreements are likely to make the argument that such an agreement is retroactive. *See, e.g., id.* at 18. Under the terms of the agreement, the granting of the judgment of dissolution is the event that triggers a reclassification of income received during the portion of the year before the judgment is granted. If a future event is to trigger the reclassification of income, that event must occur *before* the income is generated. For example, a marital property agreement providing that all income received after the filing of a petition for divorce will be the individual income of the earning or recipient spouse is acceptable for Wisconsin purposes and should be acceptable for federal purposes, provided that the agreement is signed before the income is earned. *Id.*

Alternatively, it is not uncommon for divorce settlement agreements or judgments to include provisions assigning responsibility for the payment of federal income taxes. Often, these will provide that one spouse is responsible for any taxes owed for the last year in which a joint income tax return is filed. Joint returns may be filed during the pendency

of the divorce action, because the tax rates are more favorable than those available to married persons filing separate returns. Great care is required, however, because divorce property settlement agreements or judgments fixing responsibility for the payment of federal income taxes are not binding on the IRS. The tax liability on a joint return is joint and several. I.R.C. § 6013(d)(3). Therefore, the IRS may enforce collection of unpaid taxes against either party and leave it to the former spouses to resolve in state court the issue of compliance with the terms of the divorce settlement agreement or judgment. The most that can be achieved for divorcing spouses is either to ensure that the taxes shown on the return are paid when the return is filed or seek verification from the IRS that the taxes have been paid before the divorce judgment is rendered. See DOR Publ'n 113, *supra* § 9.6, at 19, for a description of the verification procedure.

The following sample provision is designed to assign responsibility for payment of taxes between divorcing spouses:

If either spouse is required to report and pay income tax on more income than he or she was legally entitled to receive during the calendar year in which the divorce judgment was entered (*excess income tax*), the spouse who was required to pay such excess income tax shall be reimbursed for the amount of the excess by the other spouse. By _____ [insert date] each spouse shall furnish the other spouse with a list of all income received by that spouse during 20__ [insert year in which divorce judgment is expected to be entered] up to the date on which the divorce judgment is entered to enable such spouse to determine how much income should be reported.

J. Wisconsin Income Tax: Generally [§ 9.36]

Wisconsin's income tax system may be described as being federalized in the sense that Wisconsin taxable income of natural persons and fiduciaries is derived from the definitions of federal taxable income and federal adjusted gross income in section 71.01(4). In the case of both natural persons and fiduciaries, Wisconsin taxable income is determined after making various modifications and transitional adjustments required by section 71.05.

The Wisconsin income tax statutes include a number of provisions that are designed to specifically address certain marital property issues. For example, the definition of Wisconsin taxable income in section 71.01(16) provides that losses, depreciation, recapture of benefits,

offsets, depletion, deductions, penalties, expenses, and other negative income items are to be determined according to the manner that income is or would be allocated for income tax purposes. Thus, the general rule under section 71.01(16) is that the negative characteristics of income are generally to follow the positive characteristics for tax purposes, whether the property is predetermination date, individual, or marital property.

Under the general proportionate-allocation rule of section 71.01(16), negative income allocations ordinarily would be split between the spouses in the same ratio as the income from the property is allocated. In the case of spouses filing separate returns, however, the application of this general formula could be inequitable with regard to net rent or other net returns from nonmarital property assets owned by one spouse. The general rule could result in a windfall for the nonowning spouse because he or she would receive one-half of the net income (income less negative income items), plus an additional share of the negative income items attributable to nonmarital property assets, which would thereby reduce the amount of income subject to taxation on the nonowning spouse's separate return. To address this concern, all of the negative income items arising from nonmarital property assets are expressly allocated under section 71.01(16) to the spouse owning the property, despite the fact that net rent or other net returns from nonmarital property assets are classified as marital property income under the Act and thus are deemed to be owned in equal shares (unless the spouse owning such nonmarital property has executed a unilateral statement classifying such income as individual property). The application of this provision is of course limited to married persons filing separate returns, because the problem does not exist if all the income and all the negative income items of both spouses are included on a joint return filed by the spouses.

Under section 71.01(8), the terms *married person* and *spouse* are defined as persons determined to be married under I.R.C. § 7703(a), unless the context requires otherwise. The statute also provides that for tax purposes a decree of divorce, annulment, or legal separation terminates the marriage and the application of the Act to the property of the spouses after the date of the decree, unless the decree provides otherwise.

Another provision of interest is section 71.10(6)(d), which has potential significance if one or both of the spouses are not domiciled in Wisconsin for the entire taxable year. This section provides that the tax liability and reporting obligations of both spouses during the period a

spouse is not domiciled in Wisconsin shall be determined without regard to chapter 766, except as otherwise provided. The intent of this provision is that common law property concepts of title ownership will be applied in allocating the income of the spouses between Wisconsin and another jurisdiction. This statute addresses the concern that if chapter 766 were to apply, a spouse domiciled in Wisconsin might be able to shift one-half of his or her earnings or investment income to a spouse who was domiciled elsewhere, at least until the other spouse established domicile in Wisconsin.

The interaction of the Act with Wisconsin's rules on the satisfaction of marital tax obligations is addressed in section 71.91(3). This provision provides that all tax obligations to the state of Wisconsin incurred by a spouse during marriage and after December 31, 1985, or after establishment of a marital domicile in Wisconsin, whichever is later, are incurred in the interest of the marriage or the family and may be satisfied only under sections 766.55(2)(b) and 859.18. If one spouse is relieved of liability under the innocent spouse rules of subsection 71.10(6)(a), (b), or (6m), the other spouse's tax obligation may be satisfied only under section 766.55(2)(d) as an obligation incurred during marriage that is not a support, family-purpose, or premarital obligation, or by set-off under the provisions of sections 71.55(1), .80(3) or (3m), or .61(1).

K. Wisconsin Income Tax: Joint Return Filing [§ 9.37]

1. Joint Returns [§ 9.38]

The Act not only permits spouses to file joint returns in Wisconsin but also affirmatively encourages them to file jointly through adoption of a more favorable rate structure. Subsections 71.03(2)(d) through (l) are based on I.R.C. § 6013 and adopt parallel requirements for the filing of joint returns by married persons, either originally or after separate returns have been filed by the spouses. Married persons must file either a joint return or a separate return. Married persons who qualify to file a joint federal return may file a Wisconsin joint return. It is unclear whether married persons who file separate federal returns also must file separately in Wisconsin, or whether they are permitted to file a Wisconsin joint return. Similar to the federal rule, a husband and wife may file a Wisconsin joint income tax return even though only one spouse has income or deductions. Wis. Stat. § 71.03(2)(d). There are

only a few exceptions to the broad availability of joint returns for Wisconsin married couples:

1. A joint return may not be filed if either spouse at any time during the taxable year is a nonresident alien, unless certain elections under the Internal Revenue Code are in effect. Wis. Stat. § 71.03(2)(d)2.
2. No joint return may be filed if the husband and wife have different taxable years, unless the difference in taxable years is attributable solely to the death of either or both spouses. However, a joint return may not be filed if the surviving spouse remarries before the close of his or her taxable year. Wis. Stat. § 71.03(2)(d)3.

A joint return may also be filed by the decedent's personal representative and the surviving spouse, or by the surviving spouse alone if no personal representative is appointed. If a personal representative is appointed after the filing of a joint return by a surviving spouse, the personal representative may disaffirm the joint return by filing, within one year after the last day prescribed by law for filing the return of the surviving spouse, a separate return for the taxable year of the decedent for which the joint return was filed. If the joint return is disaffirmed, the return filed by the surviving spouse is the survivor's separate return and the tax on that return shall be determined by excluding all items properly included in the return of the decedent spouse. Wis. Stat. § 71.03(2)(e).

Spouses may file a joint return after one or both have filed separate returns even though the time prescribed by law for timely filing the return for that taxable year has expired. Wis. Stat. § 71.03(2)(g). All payments, credits, refunds, or other repayments made or allowed with respect to the separate returns of each spouse for that taxable year are taken into account in determining the extent to which the tax based on the joint return has been paid. If a joint return is filed under this provision, any election (other than an irrevocable election to file a separate return) made by either spouse with respect to the treatment of any income, deduction, or credit on that spouse's separate return for that taxable year may not be changed on the joint return. *Id.* The election to file a joint return after one or both spouses have filed separate returns may also be made in the taxable year in which one or both spouses die. Wis. Stat. § 71.03(2)(h). The joint return may be filed by the decedent's personal representative and the surviving spouse, if any.

The election to file a joint return after one or both spouses have filed separate returns is subject to several limitations described in section 71.03(2)(i). The most significant of these are the following:

1. The amount of the tax shown on the joint return must be paid in full at or before the time the joint return is filed.
2. The joint return may not be filed later than four years from the last date prescribed by law for filing the return for the taxable year in question, determined without regard to any extension of time granted to either spouse.
3. The joint return may not be filed if a notice of adjustment has been mailed to either spouse and the spouse files a petition for redetermination, except that if both spouses request and the DOR consents, the election to file a joint return may be made; the joint return may not be filed if either spouse has commenced a suit for recovery of any part of the tax for that taxable year.
4. The joint return may not be filed if either spouse has entered into a closing agreement or a compromise of any civil or criminal case against the other spouse with respect to that taxable year.

Section 71.03(2)(m) permits spouses who have filed a joint return to change to separate returns if both spouses file on or before the last day for the timely filing of a return by either spouse. For a discussion of separate returns, see section 9.45, *infra*.

2. Rate Structure; Married Persons' Credit [§ 9.39]

The rate schedules in section 71.06(2) indicate that the tax brackets for married persons filing joint returns are exactly twice as large as those of married persons filing separately. Thus, if the spouses have equal incomes, the sum of their Wisconsin income taxes on separate returns will exactly equal the tax due on a joint return. A disparity develops as the spouses' incomes grow more and more unequal, so that in single-earner families, filing separate returns ordinarily makes little sense because it produces a greater tax than a joint return. The tax brackets and rates for single individuals and fiduciaries in section 71.06(1) fall midway between those for married persons filing jointly and married persons filing separately.

To mitigate some of the adverse impact on married couples filing joint returns when both spouses have earned income, a married persons' credit was adopted. This credit is an amount equal to three percent of the earned income of the spouse with the lower income, but not exceeding \$480. Wis. Stat. § 71.07(6)(am)2.d. The computation of earned income is made "notwithstanding the fact that each spouse owns an undivided one-half interest in the whole of marital property." Wis. Stat. § 71.07(6)(am)1. A marital property agreement or a unilateral statement under chapter 766 transferring income between the spouses has no effect in computing earned income for purposes of this credit. The earned income credit may not exceed the amount of Wisconsin net income taxes otherwise due on the joint return. Amounts received by one spouse in the employ of the other spouse may be used to compute the married persons' credit.

For purposes of the married persons' credit, earned income includes only earned income allocable to Wisconsin. The married persons' credit is not available to married persons who reduce their gross income by foreign earned income under I.R.C. § 911 or by income earned in certain specified United States possessions under I.R.C. § 931. Earned income is linked to the definition of *qualified earned income* in I.R.C. § 221(b), plus certain employee business expenses under I.R.C. § 62(2)(B), (C), and (D) (provided such income or expenses are allocable to Wisconsin), minus the amount of excludable disability income and any other amount of earned income not subject to Wisconsin income tax.

3. Joint and Several Liability [§ 9.40]

Married persons filing a joint return are jointly and severally liable for the tax, interest, penalties, fees, additions to tax, and additional assessments applicable to the return. Wis. Stat. § 71.10(6)(a). An innocent spouse is relieved of liability for a joint return in the same manner as specified in I.R.C. § 6015, notwithstanding the amount or percentage of the understatement. *Id.* See section 9.3, *supra*, for a discussion of the federal innocent-spouse provisions, and section 9.46, *infra*, for a discussion of the Wisconsin version.

As demonstrated by *Smith v. Wisconsin Department of Revenue*, No. 93 CV 356, [1993–1998 Transfer Binder], St. Tax. Rep. (CCH) ¶ 400-098 (Wis. Cir. Ct. Barron County Apr. 7, 1994), the imposition of joint and several liability can lead to a harsh result when only one spouse

receives the benefit of the taxable income. In *Smith*, an ex-husband was found jointly and severally liable for Wisconsin income taxes owed on capital gains realized from the sale of a residence that he owned with his ex-wife because they filed a joint return for the taxable year at issue, even though the proceeds from the sale were awarded to the ex-wife in the divorce decree. The court ruled that the fact that the ex-wife received all the proceeds from the sale was irrelevant for purposes of imposing joint and several liability on the ex-husband under section 71.10(6)(a).

4. Refunds and Overpayments; Satisfaction of Certain Obligations [§ 9.41]

Both spouses must sign claims for refund or credit of overpayments with respect to joint returns. Wis. Stat. § 71.75(6). A marital property agreement or unilateral statement cannot affect the requirements for claims for refund or credit under this provision. Under section 71.75(8), a refund payable on the basis of a joint return must be issued jointly to the persons who filed the return. However, if a judgment of divorce apportions any refund that may be due to the formerly married couple to one of the former spouses, or between the spouses, and if they include with their income tax return a copy of that portion of the divorce judgment that relates to the apportionment of their tax refund, the DOR will issue the refund check to the person to whom the refund is awarded under the divorce judgment or will issue separate checks to each of the former spouses according to the apportionment terms of the divorce judgment. Wis. Stat. § 71.75(8).

The rules for the crediting of overpayments, homestead and farmland preservation credits, and other refunds, including any interest allowed, resulting from joint returns are set forth in section 71.80(3m). As a general rule, the DOR may credit any overpayment, credit, or refund on a joint return against any liability of either spouse or both spouses for taxes, debts to the state under section 71.93, or delinquent child support obligations under section 49.855 that were incurred during marriage and after December 31, 1985, or after both spouses are domiciled in Wisconsin, whichever is later. This authorization is made subject to the innocent-spouse provisions in subsections 71.10(6)(a), (b), and (6m). Wis. Stat. § 71.80(3m)(a); *see also* Wis. Stat. § 71.10(6m).

Proportionate crediting of overpayments, credits, or refunds from a joint return is also authorized if the spouse incurred the liability to the

DOR either before January 1, 1986, or before marriage, whichever is later. This applies to debts to the state or certain delinquent child support obligations that are not deemed to be incurred in the interest of the marriage or the family and also to amounts that are subject to the innocent-spouse or former-spouse reallocation rules in subsections 71.10(6)(a), (b), and (6m). Wis. Stat. § 71.80(3m)(b). Only the proportion that the Wisconsin adjusted gross income that would have been the spouse's property but for the marriage bears to both spouses' total adjusted gross income can be offset. *Id.* These provisions effectively create debt-satisfaction rules similar to those found in subsections 766.55(2)(b) and (c) and eliminate the necessity for the DOR to credit the overpayments, credits, and refunds in accordance with the marshalling provisions of section 766.55(2)(d). *See supra* § 9.36 (discussion of satisfaction of tax obligations under section 71.91(3)).

The offset provisions in section 71.80(3m) require the DOR to provide notice to the spouses of its intent to use the crediting process. Wis. Stat. § 71.80(3m)(c). Within 20 days after the date of the notice, the nonobligated spouse is allowed to prove by clear and convincing evidence that the overpayment, credit, or refund is his or her nonmarital property. Wis. Stat. § 71.80(3m)(intro.). If a spouse does not receive the requisite notice, and if the DOR incorrectly credits the overpayment, refund, or credit, a claim for refund may be filed within two years after the date of the offset that was the subject of the notice. Wis. Stat. § 71.80(3m)(d).

It is not clear what effect a marital property agreement may have on the DOR's debt-satisfaction powers under section 71.80(3m) if the agreement is filed with the DOR before assessment of the liability. It is arguable that the marital property agreement should control, in the absence of a specific statutory provision to the contrary. On the other hand, it can also be argued that because section 71.75(6) limits the ability of a marital property agreement to affect the ownership of a refund or overpayment, that section similarly limits the ability of an agreement to vary the DOR's power to apply a refund or overpayment against the liability of either or both spouses under section 71.80(3m).

The DOR may not apply a refund otherwise due an individual against any tax liability owed to the DOR by the individual or by a former spouse of the individual if (1) a judgment of divorce apportions that liability to the former spouse, and (2) the individual includes with his or

her tax return a copy of the divorce judgment. *See* DOR Publ'n 109, *supra* § 9.6, at 16.

5. Joint Estimated Tax Payments [§ 9.42]

Spouses may jointly pay estimated taxes unless they have different taxable years or unless one spouse is a nonresident alien. Wis. Stat. § 71.09(16). If the couple pays jointly, the provisions of section 71.09 otherwise applicable to individuals become applicable to the couple jointly. If a married person files a separate return for a taxable year for which a joint payment was made, the payments may be allocated between the spouses as they choose. If they do not agree on an allocation, the DOR will allocate the payments in proportion to the taxes shown on their separate returns. Thus, as a matter of administrative convenience, either the spouses or the DOR may allocate estimated tax payments regardless of whether the payments are made with marital property or individual property funds.

Section 71.09(13) adopts the federal system for determining the amount of estimated tax required to be paid to avoid the penalty for underpayment of estimated tax. Basically, the amount required to be paid by each installment due date is 25% of the lower of (1) 90% of the tax due for the taxable year, or (2) the tax due for the preceding year.

6. Miscellaneous Procedural Provisions [§ 9.43]

The Wisconsin income tax law includes a number of procedural provisions that are designed to assist in the administration of the joint return filing provisions. For example, under section 71.74(11), if married persons have filed a joint return, a notice of additional assessment may be a joint notice, and a notice served on one spouse is proper notice to both spouses. If the spouses have different addresses when the notice of additional assessment is served, and if either spouse notifies the DOR in writing of those addresses, the DOR is required to serve a duplicate of the original notice on the spouse who has the address other than the address to which the original notice was sent, as long as no request for a redetermination or a petition for review has been commenced or finalized. Redetermination and appeal rights for the spouse who did not receive the original notice begin upon the service of a duplicate notice. *Id.* Under sections 71.74(8) and 71.88(1)(b), notices

to spouses regarding the determination or redetermination of a claim under the homestead credit, married persons' credit, and farmland preservation credit statutes must conform to the notice requirements of section 71.74(11).

With respect to petitions to the DOR for redetermination of an assessment, or appeals to the Wisconsin Tax Appeals Commission, the definitions of *person feeling aggrieved* and *person aggrieved* are found in section 71.87. They include the spouse of a person against whom an additional assessment was made or who was denied a claim for refund for a taxable year for which a separate return was filed. They also include either spouse for a taxable year for which a joint return was filed or could have been filed. This is appropriate, considering the family-purpose nature of Wisconsin income tax obligations under section 71.91(3). Under section 71.88(1)(a), a petition or appeal by one spouse is a petition or appeal by both. The requisite notification to the spouses that they may forestall the accrual of additional interest by depositing the amount of an additional assessment will be made jointly to the spouses, unless different addresses for the spouses are furnished to the DOR in writing. Wis. Stat. § 71.90(1).

In situations in which taxpayers report less than 75% of the net income properly assessable, the six-year statute of limitation in section 71.77(7) applies, rather than the normal four-year statute. The minimum threshold for making an assessment on a joint return under the extended period is \$200 of taxable income.

The confidentiality rules in section 71.78(4)(k) provide that a spouse or former spouse of a taxpayer may request and receive information from a return (or a claim for credit) filed by the taxpayer. This exception applies in only the following two circumstances: (1) the spouse or former spouse making the request may be liable for, or his or her property is subject to, a collection action with respect to a delinquency relating to the return or claim for credit; or (2) the DOR has issued an assessment or denial of claim to the spouse or former spouse with respect to the return or claim. Such disclosure is appropriate because tax obligations are classified as family-purpose obligations. Therefore, the marital property of a spouse or former spouse may be subject to satisfaction of the tax liability or the liability for the tax obligation of the other spouse may be assigned by court decree under chapter 766 or 767. Under section 71.78(4m), the DOR is permitted to disclose to the spouse or former spouse of a person who has filed a return or claim for credit

whether an extension for filing the return or claim was obtained, the extended due date, and the date on which the return or claim was actually filed with the DOR.

The Wisconsin income tax law also includes several procedural provisions designed to permit the DOR to make assessments in the alternative against married persons. Properly allocating income and assessing taxes are particular problems when the spouses are separated and filing separate returns in the year when the spouses are divorced. *See supra* §§ 9.5, .6. If the DOR is compelled to proceed against spouses sequentially, by the time the facts and law applicable to assessment of one spouse have been determined, the expiration of the statute of limitation may bar assessment of tax on income properly allocable to the other spouse. The innocent-spouse provision for married persons filing separate returns in section 71.10(6)(b) adds another complicating factor. *See infra* § 9.46. Accordingly, section 71.74(9) provides that if the DOR determines that liability for Wisconsin income tax exists and that more than one person may be liable, the DOR may assess the entire amount to each person, specifying that it is assessing in the alternative. Similarly, section 73.01(4)(i) permits the hearing of appeals from assessments in the alternative on a combined docket basis.

L. Wisconsin Income Tax: Separate Return Filing by Married Persons [§ 9.44]

1. Separate Returns [§ 9.45]

Although the filing of a joint return will generally provide significant tax benefits to a married couple, they are free to file separate Wisconsin income tax returns. For married persons filing separately, the Wisconsin treatment of deductible expenses allowed in the computation of the itemized deductions credit under section 71.07(5) is the same as the federal treatment of these deductions. DOR Publ'n 113, *supra* § 9.6, at 19. See section 9.6, *supra*, for a discussion of the federal treatment. Generally, expenses incurred to earn or produce marital property income are divided equally between the spouses. *Id.* Expenses incurred to earn or produce individual property income are allocated to the spouse who generates or receives the income, provided that spouse paid the expenses from his or her individual property. *Id.* at 20. Expenses that are not attributable to any specific category of income, such as medical expenses

or charitable contributions, are deductible by the spouse who pays them. If these personal deductions are paid from marital property funds, however, then the amounts are divided equally between the spouses. *Id.*

If married persons file separate returns for a taxable year for which a joint estimated tax payment was made, the estimated tax payment may be allocated between the spouses as they choose, but if they do not agree on an allocation, the DOR will allocate payment to each spouse on the basis of the ratio of taxes shown on their separate returns or pursuant to default assessment under section 71.74(3). Wis. Stat. § 71.09(16). If either spouse makes an estimated tax payment separately, no part of the payment may be allocated to the other spouse. *Id.* These allocation rules are adopted for administrative convenience and without regard to whether the estimated tax payments were made with marital property or individual property funds.

Unlike federal law, section 71.03(2)(m)1. provides that if the spouses have filed a joint return for a taxable year, they may file separate returns if they do so on or before the last day prescribed by law for timely filing of the return of either spouse. If a husband and wife change from a joint return to separate returns within the prescribed time, the tax paid on the joint return is allocated between them in proportion to the tax liability shown on each separate return. Wis. Stat. § 71.03(2)(m)2. A separate return may not be filed under this section unless the amount of tax shown on that separate return is paid in full on or before the date when the separate return is filed. Wis. Stat. § 71.03(2)(m)5.

In the taxable year in which one or both spouses die, either the surviving spouse or the decedent's personal representative may file a separate return after a joint return has been filed either by the surviving spouse or by the personal representative and the surviving spouse. Wis. Stat. § 71.03(2)(m)3. The time allowed the personal representative to disaffirm the previously filed joint return by filing a separate return does not establish a new due date for the return of the deceased spouse. Wis. Stat. § 71.03(2)(m)4.

The special provisions of I.R.C. § 66(a), which under certain circumstances allow separated spouses to report without regard to state community property laws the income earned by each, do not apply for Wisconsin income tax reporting purposes (the requirements of I.R.C. § 66(a) are discussed in section 9.5, *supra*). Wis. Stat. § 71.05(10)(f); DOR Publ'n 113, *supra* § 9.6, at 10. Consequently, while spouses who

are living apart may file separate federal returns reporting their income without regard to most of the Act's ownership principles (assuming that they meet the criteria established under I.R.C. § 66(a)), they cannot report their income in this fashion when filing their Wisconsin separate returns. For Wisconsin income tax reporting purposes, the spouses must report their respective shares of income on the basis of the marital property ownership principles established under the Act unless the specific relief provisions for innocent spouses filing separate returns apply. *See* Wis. Stat. § 71.10(6)(b) (discussed in section 9.46, *infra*).

Under section 71.64(1)(c), withholding taxes collected from “marital income” are to be allocated between the spouses in the same manner that the income is allocated or would be allocated. The term *marital income* is not defined, and thus it is not known whether it refers only to income classified as marital property under section 766.31(4). This provision apparently is in response to the concern that one-half of the earned income of an employee spouse may be allocated to a divorcing nonemployed spouse through application of section 766.31(4) and corresponding rules of taxation, while the employee spouse could claim all the withholding as a credit against his or her tax on the other half of the income. This would leave the nonemployed spouse with a tax liability and no share of the withholding taxes to credit against it. Meanwhile, the employee spouse might actually receive a refund by virtue of having all the withholding credited to him or her. *See* section 9.4, *supra*, for further discussion of the federal rules applicable to filing of separate returns by married persons.

The DOR's views on the subject of the filing of separate returns by spouses and former spouses is set forth in DOR Publ'n 109, *supra* § 9.6. The DOR suggests that spouses filing separate returns should each attach a copy of the worksheet included in the back of DOR Publication 109 to show how each computed the income, deductions, and credits he or she is reporting. *See also* DOR Publ'n 113, *supra* § 9.6, at 5.

2. Liability; Innocent-spouse Provisions [§ 9.46]

Wisconsin does not follow the special federal tax rule found in I.R.C. § 66(a) for spouses “living apart all year.” Although the DOR proposed that a similar Wisconsin rule be adopted, the Legislature's Special Committee on Marital Property Implementation rejected this approach because the Act applies to spouses until dissolution of the marriage. *See*

DOR Publ'n 113, *supra* § 9.6, at 13. Instead, a much broader innocent-spouse statute, section 71.10(6)(b), which is based on the federal rules contained in I.R.C. § 66(b) and (c), was adopted in Wisconsin for spouses filing separately. See section 9.3, *supra*, for a discussion of the federal innocent-spouse provisions.

With respect to unreported marital property income, section 71.10(6)(b) provides that the DOR may not apply chapter 766 in assessing a taxpayer if the taxpayer failed to notify his or her spouse about the amount and nature of the income before the due date (including extensions) for filing a return for the taxable year in which the income was derived. Under such circumstances, the marital property income cannot be divided equally between the spouses. Instead, the DOR must include all the marital property income in the gross income of the taxpayer who failed to disclose and must exclude all of that income from the gross income of the taxpayer's spouse. The taxpayer's spouse who files a separate return under these circumstances may be relieved of liability for the tax, interest, and penalties with regard to the unreported marital property income in the manner specified in I.R.C. § 66(c). In addition, subsections 71.05(10)(f), (g), and (h) require appropriate adjustments to the federal adjusted gross income of a spouse filing separately to reflect the inapplicability of I.R.C. § 66(a), the applicability of the Wisconsin innocent-spouse provisions contained in section 71.10(6)(b)–(d), and any other differences between the treatment of marital property income for federal and Wisconsin income tax purposes. DOR Publ'n 113, *supra* § 9.6, at 12.

Under section 71.10(6)(b), the burden is placed on the spouse receiving the income to notify the nonrecipient spouse about the amount and nature of marital property income. *Id.* If the nonrecipient spouse is not notified by the due date, including extensions, for filing the recipient spouse's tax return, the nonrecipient is an innocent spouse with respect to that marital property income. *Id.* In the case of divorce, if the innocent-spouse rule applies, the DOR may assess only the recipient spouse, even if the couple's divorce decree provides that each spouse is liable for one-half of the couple's total tax liabilities. *Davis v. Wisconsin Dep't of Revenue*, [1998–2000 Transfer Binder], St. Tax. Rep. (CCH) ¶ 400–422 (Wis. Tax App. Comm'n 1999).

It appears that these requirements will be strictly construed. In *Bennett v. Wisconsin Department of Revenue*, [1986–1990 Transfer Binder] St. Tax Rep. (CCH) ¶ 203-105 (Wis. Tax App. Comm'n 1989),

both spouses had filed for and received extensions to file their 1986 federal returns, first to August 15, 1987, and then to October 15, 1987. The wife notified the husband of her 1986 earnings, withholding, and deductions by certified letter in July 1987. In September 1987, she filed her 1986 Wisconsin income tax return, reporting all her wages, interest income, and itemized deductions and none of her husband's income or deductions. On October 13, 1987, she was personally served with information concerning her husband's 1986 earnings, investment income and losses, and itemized deductions. Subsequently, the DOR assessed the wife for additional income taxes and interest under the provisions of section 71.74(9) (formerly section 71.11(21)(f)), which permits assessments in the alternative. The wife petitioned for reconsideration, raising the question whether the husband's notification regarding his marital property income two days before the extended due date for filing returns was timely and proper under section 71.10(6)(b) (formerly section 71.11(2m)). The Wisconsin Tax Appeals Commission concluded that the due date for filing the return is also the statutory due date by which one spouse is obligated to notify the other. Accordingly, the notifications by both the wife and the husband were timely, even though the husband's notification was received after the wife had filed her return. Consequently, both spouses were required to report one-half of their combined marital property income. Based on the commission's decision, it appears that a spouse's practical difficulty in using the proffered information to file a timely return is not sufficient to obtain innocent-spouse status.

Section 71.10(6)(b) does not specifically require the recipient spouse to notify the nonrecipient spouse for income tax purposes. If the recipient spouse does not provide notification about the nature and amount of marital property income over which he or she had control, the penalty is that the recipient spouse must report all of that marital property income as his or her own income. DOR Publ'n 113, *supra* § 9.6, at 13. Thus, failure to notify results in treatment similar to that provided in the federal "living apart all year" rule of I.R.C. § 66(a). *Id.* By not notifying, each spouse would be an innocent spouse with respect to the other's marital property income. *Id.*

In addition, the statute does not specify what constitutes adequate notification. *Id.* However, the DOR suggests that notification by certified mail, return receipt requested, should be adequate for purposes of the statute. *Id.* at 12. The DOR also indicates that a notice containing only a total dollar amount of income will probably be inadequate, since

the nonrecipient spouse will not know how to report it. *Id.* Further, if the recipient spouse fails to notify the nonrecipient about expenses, deductions, and withholdings relating to marital property income, the DOR may conclude that no notification took place and that the recipient spouse must report all the marital property income. *Id.* This stems from the requirement of section 71.01(16) that certain negative income items be allocated in the same manner as the income to which they relate (*see supra* § 9.36) and also from the similar rule in section 71.64(1)(c) pertaining to withholding (*see supra* § 9.45). DOR Publ'n 113, *supra* § 9.6, at 12.

A question may arise as to whether the disclosure of income in divorce proceedings constitutes adequate notification for purposes of the Wisconsin innocent-spouse statute. *Id.* at 18. In the absence of court decisions, the DOR has declined to provide any guidance and has suggested that the best solution is for the spouses to agree whether or not they will notify each other of the amount and nature of their marital property income. *Id.*

Whenever it is apparent to the DOR that there is a dispute between the spouses as to whether proper notification has occurred, it will issue assessments to both spouses in the alternative. *Id.* at 14. These assessments may reflect more than the total income of both spouses. *Id.* For example, if the recipient spouse reports one-half of the marital property income from his or her earnings or investments and the nonrecipient spouse fails to report the other half, the recipient spouse will be assessed tax on 100% of the marital property income he or she received (in effect denying that proper notification occurred). The nonrecipient will be assessed tax on one-half of the recipient's marital property income (in effect denying that spouse's claim to be an innocent spouse). *Id.* Upon final determination of the proper allocation and reporting of income, the DOR will adjust either or both spouses' incomes, expenses, and deductions, as appropriate. *Id.*

Under section 71.10(6m), innocent-spouse protection may also be applied to former spouses, whether or not they are remarried, who are filing a return for a period covering the former marriage. The rules for satisfaction of marital tax obligations under section 71.91(3) treat the liability of the noninnocent spouse as a nonfamily-purpose obligation. *See supra* § 9.36.

A chart comparing the differences between federal and Wisconsin innocent-spouse treatment is set forth in DOR Publ'n 113, *supra* § 9.6, at 14.

3. Refunds and Overpayments [§ 9.47]

Section 71.75(8) specifically states that a refund payable on the basis of a separate return must be issued to the person who filed the return. Under section 71.75(6), a claim for refund or credit must be signed by the spouse who filed the separate return. Thus, it is not possible for married persons filing separate returns to credit all or part of the overpayment of one spouse against the tax liability of the other.

Section 71.80(3) authorizes the DOR to presume that any overpayment, homestead or farmland preservation credit, or refund on an individual or separate return is the nonmarital property of the filer, all of which may be credited against any tax liability, debt to the state under section 71.93, or delinquent child-support obligation under section 49.855 incurred by the filer before, during, or after a marriage. The filer's spouse or former spouse may file a claim for refund of amounts so credited if the spouse or former spouse can prove by clear and convincing evidence that all or part of the overpayment, credit, or refund was nonmarital property of the nonobligated spouse. Such a claim for refund must be filed within two years after the crediting by the DOR.

4. Separate Estimated Tax Payments [§ 9.48]

At least by implication, section 71.09(16) makes clear that a married person may make separate estimated tax payments. The final sentence of this subsection states that if either spouse pays estimated tax separately, no part of the payment may be allocated to the other spouse.

M. Wisconsin Income Tax: Gain or Loss Transactions Between Spouses [§ 9.49]

Wisconsin's income tax system has been federalized, in the sense that the taxable income of individuals is derived under section 71.01(4) from the definitions of federal taxable income and federal adjusted gross income. Accordingly, all of the nonrecognition rules encompassed in

I.R.C. § 1041 apply for purposes of determining the Wisconsin income tax treatment of transactions between spouses. *See supra* § 9.7.

N. Wisconsin Income Tax: Basis-adjustment Rules for Marital Property Assets [§ 9.50]

The Wisconsin equivalent of I.R.C. § 1014(b)(6) (*see supra* § 9.24) is found in section 71.05(10)(e). The Wisconsin provision relates generally to modifications of Wisconsin adjusted gross income for adjustments to basis when the value of property acquired from a decedent is different for federal estate tax purposes and Wisconsin estate tax purposes.

➤ **Comment.** For a brief discussion of the current uncertainty regarding estate tax law, see the “Note to Readers” accompanying chapter 10, *infra*.

With respect to deaths of Wisconsin married persons occurring after 1991, the federal and the Wisconsin basis of assets acquired from a decedent normally will be identical because the Wisconsin inheritance tax was replaced, effective January 1, 1992, with a “pick-up” estate tax based on the federal estate tax credit for state death taxes. Wis. Stat. § 72.02. *But see* Wis. Stat. § 71.02(11m) (decoupling Wisconsin’s estate tax from the federal estate tax effective until December 31, 2007, and allowing the federal estate tax credit for state death taxes to be computed for Wisconsin estate tax purposes under the federal estate tax law in effect on December 31, 2000). Because differences between the federal and the Wisconsin basis were possible under the former Wisconsin inheritance tax law, sections 72.01–.35 (1985–86), the modification adjustments in section 71.05(10)(e) will continue to be relevant with respect to dispositions of property acquired from a decedent before 1992. Such modification adjustments could also become more relevant in the future if Wisconsin chooses to reinstate to maintain the independent estate tax system it maintained from 2002 through 2007. For a comprehensive discussion of the Wisconsin estate tax that was in effect for the tax years 2002–07, see Michael W. Wilcox, *Wisconsin’s New Estate Tax*, Wis. Law., Dec. 2001, at 10.

Under section 71.05(10)(e), if at the time of death at least 50% of the marital property assets held by the decedent and the decedent’s surviving spouse are includible for purposes of computing the federal estate tax on

the decedent's estate, all the decedent's assets (of whatever classification) and all of the surviving spouse's marital property assets are treated as property includible for Wisconsin death tax purposes and receive a basis adjustment. Section 71.05(10)(e) makes clear that while Wisconsin death tax values control in making basis determinations, property that passed to a spouse (and thus was exempt from inheritance tax under section 72.15(5) (1985–86)) will be deemed includible for Wisconsin death tax purposes, but property subject to the former joint-tenancy exclusion under section 72.12(6)(b) (1985–86) will not be deemed includible.

Although the issue is not free from doubt, the legislature appeared to have recognized that assets owned in joint tenancy may have a marital property component and, if so, both halves of that component are entitled to a basis adjustment. Specifically, the 1985 Trailer Bill Supplemental Tax Note to section 71.05(1)(g) (1985–86) states: “Each half of the marital property component of a property owned exclusively by the spouses in joint tenancy receives a basis adjusted to the date-of-death value. Otherwise, only the decedent's share of the nonmarital property component of such a joint tenancy receives an adjusted basis.”

This note indicates that a marital property component may be created in a predetermination date asset owned in joint tenancy, despite the prevalence of the “incidents” of the joint tenancy under section 766.60(4)(a) in the event of a conflict. *See supra* §§ 2.253–.255. The result is that both parts of the marital property component, along with one-half of the joint-tenancy component, would receive a Wisconsin income tax basis adjustment at the death of one of the spouses.

The foregoing analysis may not agree with the position of the IRS or the DOR on the appropriate methodology for calculating the basis adjustment for marital property assets at the death of a spouse. *See* DOR Publ'n 113, *supra* § 9.6, at 30. However, assuming that the nonmarital property component of a predetermination date asset titled in joint tenancy can be traced, the normal mixing-reclassification rule of section 766.63(1) will be avoided, and no policy reason exists why the marital property component of the asset titled in joint tenancy should not be recognized and receive a full basis adjustment for both federal and Wisconsin income tax purposes.

O. Wisconsin Income Tax: Modifications and Transitional Adjustments [§ 9.51]

Among the modifications employed in arriving at Wisconsin taxable income that are relevant from a marital property perspective are those found in subsections 71.05(10)(f), (g), and (h). These include a modification to reflect the inapplicability of I.R.C. § 66(a) (federal innocent-spouse provision on income of spouses “living separate and apart,” *see supra* § 9.5); a modification to account for the different treatment of marital property agreements under section 71.10(6)(c); a modification to account for the different treatment that results under section 71.10(6)(d) when both spouses are not domiciled in Wisconsin for the entire taxable year; and a modification to account for the more liberal Wisconsin treatment of the separately filing innocent spouse under section 71.10(6)(b). Section 71.05(10)(h) also permits any other modifications (including those adopted by administrative rule) that are necessary to reflect any other differences between the treatment of marital income for federal income tax purposes and the treatment of such income under the Wisconsin income tax laws.

Another specific marital property related modification deals with treatment of excludable disability payments. Section 71.05(6)(b)4. makes it clear that if the spouses file a joint return and only one spouse is disabled, the maximum exclusion is either \$100 per week for each week that payments are received or the amount of the disability pay reported as income, whichever is less. This provision is designed to prevent both spouses from claiming the exclusion on the ground that the disability pay is a marital property asset. Moreover, only the disabled spouse who is divorced during a given taxable year may claim the exclusion. *Id.*

Section 71.05(6)(a)16. treats the court-approved exchange of former marital property interests between a surviving spouse and a distributee of the decedent spouse under section 857.03(2) as a nontaxable exchange for Wisconsin income tax purposes. Any loss recognized on such an exchange for federal income tax purposes is treated as a modification addition, *see* Wis. Stat. § 71.05(6)(a)16., and any gain recognized for federal income tax purposes in such an exchange is treated as a subtraction modification. Wis. Stat. § 71.05(6)(b)12. For basis-determination purposes, the exchange is treated as if each asset received in the exchange were acquired as a gift from the other party. Wis. Stat.

§ 71.05(12)(d); *see infra* § 12.178 (discussion of statutory requirements for court-approved property exchanges under section 766.31(3)(b)3.).

The modification provisions addressing an exchange between a surviving spouse and a distributee of the decedent spouse are apparently intended to avoid any uncertainties regarding the proper treatment of non-pro rata distributions of former marital property assets for federal income tax purposes. See section 9.20, *supra*, for a discussion of the federal income tax rules on this subject. If federal income tax law regarding non-pro rata distributions of former marital property assets between the surviving spouse and other distributees of the decedent spouse in fact characterizes these transactions as nontaxable exchanges, then the Wisconsin modifications should not be necessary. On the other hand, if federal income tax law characterizes these transactions as taxable exchanges, then the Wisconsin modifications are necessary to undo that result for Wisconsin income tax purposes.

P. Wisconsin Income Tax: Effect of Marital Property Agreements or Unilateral Statements [§ 9.52]

A number of specific provisions are included in the Wisconsin income tax statutes that diminish or negate the effect of marital property agreements under section 766.58 or unilateral statements under section 766.59 on the determination, assessment, or collection of income taxes. Section 71.10(6)(c) states, as a general proposition, that during any period that either or both spouses are not domiciled in Wisconsin, a marital property agreement or a unilateral statement under chapter 766 does not affect the determination of income that is taxable by Wisconsin, or the determination of the person who is required to report the income. Even for periods during which both spouses are domiciled in Wisconsin, a marital property agreement or unilateral statement is effective in the determination or reporting of income only if it is filed with the DOR before any assessment resulting from an audit is issued. The statute also requires the DOR to notify a taxpayer whose separate return is under audit that a marital property agreement or unilateral statement is effective only if it is filed with the DOR before any assessment is issued, and then only for any period during which both spouses are domiciled in Wisconsin. *Id.*

The DOR has stated that because it is not bound by a marital property agreement it has not received before issuing an assessment, spouses may

wish to send a copy of the agreement to the DOR when the agreement is executed. DOR Publ'n 113, *supra* § 9.6, at 16. The copy may be sent to the following address:

Wisconsin Department of Revenue
Specialized Services Unit
Mail Stop 5-144
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The DOR does not acknowledge the receipt of unsolicited agreements and does not review them. *Id.*

Section 71.10(6)(c) is intended to preclude the use of marital property agreements to shift otherwise taxable Wisconsin income to a spouse domiciled in another state. However, there are some problems with the statute. By its terms, it only circumscribes the effect of *marital property agreements* and does not appear to apply to marriage agreements between spouses entered into before the determination date that affect the property rights of either or both spouses. A marital property agreement is a creature of the Act, specifically section 766.58. The basic rule, set forth in section 766.03, is that the Act first applies to spouses upon their determination date, which, in the case of a nonresident married couple, will be the date on which both spouses are domiciled in Wisconsin. *See* Wis. Stat. § 766.01(5)(b). Thereafter, the Act continues to apply to the spouses “during marriage.” The term *during marriage* is limited to the period during which both spouses are domiciled in Wisconsin. It ends when one or both spouses are no longer domiciled in Wisconsin, at dissolution of the marriage, or at the death of a spouse. Wis. Stat. § 766.01(8). The Act ceases to apply when one of the spouses is no longer domiciled in Wisconsin. If the spouses have a premarital or postmarital agreement that is not a marital property agreement because it was executed at a time when the Act did not apply to them, it may fall outside the rather narrow language of section 71.10(6)(c).

A marital property agreement or unilateral statement under chapter 766 does not affect the requirements with respect to refunds or overpayments on a joint or separate return. Wis. Stat. § 71.75(6). Under section 71.75(8), a refund on a separate return is to be issued to the person who filed the return, while a refund payable with respect to a joint return is to be issued jointly to the spouses who filed the return.

A marital property agreement or unilateral statement also has no effect on the computation of “income,” “property taxes accrued,” or “rent constituting property taxes” for a person whose homestead is not the same as the homestead of his or her spouse. Wis. Stat. § 71.52(6), (7), (8). Similarly, a marital property agreement or unilateral statement under chapter 766 allocating income between spouses has no effect in computing the three-percent married persons’ credit on a joint return. Wis. Stat. § 71.07(6)(a).

A significant difference between the federal and Wisconsin treatment of marital property agreements is that, unlike the IRS, the DOR will recognize an agreement that allocates more than one-half of the marital property income to the nonearning spouse. DOR Publ’n 113, *supra* § 9.6, at 16. See sections 9.6 and 9.35, *supra*, for further discussion of the limitations placed on marital property agreements for federal income tax purposes.

A related issue involving the effect of marital property agreements is whether spouses, particularly spouses who are filing separate returns as the result of a divorce, may reclassify their income after the fact. Like the IRS, the DOR will not recognize a provision in a marital property agreement that attempts to retroactively reclassify income previously received, whether from marital property income to individual income or vice versa, and a court may also not order such a retroactive reclassification. DOR Publ’n 113, *supra* § 9.6, at 16, 18. This position finds support in a number of Wisconsin Supreme Court cases. See *Ladish Co. v. Department of Revenue*, 69 Wis. 2d 723, 233 N.W.2d 354 (1975); *Trepte v. Department of Revenue*, 56 Wis. 2d 81, 201 N.W.2d 567 (1972); *Webster v. Department of Revenue*, 102 Wis. 2d 332, 306 N.W.2d 701 (Ct. App. 1981). These cases hold that income taxes accrue as the events giving rise to them occur—that is, as the income is earned or generated.

For reasons discussed in section 9.35, *supra*, these precedents militate against spouses being able to retroactively reclassify income by marital property agreement to treat it differently than it would be treated under Wisconsin marital property law. This would preclude the use of divorce settlement agreements to alter the spouses’ respective income-reporting obligations for the portion of a tax year preceding the date of the divorce, if the recharacterization is contrary to ownership of the income under the Act. Conversely, a marital property agreement can have prospective effect on the classification of income for Wisconsin income tax purposes

for periods when both spouses are domiciled in the state, provided the agreement is filed with the DOR before an assessment is issued. *See* Wis. Stat. § 71.10(6)(c). Note that retroactive reclassification of income by marital property agreement is to be distinguished from the ability to reclassify the property into which the income has been invested. Reclassification of property clearly is permitted under sections 766.31(10) and 766.58(3)(a).

An issue may arise whether the DOR may collaterally attack on grounds of unenforceability a marital property agreement that it perceives as being unfavorable to it with respect to classifications for income tax or death tax purposes. Under section 766.58(6), only the spouse against whom enforcement is sought can raise defenses to enforceability. The rather limited language of section 766.58(6) appears to preclude such a collateral attack, unless it is shown that the agreement was a sham devised for fraudulent or illegal purposes.

Q. Wisconsin Income Tax: Minimum Tax on Tax-preference Items [§ 9.53]

The 6.5% Wisconsin minimum tax in section 71.08(1) applies to married couples filing jointly. Wis. Stat. § 71.08(2). Spouses who file a joint income tax return are required to file a joint minimum tax return, and are jointly and severally liable for the tax, interest, penalties, fees, additions to tax, and additional assessments. *Id.*

III. Transfer Tax Considerations [§ 9.54]

A. Federal Estate and Gift Tax: Generally [§ 9.55]

In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 [hereinafter the 2001 Act], which made extensive changes to the federal estate and gift tax regime. Under the 2001 Act, the federal estate tax exemption was scheduled to gradually increase to \$3.5 million in 2009. I.R.C. § 2010(c). The 2001 Act further provides for the repeal of the federal estate tax in 2010. The federal gift tax, however, is not repealed, and the federal gift tax exemption is limited to \$1 million.

➤ **Comment.** For a brief discussion of the current uncertainty regarding estate tax law, see the “Note to Readers” accompanying chapter 10, *infra*.

The 2001 Act also provides that beginning in 2010, after the estate tax has been repealed, the rules in I.R.C. § 1014 (including the full basis step-up for community property under I.R.C. § 1014(b)(6)) providing for a basis adjustment for property acquired from a decedent will be repealed. Instead, a modified carry-over basis system will take general effect. Under this new system, recipients of property transferred at a decedent’s death will generally receive a basis for such property equal to the lesser of the decedent’s adjusted basis in the property or the fair market value of the property on the date of the decedent’s death. The 2001 Act, however, does allow for a \$1.3 million exemption from the carry-over basis rules that may be allocated to increase (i.e., *step up*) the basis in assets owned by the decedent by such amount. In addition, the basis of property transferred to a surviving spouse either outright or as QTIP can be increased by an additional \$3 million. Thus, the basis of property transferred to a surviving spouse can be increased by a total of \$4.3 million. I.R.C. § 1022.

To meet budget guidelines, *all* the provisions of the 2001 Act, including the repeal of the federal estate tax, are scheduled to sunset after 2010, when the federal estate tax law will revert to what it was before the enactment of the 2001 Act. Accordingly, attorneys are advised to keep abreast of future federal legislation that either makes the estate tax repeal and carry-over basis system permanent or enacts some other form of permanent estate tax.

The following sections generally focus only on situations in which the treatment of community property under the federal estate and gift tax laws differs materially from the treatment presently accorded common law forms of property ownership by spouses.

B. Federal Estate Tax: Valuation [§ 9.56]

Under I.R.C. § 2031(a), the gross estate of a decedent is determined by including, to the extent required by the federal estate tax law, the value of all property owned by the decedent at the time of his or her death. The value of every item of property that is includible in the gross estate is its fair market value at the time of the decedent’s death, unless

the personal representative elects the alternate valuation method under I.R.C. § 2032, in which case the value is generally the fair market value at the alternate date. Treas. Reg. § 20.2031-1(b). For federal estate tax purposes, fair market value is defined as the price “at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.” Treas. Reg. § 20.2031-1(b).

After several favorable court decisions, the applicability of a minority-interest discount for a deceased spouse’s one-half community property interest in property included in the decedent’s gross estate has become relatively well settled. See *Estate of Bright v. United States*, 658 F.2d 999 (5th Cir. 1981); *Estate of Lee v. Commissioner*, 69 T.C. 860 (1978). Moreover, it is also now clear that the interests in property held by a surviving spouse and a marital trust do not need to be aggregated for valuation purposes, so long as the surviving spouse is not granted a testamentary general power of appointment with respect to the trust. See *Estate of Bonner v. United States*, 84 F.3d 196 (5th Cir. 1996); *Estate of Mellinger v. Commissioner*, 112 T.C. 26 (1999); *Estate of Nowell v. Commissioner*, No. 19056-96, 1999 WL 30927 (U.S. Tax Ct. Jan. 26, 1999); *Estate of Lopes v. Commissioner*, 78 T.C.M. (CCH) 46 (1999);. *But see Estate of Fontana v. Commissioner*, 118 T.C. 318 (2002) (holding that interests in closely held stock held by surviving spouse and marital trust must be aggregated for valuation purposes because surviving spouse held testamentary general power of appointment over marital trust); Field Serv. Advisory 200119013 (May 11, 2001).

A minority-interest discount will typically be sought in valuing closely held stock in cases in which the decedent’s voting interest in the corporation is such that he or she alone cannot compel the declaration of dividends, force a liquidation of the corporation, or otherwise control the governance of the corporation. The minority-interest discount reduces the ratably determined per-share value of the stock to reflect that a buyer of the stock acquires only an interest in the capital of the corporation, but lacks the ability to control the yield on that investment or to liquidate the stock purchased. Conversely, in situations in which a shareholder’s stock ownership interest is large enough to exert control over the declaration of dividends, liquidation, and corporate policy, that block of stock will often be viewed as worth more than its ratably determined per-share value and be subject to a control premium for valuation purposes.

The same type of valuation issues also apply to the valuation of limited partnership interests, which will typically qualify for a minority-interest discount as a result of the inability of limited partners to participate in the management of the partnership. General partnership interests, however, may be subject to a control premium because of the ability of general partners to manage and control the affairs of the partnership.

The minority-interest discount issue can be illustrated as follows in the Wisconsin marital property context: a husband and wife own 70% of the outstanding voting stock in a closely held corporation as marital property. The husband dies, and one-half of the marital property interest (i.e., 35% of the outstanding voting stock of the company) is included in his estate. Standing alone, this 35% interest is a minority interest, and it seems clear that if the willing buyer/willing seller test prescribed by the IRS valuation regulations (Treas. Reg. § 20.2031-1(b)) is used, a minority-interest discount should apply.

Two significant court decisions—*Estate of Lee* and *Estate of Bright*—have confirmed that taxpayers can claim a minority-interest discount under facts like those in the foregoing example. These cases overruled the long-standing position of the IRS that had rejected a minority-interest discount when the stock in a closely held corporation was owned by spouses or members of a harmonious family, and instead valued as a block all stock held by family members. Under the IRS position, instead of owning a 35% minority interest, a decedent in the above example would own half of a 70% controlling interest and would not be entitled to a minority-interest discount (and perhaps could even be subject to a control premium).

The former position of the IRS on this issue was stated in Revenue Ruling 81-253, 1981-2 C.B. 187, 188, as follows: “[O]rdinarily no minority-interest discount will be allowed with respect to transfers of stock among family members where, at the time of transfer, control (either majority voting control or de facto control) of the corporation exists in the family.” The rationale is that “where a controlling interest in stock is owned by family members, there is a unity of ownership and interest, and the shares owned by family members should be valued as part of that controlling interest.” *Id.*

In Revenue Ruling 93-12, 1993-1 C.B. 202, however, the IRS reversed its position by revoking Revenue Ruling 81-253 and stated that

it will follow *Estate of Bright* and *Estate of Lee* in cases involving a corporation with a single class of stock. Notwithstanding the family relationship of the donor, donee, and other shareholders, the IRS stated it would not aggregate the shares of the other family members with the transferred shares to determine whether the transferred shares should be valued as part of a controlling interest. Consequently, a minority-interest discount will not be disallowed solely because a transferred interest, when aggregated with interests held by family members, would be part of a controlling interest.

The discounting of fractional community property interests has also been applied to real estate. Specifically, in *Propstra v. United States*, 680 F.2d 1248 (9th Cir. 1982) (applying Arizona law), the court held that a fractional-interest discount was allowable for a decedent's one-half community property interest in real estate, because an undivided fractional interest in property typically will sell for less than the proportionate share of the fair market value of the whole. In *Propstra*, the IRS once again took the position that to qualify for the fractional-interest discount, the taxpayer must demonstrate that it is likely that the decedent's interest will be sold apart from the survivor's interest. The court, however, reconfirmed its rejection of this unity-of-ownership or family-attribution approach to valuation, noting that there was no direct congressional sanction for it. Accordingly, a fractional-interest discount should be available for any parcel of marital property real estate owned by a Wisconsin married couple because the ownership of such real estate is by definition fractionalized into equal shares between the spouses. *But see Estate of Young v. Commissioner*, 110 T.C. 297 (1998) (holding fractional-interest discount did not apply to a deceased spouse's interest in California real estate held in joint tenancy and not as community property, even when only one-half of value of real estate was included in decedent's gross estate because contributions of surviving spouse for other half of property could be traced).

Minority-interest valuation discount opportunities of the type discussed in this section can be expected to arise with respect to married Wisconsin decedents who own a marital property interest in stock of a closely held business, in a limited partnership, in real estate, or in other nonliquid assets. The estate of the first spouse to die should be entitled to a minority-interest or fractional-interest discount without being confronted with claims by the IRS of family attribution or unity of ownership.

Until recently, the IRS had also unsuccessfully attempted to apply an attribution or unity-of-ownership type theory to stock taxable in the estate of a surviving spouse, valuing as a single interest a block of stock owned outright by the surviving spouse (and includible in the spouse's estate under I.R.C. § 2033) and a block held in a QTIP marital trust for the benefit of the surviving spouse (and includible in the spouse's estate under I.R.C. § 2044). In four separate cases, however, the courts have rejected this position and instead ruled that interests held in a QTIP marital trust cannot be aggregated by the IRS for estate tax valuation purposes with interests owned outright by a surviving spouse at death.

This issue first presented itself in *Estate of Bonner*, in which the Fifth Circuit Court of Appeals rejected the aggregation theory put forth by the IRS. In this case, Bonner died owning a 62.5% interest in a ranch, a 50% interest in other real property, and a 50% interest in a pleasure boat. The remaining interests in these assets were owned by a QTIP marital trust that had been established for his benefit by his deceased wife. Bonner's estate applied fractional-interest discounts of 45% to both the interests owned by the marital trust and those owned by Bonner individually. The IRS disallowed the discounts, claiming that the undivided interests owned by Bonner and by the QTIP marital trust should be aggregated (or merged) for valuation purposes. When aggregated, Bonner's estate owned 100% of each of the three assets, thus making fractional-interest discounts unavailable and increasing the size of his taxable estate.

The court rejected the IRS's aggregation argument and concluded that the reasoning of *Estate of Bright*, which held that no family attribution should be applied in valuing undivided community property interests, also controlled in this instance. The court noted that Mr. Bonner did not control a 100% interest in the assets. Instead, he controlled only the fractional interest in each asset that he individually owned. The trustee of the QTIP marital trust controlled the balance of the assets. Furthermore, the terms of the trust, not Mr. Bonner, controlled the disposition of the assets held in the marital trust upon his death. Thus, the court reasoned that Mr. Bonner was not in the position of a hypothetical willing seller of 100% interests for valuation purposes, because he could not have voluntarily transferred such an interest in each asset. Accordingly, the court held that the "valuation of the assets should reflect that reality" and the IRS could not aggregate the QTIP marital trust assets with Mr. Bonner's own assets for valuation purposes.

The court also rejected the public policy argument put forth by the IRS that if the court allowed Mr. Bonner's estate to take a fractional interest discount, it would condone using QTIP marital trusts as a tax-avoidance technique. The court instead commented that public policy actually supported the estate's position because two transfers were essentially taxed upon Mr. Bonner's death. The first was the transfer by Mr. Bonner of the fractional interests he owned individually. The second was the transfer by his previously deceased wife of the fractional interests remaining in the QTIP marital trust that was completed at his death. Contrary to the IRS's claim that allowing the discounts would violate public policy, the court noted that public policy required that "each decedent should be required to pay taxes on those assets whose disposition that decedent directs."

Three subsequent Tax Court cases, all citing the *Bonner* case, have also refused to follow the IRS's aggregate approach. In *Estate of Mellinger*, the decedent's husband, the founder of Frederick's of Hollywood, left his community property interest in his publicly traded Frederick's stock, representing a 27.87% interest in the company, to a QTIP marital trust for the benefit of the decedent. At her death, the decedent's revocable trust also held an identical 27.87% interest in Frederick's stock representing her community property interest in the stock. The trustees of the marital trust and the revocable trust were the same. The decedent's estate tax return reported the 27.87% blocks held by the marital trust and the revocable trust separately and claimed a blockage discount for each block (to account for the fact that the size of each block was so large that it could not be liquidated without depressing the market). The IRS denied the discount and instead argued that the stock should be valued as an aggregate 55.74% controlling block and subject to a control premium.

In support of its position in *Estate of Mellinger*, the IRS argued that when the QTIP concept was passed by Congress in the form of I.R.C. § 2044, it did not intend to alter the estate tax treatment that would otherwise arise if a decedent left property outright to his or her surviving spouse. The Tax Court, however, rejected this argument and refused to value the stock held in the revocable trust and the marital trust as an aggregate block. The court observed that there was no congressional indication that section 2044 mandated identical tax consequences for a QTIP marital trust and an outright transfer to a surviving spouse. The court further concluded that section 2044 is an inclusion section only, and not a valuation section.

On the same day it issued the *Estate of Mellinger* decision, the Tax Court also decided *Estate of Nowell*, a case in which partnership interests were divided between two QTIP marital trusts and a revocable trust created by the surviving spouse. Significantly, the surviving spouse was granted a testamentary limited power of appointment over both marital trusts and in fact exercised the powers. Consistent with its analysis in *Estate of Mellinger*, the court concluded that the partnership interests in the revocable trust and the two marital trusts could not be aggregated by the IRS for valuation purposes.

The Tax Court also followed its decision in *Estate of Mellinger* in *Estate of Lopes*, which involved fractional interest discounts for real estate held in two separate trusts, the surviving spouse's revocable trust and a QTIP marital trust. Pursuant to a trust agreement between the decedent and her husband, the decedent's community property interest in 21 separate California ranch properties had been placed in a survivor's trust for her benefit, while her predeceased husband's community property interest in the properties had been placed in the marital trust. Following its decision in *Estate of Mellinger*, the court concluded that there was nothing in I.R.C. § 2044 or the accompanying legislative history indicating that Congress intended QTIP property that is included in a decedent's estate pursuant to I.R.C. § 2044 to be treated as if the decedent actually owned that property for aggregation purposes.

In Action on Decision 1999-006 (Aug. 30, 1999), the IRS gave up the fight on its aggregation theory and acquiesced to the Tax Court's decision in *Estate of Mellinger*. In its action on decision, however, the IRS cautioned that proper funding of a QTIP marital trust should reflect the discounted value of minority interests in closely held entities or fractional interests in real estate that are used to satisfy the bequest to the marital trust.

The rejection of the IRS's aggregation theory means that in structuring a married couple's estate before the death of one of the spouses, a very important strategy that should be taken into consideration is whether to use a bequest to a QTIP marital trust, rather than an outright gift to the surviving spouse, to take advantage of valuation discounts in the surviving spouse's estate for estate tax purposes. The discounting advantages that can be obtained by using a QTIP marital trust should be available, even if the surviving spouse is named as sole trustee of the marital trust, because of fiduciary duties inherent in the position of trustee and the surviving spouse's lack of ultimate disposition

of the trust assets upon his or her death. It appears that the surviving spouse can even be granted a limited testamentary power of appointment over the marital trust without negatively affecting the potential discount. If subsequent case law, however, were to hold that the surviving spouse serving as a trustee or the surviving spouse having a limited power of appointment would endanger the discount, the surviving spouse could always disclaim the power of appointment and resign as trustee.

➤ **Comment.** Significantly, the IRS's acquiescence in Action on Decision 1999-006 makes no reference to the surviving spouse's lack of control over the QTIP marital trust. Instead, the IRS simply states that "we agree with the Tax Court's opinion that closely held stock held in a QTIP trust should not be aggregated, for valuation purposes, with stock in the same corporation held in a revocable trust and includible in the decedent's gross estate." The Fifth Circuit's decision in *Estate of Bonner* discussed the surviving spouse's lack of control over the marital trust assets, but provided little insight as what terms could be included in the trust and still achieve a discount. The fact that the surviving spouse held and exercised a testamentary limited power of appointment in *Estate of Nowell*, and the omission of any reference to the control issue in the IRS's acquiescence to *Estate of Mellinger*, would seem to indicate that a discount should apply regardless of the terms of the QTIP marital trust or the degree of control left to the surviving spouse over the assets of the marital trust.

A recent field service advisory issued by the IRS also confirms that granting a surviving spouse a testamentary limited power of appointment over a QTIP marital trust will not cause aggregation to apply. Specifically, in Field Service Advisory 200119013 (May 11, 2001), the IRS advised that it would aggregate the interests held by a surviving spouse and a QTIP marital trust when the surviving spouse holds a testamentary *general* power of appointment over the marital trust. However, the IRS also acknowledged that the decedent in *Estate of Nowell* held a testamentary limited power of appointment and noted that the Tax Court did not take this power into account in finding that aggregation did not apply. The advisory goes on to instruct that even a broad limited power of appointment should not require aggregation, specifically stating the following:

We recognize that in some situations a limited power of appointment may afford the holder broad powers of disposition. However, the power holder

would not, in any event, be authorized to appoint the property to his or her estate (or his or her creditors) as is the situation presented with a general power.... Given the nature of a limited power, and the fact that a limited power is not recognized for estate and gift tax purposes as affording the power holder sufficient control to generate any transfer tax consequences when possessed or exercised, the court in *Estate of Nowell* was justified in treating a QTIP trust subject to a limited power in the same manner as a QTIP trust where the remainder beneficiaries are designated by the first spouse to die.... It does not follow that the same result should obtain in this case where the Decedent possessed a general power of appointment.

In *Estate of Fontana v. Commissioner*, 118 T.C. 318 (2002), the Tax Court agreed with the IRS's position that aggregation applies when the surviving spouse has a general power of appointment over the marital trust. Specifically, the court held that stock owned by the surviving spouse individually at death must be aggregated with stock held in a general-power-of-appointment marital trust for valuation purposes and that no discount applies. The court focused on the surviving spouse's ability to control the ultimate disposition of the stock held in the marital trust and concluded that such power was the equivalent of outright ownership for valuation purposes. Accordingly, the court reasoned that the general power of appointment made the case distinguishable from *Estate of Mellinger*, because the property in a QTIP marital trust is not subject to the surviving spouse's unrestricted power of disposition.

➤ **Comment.** The rejection of the aggregation theory means that the IRS may pay more attention, especially in community property states, to the values assigned to property at the first spouse's death. The concern of the IRS would be to ensure that appropriate discounts are applied to minority interests in closely held businesses and fractional interests in real estate, so that such interests are not overvalued in order to obtain an excessive step-up in basis for such interests at the first death. Alternatively, if it were determined that appropriate discounts were not applied at the first spouse's death the IRS might argue that a "duty of consistency" applies at the surviving spouse's death, which would require that the same valuation approach applying no discounts would have to be used in valuing property included in the surviving spouse's estate. Accordingly, careful consideration of applicable discounts should be taken into account when making valuation decisions for property included in the estate of the first spouse to die.

C. Federal Estate Tax: Special Use Valuation of Certain Farm and Closely Held Business Real Property

[§ 9.57]

Under I.R.C. § 2032A, real estate used for farming or in a closely held business is subject to special valuation rules for estate tax purposes. A specific provision in I.R.C. § 2032A(e)(10) provides that if qualified real property for purposes of the special valuation rules is held by the decedent and his or her surviving spouse as community property, the interest of the surviving spouse must be taken into account to the extent necessary to provide a result that is consistent with the result that would have been obtained if the property had not been community property.

Revenue Ruling 83-96, 1983-2 C.B. 156, interpreted the purpose of this provision as ensuring the same special-use-valuation treatment for qualified community property as that accorded to qualified property owned in a common law jurisdiction. The revenue ruling pointed out that the result is achieved by treating a decedent's community property interest as though owned by the decedent as an individual. Accordingly, the decedent's one-half community property interest is treated as analogous to a common law decedent's interest in a tenancy in common between the spouses, or a tenancy by the entireties. The revenue ruling pointed out that this treatment applies regardless of the actual amount a spouse contributes toward acquisition of the qualified real estate. Moreover, the entire-value-reduction limitation in I.R.C. § 2032A(a)(2) (and not merely one-half) would be permitted against the community property interest. Thus, the decedent's one-half interest is includible in the gross estate, and the full-reduction-limitation is available against that interest.

The special rule for community property provided for under I.R.C. § 2032(A)(e)(10) is important in Wisconsin for federal estate tax purposes, because only one-half of qualifying marital property real estate used in farming or for a closely held business will be includible in the adjusted value of the gross estate for purposes of determining whether special use valuation is available.

In Technical Advice Memorandum 8926002 (June 30, 1989), the IRS advised that a surviving spouse who is not the devisee of the decedent's community property interest in special-use-valuation property is not required to execute a tax-recapture agreement with respect to the

property in a community property jurisdiction. The ruling involved a decedent who willed his community property interest in a ranch to his son and grandson. Other assets were left to his wife. Because the wife was not the devisee of the decedent's community property interest, the ruling indicated that it was not necessary for her to execute the tax-recapture agreement required under I.R.C. § 2032A(d). As a tenant in common with the decedent's estate following his death, the surviving spouse did not have an interest in the decedent's former community property interest that was subject to special-use valuation. Accordingly, it was sufficient that the decedent's son and grandson executed the tax-recapture agreement. This rule also would apply in Wisconsin for special-use valuation of a decedent's marital property interest in real estate used for farming or in a closely held business.

D. Federal Estate Tax: Gross Estate [§ 9.58]

Neither the Internal Revenue Code nor the Treasury regulations contain specific provisions for the estate taxation of community property. Accordingly, only one-half of the value of each item of community property is includible in a deceased spouse's gross estate under the general provisions of I.R.C. § 2033, since that is the property interest owned by the decedent. Wis. Stat. § 766.31(3); *Lang v. Commissioner*, 304 U.S. 264 (1938). This rule holds true even in cases in which a surviving spouse acquiesces to the deceased spouse's attempt to dispose of the survivor's interest in community property, and permits his or her one-half of the community property assets to pass under the will or trust of the deceased spouse in a forced-election estate plan. The rule also holds true when a decedent's will authorizes the personal representative to enter into an agreement with the decedent's spouse providing for a division of the community property assets that is not pro rata but equal in total value. Tech. Adv. Mem. 8505006 (Oct. 19, 1984).

The treatment of Wisconsin deferred marital property for federal estate tax purposes has been discussed in detail in conjunction with the full-adjustment-in-basis rule. *See supra* § 9.27. The augmented deferred marital property elective right in section 861.02 grants a surviving spouse the right to elect up to one-half of the value of certain defined predetermination date assets owned by the deceased spouse that would have been marital property assets had the assets been acquired after the determination date; provided these elective rights are conditional on the survivorship of the electing spouse. The decedent's ownership of

deferred marital property assets is not affected until his or her death occurs and an election is made by the surviving spouse. Accordingly, the full value of deferred marital property assets will be included in the gross estate of the owner spouse. *See Estate of Sbicca*, 35 T.C. 96 (1960) (California quasi-community property was fully includible in deceased owner's gross estate). Similarly, since the interest of a nonowner in deferred marital property assets is merely an elective right that does not ripen until the death of the owner spouse, no portion of such assets are includible in the estate of a nonowner spouse who predeceases the owner.

For purposes of preparing the deceased spouse's federal estate tax return (Form 706), the marital property interests of the deceased spouse, valued at one-half of the total value of each item of property, should simply be listed like other property on Schedules A through I, as appropriate. The treatment of one-half of each item of property as belonging to the decedent is mandated by sections 861.01 and 766.31(3). For example, if the first spouse to die owned a marital property interest in 100 shares of Microsoft stock, the appropriate entry on Schedule B of the federal estate tax return would be as follows:

An undivided one-half (½) marital property interest in 100 shares of Microsoft Corp. common stock

and not

50 shares of Microsoft Corp. common stock.

In preparing federal estate tax returns, the preparer must be aware of the presumption in subsections 766.31(1) and (2) that all property of a Wisconsin married couple is marital property and of the related rule in section 766.63(1) that mixed property is reclassified as marital property unless the nonmarital portion can be traced. These statutory provisions require that the personal representative classify assets as marital property unless the contrary can be demonstrated.

To achieve a full basis adjustment for both the decedent's and the surviving spouse's one-half share of community property under I.R.C. § 1014(b)(6), at least one-half of the whole of the community interest in the property must be includible in determining the value of the decedent's gross estate for federal estate tax purposes. Because of the obvious advantages of the full basis adjustment in reducing capital gains

taxes on future dispositions of appreciated assets, Wisconsin fiduciaries may be tempted simply to rely upon the presumption in section 766.31(2) and treat all assets of the first spouse to die as marital property. Such a strategy, however, is inappropriate. In the context of joint-tenancy property under prior law, when inclusion in the decedent's gross estate depended on the amount of consideration for the purchase price furnished by the decedent, the tax court held that proof of contribution cannot be withheld by the survivor to purposely include part or all of the property in the decedent's gross estate to receive a stepped-up basis. *See, e.g., Madden v. Commissioner*, 52 T.C. 845 (1969), *aff'd*, 440 F.2d 784 (7th Cir. 1971). Similarly, evidence of predetermination date acquisition, acquisition with assets other than marital property, acquisition by gift or inheritance, or similar facts demonstrating a classification as other than marital property must be considered by Wisconsin fiduciaries.

It should be kept in mind that the IRS is aware of this issue and may attempt to verify the classification of property included in a federal estate tax return as marital property when reviewing the return. Accordingly, Wisconsin fiduciaries filing federal estate tax returns should use reasonable diligence in attempting to establish the appropriate classifications of a married decedent's assets for purposes of preparing the return. In particular, assets that were demonstrably acquired before the spouses' determination date normally will not be classified as marital property, unless a marital property component arose through application of mixing and tracing principles, or unless the asset were reclassified as marital property by marital property agreement, gift, or other method sanctioned by the Act.

E. Federal Estate Tax: Transfers Within Three Years of Decedent's Death [§ 9.59]

Under I.R.C. § 2035(a), the gross estate of a decedent includes certain transfers that are not made for a full and adequate consideration and that are carried out within the three-year period ending on the date of the decedent's death. Among the transfers falling within this three-year recapture rule are transfers under life insurance policies on the life of the decedent with respect to which the decedent possessed incidents of ownership under I.R.C. § 2042. A series of cases have made it clear, however, that I.R.C. § 2035(a) will not apply to a life insurance policy insuring a decedent's life if the policy is owned by a spouse or a third

party and the decedent's only relationship to the policy is the direct or indirect payment of premiums. The courts have held that I.R.C. § 2035(a) will not apply in these situations because the decedent did not possess any incidents of ownership in the policy. *Estate of Perry v. Commissioner*, 927 F.2d 209 (5th Cir. 1991), *aff'd* 59 T.C.M. (CCH) 65 (1990) (holding that policy purchased by decedent's three sons within one year of his death with premiums paid by decedent was not includible); *Estate of Headrick v. Commissioner*, 93 T.C. 171 (1989), *aff'd*, 918 F.2d 1263 (6th Cir. 1990) (holding that policy owned by irrevocable insurance trust with premiums paid by decedent who died within three years of policy purchase was not includible); *Estate of Leder v. Commissioner*, 89 T.C. 235 (1987), *aff'd*, 893 F.2d 237 (10th Cir. 1989) (holding that policy purchased by decedent's wife within three years of his death with premiums paid directly by the decedent's wholly owned corporation was not includible).

Under section 766.61(3)(c), ownership and proceeds of a life insurance policy owned by one spouse on the other spouse's life are the individual property of the owner spouse, regardless of the classification of the property used to pay premiums. In *Estate of Leder*, the court relied on a similar rule in Oklahoma that the insured's payment of premiums does not, in itself, create in the insured any interest in the insurance policy. Without any incidents of ownership in the policy, the same result should apply in Wisconsin by virtue of section 766.61(3)(c) with respect to life insurance policies owned by one spouse on the other spouse's life.

F. Federal Estate Tax: Transfers with a Retained Life Estate [§ 9.60]

1. In General [§ 9.61]

Under I.R.C. § 2036(a), all property that a decedent transferred during his or her lifetime, but in which the decedent retained certain rights or interests for life, are included in the decedent's gross estate. Specifically, this provision reaches

the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust

or otherwise, under which he has retained for his life ... the possession or enjoyment of, or the right to the income from, the property.

Id. By its terms, the statute applies to both outright transfers and transfers in trust.

The corollary to unintended grantor problems for income tax purposes, discussed in section 9.34, *supra*, is the unintended retained interest for federal estate tax purposes.

➤ **Example.** A wife created an I.R.C. § 2503(c) minority trust for the benefit of a child, using assets thought to consist entirely of the wife's individual property, but in fact consisting partially of marital property. The husband is the trustee of the minority trust and has the power to accumulate or distribute the income to or for the benefit of the beneficiary.

Under I.R.C. § 2036(a), the husband's power to accumulate the income of the trust for the benefit of the child will constitute a use, possession, or other enjoyment as to the portion of the trust he is deemed to have transferred—that is, one-half of the marital property component. This component, plus the accumulated income thereon, will be included in the husband's estate unless the trust terminates or the husband resigns his position as trustee at least three years before the wife's death so that I.R.C. § 2035(a) is avoided. *See also Thompson v. United States*, 79-1 U.S.T.C. (CCH) ¶ 13,294 (C.D. Cal. 1979) (holding that extensive reserved powers over trust income resulted in inclusion in grantor's estate of one-half of corpus of trust created with community property).

Another example of the problem is found in *Estate of Hoffman v. Commissioner*, 78 T.C. 1069 (1982). In that case, the net income from all the community property subject to administration (and not just the decedent's half) was erroneously distributed to the residuary trust. The surviving spouse was a life income beneficiary of this trust, and the children took the remainder. The tax court held that the portion of the residuary trust represented by the over funding of probate income from the estate was includible in the surviving spouse's estate as a transfer with a retained life estate under I.R.C. § 2036(a).

2. Income Interest Arising by Statute [§ 9.62]

Texas, Louisiana, and Idaho are community property states with a “civil law” income rule that affords community treatment to income from separate property. *See supra* § 2.39. Wisconsin follows a similar rule, and section 766.31(4) treats the income from all property, including individual and predetermination date property, as marital property.

In community property states with an income rule of this kind, retained life estate problems can arise under I.R.C. § 2036(a) when gifts of income-producing marital property assets are made either in trust or outright by one spouse to the other, because at least part of the income interest in the gifted property may be deemed to be retained by the donor. This may be less of an issue in Wisconsin than elsewhere. First, the marital property interest in income from property is capable of being reclassified by marital property agreement, gift, conveyance, written consent with respect to life insurance, or unilateral statement. Wis. Stat. § 766.31(10). Furthermore, section 766.31(10) affirmatively states that if a spouse gives property to the other spouse and intends at the time of the gift that the property be the individual property of the donee spouse, the income from the property will also be the individual property of the donee spouse unless the donor spouse’s contrary intent regarding the classification of income is established. Absent evidence of a contrary intent on the part of the donor, the gift of property to the donee spouse should carry the income interest in the property with it, and the retained life estate rule of I.R.C. § 2036(a) will not come into play.

Application of I.R.C. § 2036(a) to situations in which a state law community property interest continued in income from property given to a spouse has been considered in a number of cases. *See Estate of Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir. 1980), *rev’g* 69 T.C. 227 (1977); *Estate of Castleberry v. Commissioner*, 68 T.C. 682 (1977). *Estate of Wyly* involved a husband and wife’s irrevocable gift of community property stock to a trust that provided income to the wife for life and a remainder interest to the couple’s grandchildren. *Estate of Castleberry* involved an outright lifetime gift of a husband’s one-half community property interest in certain municipal bonds to his wife. In both cases, the IRS sought to include a one-half community property interest in the transferred property in the gross estate of the deceased husband. In neither case had the deceased husband voluntarily retained any interest in the gifted assets. In fact, the donors in these cases did everything they could to “transfer the totality of their interest and control.” *Estate of*

Wyly, 610 F.2d at 1293. However, when these cases arose, state law conferred upon each donor spouse a virtually indestructible community property interest in the income from the separate property of the donee spouse. The question before the court was whether this income interest, which arose by operation of state law, amounted to a retained right to income for purposes of I.R.C. § 2036(a).

The court first noted that the Texas community property interest of a spouse in the income from the separate property of the other spouse is a “special community” that confers no management and control rights in the spouse who does not own the underlying property. It further noted that the nonmanaging spouse has only limited and inchoate rights to complain of fraud on his or her interest, or to seek an accounting of such income upon dissolution of the marriage if the income is used to improve the other spouse’s separate estate. The court contrasted these minimal remedies with the managing spouse’s absolute power to dispose of the principal asset itself. Accordingly, the court concluded that the community property interest that arose under Texas law in the income of the transferred property was “so limited, contingent and expectant that it does not amount to a ‘right to income’” within the purview of I.R.C. § 2036(a). *Estate of Wyly*, 610 F.2d at 1295.

In accord is *Estate of Deobald v. United States*, 444 F. Supp. 374 (E.D. La. 1977). *Estate of Deobald* involved an additional factor: Louisiana civil law permitted the donee spouse to declare all income from the gift to be the donee’s separate property, but the donee had not elected to do so. The donor, however, had taken all possible steps to divest himself of the gift.

In Revenue Ruling 81-221, 1981-2 C.B. 178, the IRS concurred with the interpretation of Texas law in *Estate of Wyly*. The revenue ruling noted that the income interest that arose in the donated property was not a general community interest subject to joint management and control. The right was inchoate and could be asserted only in the event of fraud and thus was a mere expectancy.

The foregoing analysis suggests that gift transfers between Wisconsin spouses should be documented to make sure that the right to receive future income is expressly included along with the underlying gifted property in the instrument making the gift, or in a memorandum memorializing the terms of the gift, so that the full weight of the income classification provisions in section 766.31(10) is available. The gift

documents should specifically be free of any language that could serve to establish a contrary intent on the part of the donor spouse to retain an interest in the income on the gifted property.

3. Forced-election and Voluntary-election Estate Plans [§ 9.63]

A *forced-election* estate plan of the kind described in section 10.181, *infra*, also has implications under I.R.C. § 2036(a). Under a forced-election estate plan, the deceased spouse in effect attempts to dispose of by will all of the community property assets (both the decedent's one-half and the surviving spouse's one-half), typically leaving the survivor with a life income interest in the whole. The deceased spouse provides that if the surviving spouse elects not to have this happen—that is, elects simply to take his or her one-half of the community assets outright—then the assets remaining subject to the decedent's will are disposed of as though the surviving spouse had predeceased. This effectively cuts the survivor entirely out of any interest in the deceased spouse's one-half of the community property (as well as the decedent's other property) if he or she elects against the will.

The surviving spouse's election to go along with the will means, in effect, that he or she gives up the remainder interest in his or her half of the community property assets in exchange for a life income interest in the decedent's one-half, a transaction that can have income tax consequences. *See supra* § 9.19. It also can have transfer tax consequences in situations in which the consideration received by the surviving spouse for giving up the remainder interest is inadequate. Because the surviving spouse has given up his or her half of the community property assets, but retained a life income interest in that half, this share of the community property assets will be brought back into his or her estate under I.R.C. § 2036(a), valued at the time of the survivor's death. The value of the one-half interest brought back into the survivor's estate is, however, subject to reduction under I.R.C. § 2043(a) for the value of the consideration received—that is, the present value of the life estate in the first spouse's one-half of the community property assets at the time of the exchange. *Estate of Christ v. Commissioner*, 480 F.2d 171 (9th Cir. 1973); *United States v. Gordon*, 406 F.2d 332 (5th Cir. 1969); *Estate of Vardell v. Commissioner*, 307 F.2d 688 (5th Cir. 1962); *Whiteley v. United States*, 214 F. Supp. 489 (W.D. Wash. 1963). For further discussion of the valuation of property includible in the survivor's

estate under I.R.C. § 2036(a), when the transfer with a retained interest is made for an inadequate consideration, see section 9.72, *infra*.

In *Gradow v. United States*, 11 Cl. Ct. 808 (1987), *aff'd*, 897 F.2d 516 (Fed. Cir. 1990), the issue was what portion of the surviving spouse's one-half interest in community property transferred to a trust created under her deceased husband's will should be taken into account in determining whether there was "adequate and full consideration in money or money's worth" under I.R.C. § 2036(a) for the life income interest she received in the husband's assets placed in the same trust. If the consideration was determined to be adequate, then I.R.C. § 2036(a) would not apply, and the community property interests transferred by the surviving spouse would not be includible in the surviving spouse's gross estate for federal estate tax purposes.

More specifically, the question was whether the consideration deemed to have been transferred by the wife should be measured by the value of her *remainder* interest in the community property (since she was retaining a life income interest in that property) or by the full, undiminished value of her one-half interest in the community property. The result in the case hinged on that determination, since the value of the life estate the surviving spouse received in the husband's assets was conceded to be lower than the value of her full one-half interest in the community property assets transferred to the trust but greater than the value of the remainder interest in those same assets. The court held that for the purpose of evaluating whether the surviving spouse's acquiescence in the forced election constituted full and adequate consideration within the meaning of I.R.C. § 2036(a), the consideration flowing from the surviving spouse consisted of the property that otherwise would have been included in her gross estate by virtue of her retention of a life estate—in other words, her full one-half interest in the community property and not just her remainder interest. Because the life estate the wife received was not adequate consideration to support the transfer of her full one-half interest in the community property to the husband's trust, the full value of the spouse's community property interest transferred to the trust was includible in her estate under I.R.C. § 2036(a). For a discussion of the IRS's approval of the valuation principles declared in *Gradow*, see Private Letter Ruling 8929046 (July 21, 1989).

The *Gradow* court's full-and-adequate-consideration analysis was harshly criticized by the Third Circuit Court of Appeals in *Estate of*

D'Ambrosio v. Commissioner, 101 F.3d 309 (3rd Cir. 1996), *rev'g* 105 T.C. 252 (1995). Reasoning that the *Gradow* analysis would make the sale of a remainder interest for full and adequate consideration within the meaning of I.R.C. § 2036(a) virtually impossible, the Third Circuit held that the sale of a remainder interest in property for an amount equal to its actuarial fair market value as of the date of sale will effectively remove the property from a decedent's gross estate for purposes of I.R.C. § 2036(a).

Although *Estate of D'Ambrosio* did not involve a widow's election, the Third Circuit did not hesitate to find that there is no reason why a court's analysis of a widow's election transaction should not compare the actuarial (date-of-election) value of the remainder interest transferred to the actuarial (date-of-election) value of the life estate received by the surviving spouse. The court went on to analyze in detail why a surviving spouse's sale of the remainder interest in his or her share of the community property for its actuarial fair market value would not be a tax-avoidance device as suggested by the *Gradow* court.

Applying its actuarial analysis, the *Estate of D'Ambrosio* court reasoned that whether the surviving spouse keeps the half share of community property or sells the remainder interest in the property for its actuarial fair market value, the same amount of property will be included in the surviving spouse's gross estate at death. According to the court, this result follows because if the surviving spouse's income or life interest is insufficient, he or she will have to invade principal or the consideration received for the remainder interest to the same extent. Accordingly, the court concluded there is no change in the date-of-death value of the surviving spouse's final estate, regardless of whether he or she elects against the deceased spouse's will or surrenders his or her share of the community property in return for a life interest in the whole.

Conversely, the *Estate of D'Ambrosio* court asserted that if the full value of the surviving spouse's one-half interest in the community property is included in his or her gross estate at death under I.R.C. § 2036(a), subject only to a reduction under I.R.C. § 2043(a) for the consideration received (i.e., the value of the life interest in the deceased spouse's estate), then all of the postsale appreciation on his or her share of the community property will be included in his or her taxable estate upon death. In fact, the court advised that the surviving spouse would in effect be double taxed, because the consideration received will also have appreciated and be subject to tax at its increased value.

The Fifth Circuit also analyzed *Gradow* in detail in *Wheeler v. United States*, 116 F.3d 749 (5th Cir. 1997), another case that was not a widow's election case but involved the sale of a remainder interest in property by a father to his sons. While the Fifth Circuit found the Third Circuit's analysis in *Estate of D'Ambrosio* persuasive, it concluded "that the widow election cases present factually distinct circumstances that preclude the wholesale importation of *Gradow's* rationale" for cases involving sales of remainder interests. Nevertheless, the *Wheeler* court arrived at the same conclusion as the Third Circuit, holding that the sale of a remainder interest for its actuarial fair market value is a sale for full and adequate consideration for purposes of I.R.C. § 2036(a).

In *Estate of Magnin v. Commissioner*, 184 F.3d 1074 (9th Cir. 1999), *rev'g and rem'g* 71 T.C.M. (CCH) 1856 (1996), the Ninth Circuit also adopted the view of the Third and Fifth Circuits, holding that "adequate and full consideration" should be measured against the actuarial value of the remainder interest, rather than by the full fee-simple value of the property transferred by the decedent.

The Seventh Circuit Court of Appeals has not yet weighed in on the *Gradow* analysis, so it is not clear what rule applies in Wisconsin for purposes of valuing a remainder interest. Given the unanimous view of the other circuit courts of appeal that have reviewed the issue, however, a well-reasoned argument can be presented that the *Gradow* court was wrong in its analysis, even in the context of the widow's election, and that the proper measure of whether full and adequate consideration has been received by a surviving spouse for purposes of I.R.C. § 2036(a) should be based on a comparison of the actuarial fair market value of the life estate received, as compared to the actuarial value of the remainder interest transferred.

➤ **Note.** The gift tax implications to forced-election plans are discussed in detail in section 9.97, *infra*.

A voluntary-election estate plan of the sort discussed in section 10.182, *infra*, creates no serious income tax complications, but it potentially does involve retained-life-estate difficulties under I.R.C. § 2036(a). Typically, this will occur if the surviving spouse voluntarily consents to contribute his or her half of the community property to a trust created under the deceased spouse's estate plan that provides the surviving spouse with income from the trust assets for life and vests a remainder in third parties.

Joint wills operate much like forced-election estate plans in terms of their tax consequences under I.R.C. § 2036(a). Some of the issues are illustrated in Technical Advice Memorandum 9431004 (Apr. 26, 1994), which involved a community property ranch and other property that were subject to a joint will. The joint will gave the surviving husband extensive management and control powers with respect to the ranch, including the power to mortgage or encumber any part of the real estate, and the authority to execute mineral leases on any part of the ranch. Upon his first wife's death in 1965, the joint will was offered for probate. The husband then remarried. Subsequently, he executed a new will and made a number of estate planning provisions in favor of his second wife that were inconsistent with the terms of the joint will. The husband died in 1981, and the various interested parties entered into an agreement of ownership that basically followed the terms of the joint will. The IRS concluded that the entire value of the ranch was includible in the husband's gross estate for federal estate tax purposes under I.R.C. §§ 2036 and 2041.

The IRS characterized the joint will arrangement as follows: in 1965, the decedent transferred a remainder interest in his community property share of the ranch for less than full and adequate consideration in money or money's worth, while retaining a life estate in, and a power of appointment over, that share of the ranch sufficient to cause inclusion of the value of the interest in his gross estate under I.R.C. § 2036(a). In addition, he received a general power of appointment (by virtue of the power to mortgage the property and to execute and convey mineral leases on the ranch) over his first wife's community property share of the ranch sufficient to cause inclusion of the value of that interest in his gross estate under I.R.C. § 2041.

The letter ruling did not address the application of I.R.C. § 2043(a), discussed in section 9.72, *infra*, which provides for a reduction in the amount includible in the survivor's estate by the value of consideration received for the transfer. If, in fact, the husband received what was tantamount to fee ownership of the first wife's community property interest in the ranch by virtue of powers that the IRS characterized as a general power of appointment over that share, it could be argued that the consideration was equal to, or exceeded, the interest that he gave up with respect to his community property interest. In any event, the first wife's former community property share of the ranch was included in the husband's estate under I.R.C. § 2041, while his former community

property share was included under I.R.C. § 2036(a) as a transfer with a retained life interest.

4. Specific Problems Involving Gifts in Trust **[§ 9.64]**

The basic principles concerning retained life interests discussed in the preceding sections are generally relevant to transfers in trust that are, or that become, irrevocable. The following example illustrates this.

➤ *Example 1.* A husband transfers marital property assets over which he has exclusive management and control into a revocable trust. The trust directs the trustee to pay income to the wife during her lifetime, grants the trustee the authority to make discretionary distributions of principal among the wife and their children during the wife's life, and gives a remainder interest to their children at her death. The husband reserves the power to revoke during his lifetime. The husband dies. The wife does not seek to recover her one-half marital property interest from the trust after the husband's death.

The wife's failure to recover her one-half marital property interest from the trust after the husband's death is likely to be regarded a completed gift of a remainder interest to the children not later than when the right to recover lapses. *See supra* §§ 2.102, 4.36, *infra* § 9.91. When the wife subsequently dies, one-half of the value of the trust assets will be includible in her estate under I.R.C. § 2036(a) as a transfer with a retained life estate. Even if the wife dies before expiration of her right to recover one-half of the marital property assets in the trust, it is probable that one-half of the value of the trust at the wife's death will be includible in her estate under I.R.C. § 2038 as a transfer subject to a power to revoke. *See infra* § 9.65.

The problem in the above example may be particularly acute if the husband believes that he is funding the trust with non-marital property assets, but in fact there is a marital property component. By the time this is discovered after the husband's death, the wife may be deemed to have made a completed gift of the remainder interest in her half of the marital property assets; in addition, she may be deemed to have retained an income interest for life, which will subject her marital property share of the assets to federal estate taxes under I.R.C. § 2036(a).

The retained interest rule of I.R.C. § 2036 also has potential hazards for irrevocable life insurance trusts, as illustrated by the following example.

➤ *Example 2.* A wife creates an irrevocable life insurance trust and assigns to it a number of annually renewable employment-related group term life insurance policies on her life. Income from the trust is payable to her husband during his lifetime, and the remainder interest is given to the couple's children. The wife's employer pays the policy premiums each year as an incident of employment. No marital property agreement under section 766.58 or life insurance consent under section 766.61(3)(e) is executed in an effort to reclassify the premium payments as the individual property of the insured wife. After the payment by the employer of a number of premiums, the wife dies.

Based on these facts, the entire amount of the insurance proceeds payable to the trustee might be characterized as marital property because the premium for the annually renewable policy is paid with marital property funds. If the husband does not seek to withdraw from the trust his one-half marital property interest in the insurance proceeds under section 766.70(6)(b) following the wife's death, a completed gift might be deemed to have taken place to the children, who receive the remainder interest in such one-half of the insurance proceeds. *See United States v. Gordon*, 406 F.2d 332 (5th Cir. 1969) (applying Texas law); *Whiteley v. United States*, 214 F. Supp. 489 (W.D. Wash. 1963). This will constitute a transfer with a retained life estate under I.R.C. § 2036(a), and one-half of the value of the insurance trust will be includible in the husband's estate at his death, contrary to the tax planning objectives of the spouses.

G. Federal Estate Tax: Powers to Revoke and Powers of Appointment [§ 9.65]

Several cases have raised questions concerning the existence of a general power of appointment when one or both spouses transferred community property into a revocable trust. The most detailed and interesting of these decisions is *Katz v. United States*, 382 F.2d 723 (9th Cir. 1967), which involved principles of California community property law similar to those that apply in Wisconsin under the Act. *See Wis. Stat. § 766.31(5)*.

In *Katz*, the husband created a trust of community property with an independent trustee. The trust declaration reserved the income to the husband for life, provided the wife with income for life thereafter, and finally distributed income and principal to his children and the issue of his children. The husband alone reserved the power to revoke the entire trust. The wife signed a written approval of the trust. The IRS sought to include the entire value of the trust in the husband's estate on the theory that either the wife's approval of the trust arrangement accomplished a transmutation of the community property into the husband's separate property, or, alternatively, that the husband possessed a general power of appointment over the wife's one-half of the trust assets that was taxable under I.R.C. § 2041, as well as possessing an I.R.C. § 2038 power to revoke with respect to his own one-half of the trust assets.

The court held that only the husband's one-half community property interest in the trust assets was includible in his estate under I.R.C. § 2036 or I.R.C. § 2038. Despite the husband's general management and control powers over the community property under California law, he could not make a gift of this property to himself or others without the express consent of the wife. The wife's approval of the trust did not constitute consent and, at best, constituted a transfer to the trustee of her one-half interest in the community property. Accordingly, the husband acted only as an agent for the community in funding the trust. The property transferred to the trust remained community property and was not transmuted to the separate property of the husband.

The court also rejected the argument that the husband held a general power of appointment over the wife's one-half community property interest in the trust, noting that the husband's powers over the trust were either managerial in nature or a power to revoke the trust, acting as agent for the community. The court reasoned that these powers were no more than the powers of management and control that the husband otherwise had over the community property before the transfer to the trust, and did not constitute a general power of appointment under I.R.C. § 2041.

These facts should produce the same result under the Act. Under Wisconsin law, the transfer of marital property assets into a revocable trust does not, by itself, change the classification of the assets. Wis. Stat. § 766.31(5). The comment to section 4 of the Uniform Marital Property Act (UMPA), *reprinted infra* app. A, makes clear that the principal enabling function of this subsection "is to permit the creation of revocable living trusts by one or both spouses without any automatic

reclassification of property committed to the trust.” The managerial rights over the trust retained during lifetime by the husband would not destroy the marital property nature of the trust assets. Wis. Stat. § 766.51(5). No completed gift to third parties could occur before the death of the husband, because of the power to revoke. At the husband’s death, both the husband’s and the wife’s respective halves of the marital property assets would pass in accordance with the terms of the trust. The gift of the husband’s interests would be complete at that time. If the surviving wife failed to assert her right to recover her half of the marital property assets under section 766.70(6)(a) or (b) (or other applicable provisions) within the appropriate time limit, a completed gift of the remainder interest in her half would be made to third parties. *See supra* § 9.64, *infra* § 9.91.

If the wife died before the expiration of the limitation period for recovery of her one-half interest in the marital property assets in the trust, it is likely that one-half of the value of the trust assets would be includible in her estate under I.R.C. § 2033 as a claim or cause of action, or under I.R.C. § 2038 as a transfer subject to a power of revocation. *See, e.g., Estate of Lucey v. Commissioner*, 13 T.C. 1010 (1949). Similarly, if the wife predeceased the husband, her personal representative clearly would have the right to recover her one-half interest in the marital property assets held in the revocable trust. *See* Wis. Stat. § 766.31(5); *see also supra* § 2.102. This one-half interest would be included in her estate under I.R.C. § 2033. *See supra* § 9.58.

Results similar to those in *Katz* have occurred in the few cases that have considered the question of a general power of appointment. *See Albuquerque Nat’l Bank v. United States*, 80-1 U.S.T.C. (CCH) ¶ 13,329 (10th Cir. 1979) (holding that wife’s power to amend or revoke trust was limited to half of the trust estate after husband’s death and thus did not constitute a general power of appointment over the other half); *Tucker v. United States*, 74-2 U.S.T.C. (CCH) ¶ 13,026 (S.D. Cal. 1974) (holding that husband and wife’s power of revocation was joint during their lifetimes and could not be exercised by wife after husband’s death; hence, she had no general power of appointment). It would follow from *Tucker* that if a revocable trust is created with marital property assets, and if the trust instrument reserves the power to revoke the entire trust to either or both spouses during their joint lifetimes or to the survivor thereafter, the survivor will possess a general power of appointment under I.R.C. § 2041 with respect to the deceased spouse’s former one-half of the marital property assets in the trust, and in addition will retain

an I.R.C. § 2038 power to revoke with respect to his or her own one-half. *See, e.g.*, Tech. Adv. Mem. 9431004 (Aug. 5, 1994) (joint will in which surviving spouse effectively possessed a general power of appointment over both spouses' halves of community property assets subject to the will).

H. Federal Estate Tax: Retirement Benefits [§ 9.66]

1. ERISA Preemption [§ 9.67]

Wisconsin has adopted a terminal-interest rule providing that the marital property interest of a nonemployee spouse in the deferred-employment-benefit plans of the employee spouse terminates at death if the nonemployee spouse predeceases the employee spouse. Wis. Stat. §§ 766.31(3), .62(5). This terminal-interest rule also applies to the marital property interest of the nonemployee spouse in IRA assets that are traceable to the rollover of a deferred-employment-benefit plan, meaning that the nonemployee spouse's interest in such rollover IRA will terminate if he or she predeceases the employee spouse. *Id.* Accordingly, pursuant to the terminal-interest rule, no marital property interest remains in the deceased nonemployee spouse that is includible in his or her gross estate.

In those community property jurisdictions that, unlike Wisconsin, have not adopted a terminal-interest rule for the nonemployee spouse's interest in deferred employment benefits, the question of whether one-half of an employee spouse's deferred employment benefits should be included in the estate of a deceased nonemployee spouse had historically proven to be a major area of uncertainty, especially if the benefits were subject to disposition to third parties by the nonemployee spouse's will or through intestacy. Such uncertainty was put to rest, however, by the Supreme Court's decision in *Boggs v. Boggs*, 520 U.S. 833 (1997), in which the Court held that ERISA preempts state community property laws that grant a deceased nonemployee spouse property rights in an employee spouse's qualified deferred employment benefits.

Under the terms of the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426, amending various provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461, nonemployee spouses were granted extensive rights with respect to benefits under qualified retirement plans subject to regulation under

federal law. Generally speaking, these rights cannot be defeated by the employee spouse unless the nonemployee spouse gives an express written consent executed in compliance with I.R.C. § 417(a)(2)(A). Because the REA vests such extensive rights in the nonemployee spouse with respect to qualified plan benefits, there was some question before *Boggs* whether such a spousal consent to the release of those rights and to the designation of third-party beneficiaries by the employee spouse might have adverse federal estate and gift tax consequences with respect to any community property interest that the nonemployee spouse might have in such benefits under state law. It is now clear, however, after the Supreme Court's decision in *Boggs*, that ERISA preempts state community property laws and that the nonemployee spouse should be able to give such consent with no adverse transfer tax consequences.

Ablamis v. Roper, 937 F.2d 1450 (9th Cir. 1991), was the first federal decision to consider the issue of federal preemption under ERISA of the nonemployee spouse's community property rights in the employee spouse's qualified retirement plan benefits upon the death of one of the spouses. The question posed in *Ablamis* was whether the will of a predeceasing nonemployee spouse, which purported to dispose of all of her community property interests in trust for the benefit of her children from a prior marriage, reached her community property interest in her surviving husband's retirement plan. The court held that (1) the purported transfer by the nonemployee spouse of her one-half community property interest in the retirement benefits was subject to the anti-assignment provision in ERISA, 29 U.S.C. § 1056; (2) any probate court order directing a transfer of a portion of the plan benefits would not be a QDRO made pursuant to a state's domestic relations law, and thus would not qualify for the QDRO exception to the anti-assignment provision; and (3) to the extent that California law permitted testamentary transfer of a deceased nonemployee spouse's community property interest in the employee spouse's retirement benefits, it was preempted by ERISA. *Ablamis* was followed in *Meek v. Tullis*, 791 F. Supp. 154 (W.D. La. 1992), in which the court held that ERISA preempted Louisiana community property laws that otherwise might be applicable to intestate succession of an interest in a qualified pension plan. These cases supported the position, later confirmed by the Supreme Court in *Boggs*, that except as allowed by the limited QDRO exception, state community property laws are ineffective to divest a participant of his or her interest in a qualified plan governed by ERISA.

Boggs was also a Louisiana case, but this time the district court reached a contrary result, holding that ERISA did not preempt Louisiana community property laws to defeat the community property interest in qualified plan benefits that accrued to a predeceased nonemployee spouse. *Boggs v. Boggs*, 849 F. Supp. 462 (E.D. La. 1994). The decedent had married his first wife in 1949. She died in 1979, and he remarried in 1980. At all times up to his retirement in 1985, he was employed by the same company. Following his death in 1986, his surviving second wife brought suit against his sons by his first marriage to determine whether, under ERISA, his designation of her (the surviving spouse) as beneficiary of various qualified retirement plan benefits cut off the sons' former community property rights in the plan benefits they had inherited through their mother.

The district court concluded that “despite its broad preemption provision, ERISA does not preempt state laws such as Louisiana’s community property laws which were not specifically designed to affect ERISA benefit plans.” The court reasoned that while state community property laws might indirectly implicate an ERISA plan, they do not “relate to” such plans in the manner required to trigger preemption. The court went on to state that ERISA will preempt Louisiana’s community property law if and only if (1) Congress has positively expressed its intent to preempt the state law, and (2) the state law does major damage to a clear and substantial federal interest.

After analyzing a number of Supreme Court precedents, the court concluded that the application of state community property laws does not do major damage to substantial federal interests. The court noted that a finding that ERISA preempts state community property laws would provide a strong incentive for a nonemployee spouse in a community property state to obtain a divorce before death as the only method of retaining transmissible property rights in the employee spouse’s qualified retirement plan benefits. Further, the court noted that permitting the spousal benefit rights under ERISA to override a prior spouse’s vested community property interest would violate the Fifth Amendment’s prohibition against governmental takings of private property without just compensation. The court also made reference to *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), in which the Supreme Court instructed that there is a presumption against preemption in areas of traditional state regulation such as family law.

The Fifth Circuit Court of Appeals affirmed the district court's decision and the Supreme Court granted certiorari because of the conflict between the Fifth Circuit in *Boggs* and the Ninth Circuit in *Ablamis*. *Boggs*, 520 U.S. 833. The Court first noted that the case was important in that it affected 80 million residents of community property states with more than \$1 trillion in qualified plan benefits. After announcing that its decision would also affect claims in common law jurisdictions, the Court announced a very broad ERISA preemption test:

ERISA's express preemption clause states that the Act "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan...." We can begin, and in this case end, the analysis simply by asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase "relate to" provides further and additional support for the pre-emption claim.

Id. at 841 (citation omitted).

Accordingly, the bottom line of the Court's holding in *Boggs* is that it is necessary for community property laws to yield to ERISA when such laws affect a field that Congress has appropriated for a federal purpose to carry out a uniform federal scheme. In determining whether Congress intended to preempt community property laws, the Court examined several provisions of ERISA and determined that the purpose of the law is to protect the interests of participants and beneficiaries. The Court then examined QDROS and the rules requiring joint spousal annuities that the REA provides for a nonparticipant spouse and declared the following:

The surviving spouse annuity and QDRO provisions, which acknowledge and protect specific pension plan community property interests, give rise to the strong implication that other community property claims are not consistent with the statutory scheme. ERISA's silence with respect to the rights of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist.

Id. at 847–48.

The Court further stated that ERISA's anti-alienation provisions give "specific and powerful reinforcement" to the preemption argument and went on to find that the participant's sons from his first marriage were

neither participants nor beneficiaries in their father's pension plan. Based on its premise that ERISA was designed to protect beneficiaries and participants, the Court reasoned that under Louisiana law, community property interests are enforceable against a qualified plan, and that if the sons' claims were allowed to succeed, they would have acquired an interest in their father's pension plan at the expense of plan participants and beneficiaries. The Court concluded that such a result would be contrary to the purposes of ERISA and dictated that preemption should apply.

The Court finally noted that whether the interest of the sons was enforced against their father's pension plan or against his surviving spouse (the recipient of the benefits), the result was the same. Stressing again the need to protect beneficiaries and participants, the Court instructed that "ERISA is for the living" and in summary, advised:

It does not matter that respondents have sought to enforce their right only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits. Their state-law claims are pre-empted.

Id. at 854.

In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), the Supreme Court reiterated the strong stance it took in *Boggs* that ERISA preemption can apply to override state statutes, even in areas of traditional state regulation such as family law and probate law. The case involved a divorced decedent in Washington state whose benefits from his employer included a life insurance policy and a pension plan both governed by ERISA. Before his divorce, the decedent had designated his ex-wife as the beneficiary of these benefits, which he received as part of the division of community property in the divorce. The decedent died in an automobile accident two months after the divorce, having never removed his ex-wife as beneficiary of the plan benefits. His children from another previous marriage subsequently brought an action against the ex-wife to recover the benefits based on section 11.07.010(2)(a) of the Washington Revised Code, which then stated as follows:

If a marriage is dissolved or invalidated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse is revoked. A provision affected by this section must be interpreted, and the nonprobate asset affected passes as if the former

spouse failed to survive the decedent, having died at the time of entry of the decree of dissolution or declaration of invalidity.

The ex-wife defended the action by claiming that the statute could not operate to deny her the benefits because it was preempted by ERISA. The trial court ruled in favor of the ex-wife, but the Washington Supreme Court overruled and held in favor of the children. The U.S. Supreme Court granted certiorari, stating that it agreed to review the case because courts have disagreed whether statutes like that of Washington are preempted by ERISA.

The Court ruled in favor of the ex-wife, holding that ERISA preempted the children's claims. The Court reasoned that the Washington statute directly conflicts with ERISA, because the result of applying the state law is that plan administrators must pay benefits in accordance with state law, rather than in accordance with plan documents. Thus, the Court stated the Washington statute interferes with the goal of nationally uniform ERISA plan administration.

The Court went on to state that while there is indeed a presumption against federal preemption in areas of traditional state regulation such as family law, that presumption can be overcome in situations in which Congress has made clear its desire for preemption. Referring to *Boggs*, the Court noted that it had previously not hesitated to find state family law preempted when it conflicts with ERISA or relates to ERISA plans. The Court further reasoned that ERISA preemption over state law was necessitated in such situations because requiring ERISA administrators to master the relevant laws of all 50 states would undermine the congressional goal of minimizing the administrative and financial burdens on plan administrators.

Based on *Boggs* and *Egelhoff*, it appears well settled that ERISA will preempt state community property laws and other state-specific statutes that would hinder uniform qualified-plan administration. Therefore, a nonemployee spouse residing in a community property state will have no legal interest in an employee spouse's qualified retirement plan other than those provided for under the REA, and the assets inside the qualified plan will not be subject to state community property laws. Moreover, because preemption applies, this result cannot be modified by spouses in a marital property agreement to provide for an interest in the plan for the nonemployee spouse.

2. IRAs [§ 9.68]

When analyzing possible estate tax planning strategies for married couples, it should be kept in mind that IRAs and individual retirement annuities (considered IRAs for purposes of this discussion) are expressly not subject to ERISA preemption. Instead, the ownership of an IRA is governed by state law, including community property law.

It seems likely that IRAs (even rollover IRAs funded with proceeds from qualified plans) do not fall under the *Boggs* preemption decision and thus can be structured to include a community property ownership interest in the nonparticipant spouse. Support for this position can be found in the *Boggs* decision itself, in which Justice Kennedy, writing for the majority, specifically stated:

[T]his case does not present the question whether ERISA would permit a non-participant spouse to obtain a devisable community property interest in benefits paid out during the existence of the community between the participant and that spouse.

Boggs, 520 U.S. at 845.

The argument that state community property laws control rollover IRAs and that federal preemption does not apply is also supported by the fact that recognizing community property ownership of IRAs does not make compliance with federal ERISA regulations unnecessarily burdensome on plan administrators, because IRAs are not even subject to ERISA. Therefore, many community property experts believe that as soon as qualified plan benefits are rolled over into an IRA, state community property laws control the ownership rights of the spouses.

Ownership of an IRA as community property can potentially provide favorable estate tax planning options for married couples, especially if one spouse owns a large IRA and the other spouse does not have sufficient assets to fully utilize his or her personal estate tax exemption. If the spouses can own the IRA in equal shares as community property, the estate tax equalization problem can often times be solved.

➤ **Note.** For a comprehensive discussion of planning for IRAs in community property jurisdictions, see Edward V. Brennan, *Planning for Community Property Retirement Benefits and IRAs*, Estate Planning, Apr. 2002, at 187.

Historically, there has been no consistent or clear authority as to whether federal tax law will recognize all or a portion of an IRA as community property. *See, e.g.*, I.R.C. § 408(g) (community property laws are to be disregarded for purposes of applying the IRA provisions of the Code); *Bunney v. Commissioner*, 114 T.C. 259 (2000); *Morris v. Commissioner*, 83 T.C.M. (CCH) 1104 (2002) (holding that state community property laws will not apply to IRA distributions, which are instead taxable solely to the IRA owner and reported only on his or her separate tax return). But in a series of recent private letter rulings, the IRS has clarified that I.R.C. § 408(g) does not affect actual property rights, which are to be governed by applicable state law and that the determination whether an IRA should be classified as community property lies outside the scope of I.R.C. § 408. *See* Priv. Ltr. Rul. 200928043 (Apr. 14, 2009); Priv. Ltr. Rul. 200935045 (June 1, 2009); Priv. Ltr. Rul. 200950053 (Sept. 18, 2009) (construing I.R.C. § 408(g) to allow basic recognition of community property rights of the spouse of an IRA owner with varying rulings on income tax consequences of such classification). For older similar rulings from the IRS, see Private Letter Ruling 199937055 (Sept. 17, 1999), Private Letter Ruling 9439020 (Sept. 30, 1994), and Private Letter Ruling 8040101 (July 15, 1980).

It is important to note that the statutory terminal-interest rule in section 766.31(3) specifically applies to assets in an IRA that are traceable to the rollover of a deferred-employment-benefit plan. Therefore, absent a provision in a marital property agreement to the contrary, the interest of the nonemployee spouse in such a rollover IRA terminates if he or she predeceases the employee spouse. Accordingly, if a Wisconsin married couple wants to take advantage of the planning possibilities that may be available if a rollover IRA is classified as marital property, the couple should specifically negate the application of section 766.31(3) to the IRA in a marital property agreement.

I. Federal Estate Tax: Proceeds on Life Insurance and Interest in Life Insurance Contracts [§ 9.69]

1. Individually Owned Contracts [§ 9.70]

The proper federal estate tax treatment of life insurance proceeds received upon the death of the insured may come into question when the insurance policy was formerly community property and the insured did

not own all the interests in the contract at the time of the noninsured spouse's death. Ordinarily, this issue is presented only when the spouses have a marital property agreement that eliminates the *frozen-interest* rule of section 766.61(7) (i.e., an agreement that provides that the noninsured spouse's interest in the policy on the insured spouse's life will not terminate if the noninsured spouse predeceases the insured spouse). See *supra* § 2.178. This situation is reflected in the following example from Treasury Regulation § 20.2042-1(c)(5), which confirms that an insured spouse holds incidents of ownership in a policy requiring estate inclusion under I.R.C. § 2042 only to the extent that the insured spouse is treated as owning an interest in the policy under the local community property law:

As an additional step in determining whether or not a decedent possessed any incidents of ownership in a policy or any part of a policy, regard must be given to the effect of the state or applicable law upon the terms of the policy. For example, assume that the decedent purchased a policy of insurance on his life with funds held by him and his surviving wife as community property, designating their son as beneficiary but retaining the right to surrender the policy. Under the local law, the proceeds upon surrender would have inured to the marital community. Assuming that the policy was not surrendered and that the son receives the proceeds on the decedent's death, the wife's transfer of her one-half interest in the policy is not considered absolute before the decedent's death. Upon the wife's prior death, one-half of the value of the policy would have been included in her gross estate. Under these circumstances, the power of surrender possessed by the decedent as agent for his wife with respect to one-half of the policy is not, for purposes of this section, an "incident of ownership," and the decedent, therefore, is deemed to possess an incident of ownership in only one-half of the policy.

This rule was applied by the Tax Court in *Estate of Burris v. Commissioner*, 82 T.C.M. (CCH) 400 (2001). In this case, Burris and his wife lived in Louisiana (a community property state) and, while married, he purchased three policies on his life naming himself as owner and paying the premiums using community property funds. The couple did not have a marital property agreement, and there was no evidence presented that they did not intend to hold the policies as community property. Burris's wife predeceased him and one-half of the cash values of the policies was reported in her estate (unlike Wisconsin, Louisiana apparently does not have a frozen-interest rule, which would have terminated the wife's interest at Burris's death absent an agreement to the contrary). Burris died less than a year later, with the couple's

children receiving the policy proceeds. His personal representative treated the policies as community property and reported only one-half of the proceeds in his estate.

The Tax Court agreed with the position taken by Burris's estate and held that under Louisiana law, the life insurance policies were community property. The court accordingly held that because Burris owned only a one-half interest in the policies (with his wife's estate owning the other half), only one-half of the proceeds were includible in his estate under I.R.C. § 2042.

In Action on Decision 2003-17, I.R.B. 811, the IRS acquiesced in result only to the Tax Court's decision in *Estate of Burris*. It subsequently issued Revenue Ruling 2003-40 on substantially the same facts as *Estate of Burris*, reaching the same conclusion as the Tax Court. It cautioned, however, that taxpayers will be held to a duty of consistency in reporting the estate tax treatment of community property life insurance in the estates of the husband and wife. For example, the IRS warned that a community property policy owned by a husband and insuring his life might be required to be included 100% in his estate if his wife predeceases him and her one-half share of the value of the policy is not included in her estate.

In *Scott v. Commissioner*, 374 F.2d 154 (9th Cir. 1967), involving California law, the noninsured wife predeceased her husband, leaving the residue of her estate (including her community property interest in insurance policies on her husband's life) to her sons. After the wife's death, the insured husband made additional premium payments on the policies from his separate funds. After a careful review of California cases, the court concluded that when the noninsured wife died and bequeathed her one-half community interest in the policies to her sons, the sons became tenants in common of the policies with the insured husband. When the insured husband subsequently paid additional premiums on the policies with separate funds, he acquired an additional interest of his own. The interest that he and the sons held in the policies as tenants in common was thereby diminished. The net result was that the ultimate fraction of the policy proceeds included in the insured husband's estate at his death was greater than one-half. Note that the court might have resolved the case by holding that the co-ownership shares of the husband and the sons in the policy and the proceeds did not change as a result of the subsequent premium payments by the husband, and that the husband merely had a right to reimbursement from the sons

for half of the premium payments he advanced following the wife's death.

The question of including life insurance proceeds in the estate of the second spouse to die was also the primary issue in *Estate of Cavanaugh v. Commissioner*, 51 F.3d 597 (5th Cir. 1995) *rev'g* 100 T.C. 407 (1993). The decedent and his wife were residents of Texas. In 1980, they purchased a term life insurance policy on the decedent's life. The policy had a one-year term and could be renewed automatically by making annual payments of increasing premiums. The policy had no cash value or loan value but provided an annual dividend. The decedent renewed the policy each year until his death, both before and after the death of his wife, who predeceased him by three years.

The proceeds of the policy were paid to the decedent's estate as beneficiary. The personal representative of the decedent's estate included only one-half of the policy proceeds in his gross estate, arguing that, under Texas community property law, the estate had no more than a one-half interest in the policy and its proceeds. The personal representative further contended that the other one-half interest had passed through the estate of the decedent's late wife into the residuary trust under her will, and that this trust was entitled to the other one-half of the policy and the proceeds.

The IRS took the position that the entire death benefit was includible in the decedent's estate. The Tax Court agreed with the IRS, noting that under Texas community property law the general rule is that the community interest of an uninsured spouse who predeceases the insured spouse is settled by distributing an amount equal to one-half of the cash surrender value of the unmaturing policy to the uninsured spouse's estate and the other one-half interest (plus ownership of the unmaturing policy) to the insured spouse. (This property law rule is somewhat similar to the terminal-interest rule found in section 766.61(7)). In the case of a term insurance policy having no cash surrender value (as here), Texas uses the interpolated-terminal-reserve method of valuation to determine the uninsured spouse's community property interest in the policy. Because the record in this case did not establish that the policy had any cash surrender or terminal-reserve value on the date of the wife's death, her community property interest in the policy was worth nothing, and no distribution to her estate was necessary to settle her community interest in the policy. Accordingly, her estate had no rights in the policy or its proceeds on the date of her death, and the policy devolved entirely to the

decedent. As a result, the decedent's gross estate included the entire death benefit payable under the policy.

The Fifth Circuit reversed the Tax Court's decision, relying on the strained reasoning that the wife's estate still retained a one-half interest in the policy because her property had not yet been settled or partitioned in the three years after her death and before the decedent's death. The court stated that according to Texas law, under circumstances in which the uninsured spouse predeceases the insured spouse, settlement of the decedent's community property interest (in the policy) has ordinarily been resolved by allocating one-half of the cash surrender value to the deceased spouse's estate and the other half to the surviving spouse. In this case, however, the court reasoned that the wife's property was not settled or partitioned before the decedent's death so that her one-half community property interest in the policy was never extinguished and remained intact up to the date of the decedent's death. Accordingly, the court ruling appears very fact-specific and perhaps overreaching in its attempt to include only one-half of the proceeds in the decedent's estate.

Estate of Cervin v. Commissioner, 111 F.3d 1252 (5th Cir. 1997), *rev'g* 68 T.C.M. (CCH) 1115 (1994), also involving Texas law, dealt with life insurance policies possessing cash-surrender value in a similar factual context. In this case, the Tax Court concluded that the predeceasing noninsured wife's community property interest in the policies was settled before the decedent's death, because one-half of the cash surrender value had been allocated to her estate and reported on her federal estate tax return. Further, because the couple's children (who were beneficiaries of her estate) failed to assert their right to compensation from the policies equivalent to their mother's community interest during the 10-year interval between her death and the death of the insured spouse, the children's interest in the policies was effectively abandoned. Accordingly, the children were not entitled to one-half of the cash surrender value of the policies at the insured's death, and the entire proceeds of the policies were includible in the insured's estate.

The Fifth Circuit again reversed the Tax Court, this time finding that although the wife's estate tax return listed her one-half interest in the cash value of the policy on her estate tax return, her interest in the policy was never settled during the 10-year period leading up to the death of the insured spouse because her children agreed with their father not to seek allocation of their share of the cash value but instead to keep the policy in place. Accordingly, the court concluded that because one-half of the

cash value was never distributed to the children, the deceased wife's interest in the insurance policies remained unsettled until her husband's death.

Although the Fifth Circuit reversed, a result similar to the Tax Court's decisions in *Estate of Cavanaugh* and *Estate of Cervin* likely would follow in Wisconsin, because the interest of the deceased noninsured spouse is a fixed and vested amount under section 766.07(7) and is not dependent upon an actual claim of payment by such spouse's successors-in-interest. Under section 766.70(7), a failure by the surviving insured spouse to purchase the marital property frozen interest of the deceased noninsured spouse would result in the passage of that interest to the beneficiaries of the noninsured spouse's estate. The failure of those beneficiaries to assert their ownership rights or pay a pro rata share of premiums might result in loss of those rights.

The question of the proper transfer-tax treatment of the proceeds of a life insurance policy on the life of a deceased spouse that was owned entirely by the surviving spouse, even though purchased with community funds, was addressed in Revenue Ruling 94-69, 1994-2 C.B. 241. Louisiana law was applicable to the facts. Pursuant to long-standing Louisiana statutory and common law, the presumption that property in the possession of either spouse during a marriage is community property does not apply to a life insurance policy transferred by or between spouses and specifically does not apply to life insurance that has been purchased with community funds and designates one spouse alone as the owner. Under these circumstances, policies on the life of one spouse that are unconditionally owned by the other spouse are, as a matter of law, deemed to be part of the owning spouse's separate estate. Accordingly, the proceeds are not includible in the deceased insured spouse's gross estate under I.R.C. § 2042.

Although the revenue ruling is based on and refers to Louisiana law, the principle involved also should apply to Wisconsin decedents. Like the comparable Louisiana statutory provision, section 766.61(3)(c)1. provides that the ownership interest in proceeds of a policy that designates the insured's spouse as the owner are the individual property of its owner, regardless of the classification of property used to pay premiums on the policy. If the principles of Revenue Ruling 94-69 are applied in Wisconsin—as they should be—the insured spouse's gross estate will not include the proceeds of a policy on his or her life that was owned by his or her spouse.

➤ **Note.** If a person other than the owner-spouse is named as beneficiary, Revenue Ruling 94-69 takes the position that on the death of the insured, a completed gift of the total amount of the proceeds will be deemed to have taken place from the surviving owner spouse to the beneficiary. *See also* Treas. Reg. § 25.2511-1(h)(9) (if property held by husband and wife as community property is used to purchase insurance on husband's life and third party is named beneficiary, on husband's death there is a gift by wife of one-half of amount of proceeds representing her one-half interest in policy).

2. Corporate-owned Contracts [§ 9.71]

As a general rule, if the insured owns a majority interest in the voting stock of a corporation, the incidents of ownership possessed by the controlled corporation over any policy on the insured shareholder's life will be attributable to the shareholder, except for proceeds of a policy payable directly to the corporation or payable to a third party for a valid business purpose. *See* Treas. Reg. §§ 20.2042-1(c)(6), .2031-2(f). This rule raises potential concerns when applied to majority stock interests owned by a husband and wife as community property. The IRS has privately ruled that stock separately owned by spouses that individually constitutes less than 50% of the corporation's combined voting power, but together exceeds 50% of the combined voting power, will not be aggregated under Treasury Regulation § 20.2042-1(c)(5). Priv. Ltr. Rul. 9808024 (Feb. 20, 1998) (spouses owned 72% of corporation's stock as community property); Priv. Ltr. Rul. 9037012 (Sept. 14, 1990) (spouses together owned 51.78% of corporation's stock).

Pursuing this line of reasoning could lead to the conclusion that if all (or any lesser amount) of the voting stock in a corporation is community property, there can never be a controlling stockholder, because neither spouse would ever own more than 50% of the stock. *See* Treas. Reg. § 20.2042-1(c)(5). This result is supported by the approach taken in valuation cases involving community property. *See supra* § 9.56. Yet in cases in which the community property stock is held in the name of only one spouse who alone exercises exclusive management and control over the stock, including voting rights, that spouse might be deemed to be a controlling shareholder for purposes of the regulation. It is much more likely that the rationale of the IRS's private letter rulings on this issue will be applied if the stock is held in the names of both spouses (since

joint management and control would be required), or if one half of the community property stock is registered in each spouse's name. Of course, the possible estate tax benefits that dual holdings of stock may have with respect to corporate-owned life insurance may necessarily have to yield to practical business considerations that favor having one spouse alone hold the stock in the corporation.

J. Federal Estate Tax: Transfers for Insufficient Consideration [§ 9.72]

1. Forced-election Estate Plans [§ 9.73]

The typical estate tax result of a surviving spouse's surrender of his or her one-half interest in community property for inadequate consideration under a forced-election estate plan is that, because of the survivor's retention of a life-income interest in it, the one-half interest will later be included in the surviving spouse's estate under I.R.C. § 2036(a). The half interest recaptured at the date of the survivor's death is valued in full as of that date. However, some mitigation of the estate tax consequences is provided by I.R.C. § 2043(a), which allows for a reduction of the amount includible in the survivor's estate. If a transfer, trust, interest, right, or power described in I.R.C. §§ 2035 to 2038 or 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for adequate and full consideration in money or money's worth, the amount included in the surviving spouse's gross estate is the *excess* of the fair market value of the surviving spouse's one-half interest in former community property contributed to the deceased spouse's trust, *valued at the time of the survivor's death*, over the value of the consideration received for the transfer by the (now deceased) surviving spouse. I.R.C. § 2043(a). The value of the consideration received is the present value of the income interest received by the now deceased surviving spouse in the first deceased spouse's half of the community property, *valued at the time of the first spouse's death*. *Gradow*, 11 Cl. Ct. 808; *Estate of Gregory v. Commissioner*, 39 T.C. 1012 (1963); *Whiteley v. United States*, 214 F. Supp. 489 (W.D. Wash. 1963); *United States v. Gordon*, 406 F.2d 332 (5th Cir. 1969). Several cases have ruled that the time of valuing the consideration is the date of the final decree in the first spouse's estate, rather than the date of death, if the date of the final decree was the last date under state law when an election against the will was possible.

Estate of Christ v. Commissioner, 480 F.2d 171 (9th Cir. 1973); *Estate of Sparling v. Commissioner*, 60 T.C. 330 (1973), *rev'd and remanded*, 552 F.2d 1340 (9th Cir. 1977); *see also United States v. Past*, 347 F.2d 7 (9th Cir. 1965) (involving computation of the value of property subject to a retained life estate, and the valuable consideration offset, under a divorce property settlement agreement).

As discussed in section 9.63, *supra*, there has been a debate between the federal circuit courts of appeal over whether the consideration deemed to have been transferred by the surviving spouse in a forced-election plan should be measured by the value of his or her remainder interest in the community property transferred (because the surviving spouse retains a life income interest in that property in addition to receiving a life interest in the deceased spouse's half of the community property) or by the full, undiminished value of his or her one-half interest in the community property transferred. *Compare Estate of D' Ambrosio v. Commissioner*, 101 F.3d 309 (3rd Cir. 1996), *rev'g* 105 T.C. 252 (1995) (holding that consideration flowing from surviving spouse should be measured by actuarial value of remainder interest in community property transferred); *Gradow*, 11 Cl. Ct. 808, *aff'd*, 897 F.2d 516 (holding that consideration flowing from surviving spouse consists of his or her full one-half interest in community property transferred).

The result of this valuation question is critical, because I.R.C. § 2036(a) and I.R.C. § 2043 interact in such a way that if the "adequate and full consideration" exception of section 2036(a) does not apply, then the "time-of-election" valuation of the consideration received by the surviving spouse is matched against the "time-of-death" valuation of the property included in his or her estate for purposes of applying the offset under section 2043. Consequently, if the property to be included in the surviving spouse's gross estate increases in value after the election, the offset under I.R.C. § 2043 can dramatically lose its impact. Theoretically, even a one-dollar deficiency in the consideration received by the surviving spouse at the time of the election will cause inclusion of the community property in the survivor's estate, which, although transferred, will have increased in value far beyond the one-dollar difference.

2. Release of Certain Marital Rights [§ 9.74]

Under I.R.C. § 2043(b), the relinquishment or promised relinquishment of dower or curtesy, of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate shall not be considered consideration "in money or money's worth" for federal estate tax law purposes. The intent of this provision is to preclude the relinquishment of essentially inchoate rights in exchange for a transfer of property at death in an effort to defeat the application of the federal estate tax. If the experience with California's quasi-community property statute is any guide, it is likely that promised relinquishment of the right to elect deferred marital property under section 861.02 will not be considered consideration in money or money's worth for other transfers of property at the death of a spouse. *Estate of Sbicca v. Commissioner*, 35 T.C. 96 (1960). For reasons that will be discussed in section 9.81, *infra*, however, the adoption of an unlimited estate tax marital deduction in I.R.C. § 2056 has greatly reduced, if not totally eliminated, concerns of this sort over most transfers between spouses.

The allowance of debts and claims as deductions against a deceased spouse's estate under I.R.C. § 2053(a)(3) is also conditional on these obligations being contracted for full and adequate consideration in money or money's worth. I.R.C. § 2053(c)(1). The rules of I.R.C. § 2043(b) concerning relinquishment of marital rights are made applicable to the debts and claims provisions of the Internal Revenue Code by I.R.C. § 2053(e).

In *Estate of Carli v. Commissioner*, 84 T.C. 649 (1985), the Tax Court held that the surrender by a wife of her community property rights in the earned income of her husband in exchange for the grant of a life estate in the husband's residence was adequate and full consideration for purposes of I.R.C. § 2043(b), thus permitting the deduction of the commuted value of the life estate as a claim against the deceased husband's estate under I.R.C. § 2053(a)(3). In *Estate of Herrmann v. Commissioner*, 85 F.3d 1032 (2d Cir. 1996), however, a deceased husband's estate was not allowed to deduct, as a claim against the estate, the value of a surviving wife's life estate in a residence that the decedent bequeathed to her pursuant to the terms of a prenuptial agreement in which the wife waived any right to an equitable distribution of the couple's property upon divorce.

The *Estate of Herrmann* court began by giving some insight on the tax-avoidance device its denial of the estate's claim was intended to prevent. The court instructed that I.R.C. § 2043(b)(1) is designed to prevent a married couple from entering into agreements that use consideration that is valid under state contract law to transform nondeductible marital rights—such as dower—into deductible contract claims against the estate, thereby depleting the taxable estate. The court went on to state that married couples normally will have no reason to structure bequests to each other as contractual debts, because most transfers between spouses should qualify for the estate tax marital deduction. The court noted, however, that life estates (and other terminal interests) for the benefit of a surviving spouse are not eligible for the marital deduction, because they end at the survivor's death and are not included in the survivor's taxable estate. Therefore, it follows that, absent I.R.C. § 2043(b), married couples would have a significant interest in the converting nondeductible life interests into deductible claims against the estate.

Stressing that the couple in *Estate of Herrmann* (who resided in New York, a common law state) remained married until the husband's death, the court then distinguished *Estate of Carli* by reasoning that the crucial fact in that case was that the widow's community property interest in her husband's future earnings was a presently enforceable right and that absent her waiver of that interest, half of his earnings would have been excludable from his gross estate because they would have been her property, not his. Therefore, because the widow's waiver increased her husband's taxable estate, any transaction in which she received equivalent value would not give rise to the tax avoidance I.R.C. § 2043(b) is intended to prevent.

By contrast, the court noted that the widow in *Estate of Herrmann* had no currently enforceable claim against any of her husband's property nor would she ever obtain such a claim during their marriage. At most, she traded away a contingent future right to an equitable share of her husband's property in the event of a divorce. Because no divorce took place and the couple was still married at the husband's death, the wife's waiver did not add anything to his estate. Therefore, the court reasoned that if it allowed the deduction for the wife's life estate, the effect would be that the husband's taxable estate would be diminished by the full amount of what he gave up in exchange for a waiver by his wife that added nothing to his estate. The court concluded that such a result is precisely what I.R.C. § 2043(b) was designed to prevent.

It is important to note that I.R.C. § 2043(b)(2) contains an exception for certain transfers under divorce-related property settlements that can be treated as having been made for an adequate and full consideration in money or money's worth. In order to qualify for this exception, the settlement must involve transfers of property or interests in property in satisfaction of marital or property rights under an arrangement that qualifies as nontaxable for gift tax purposes under I.R.C. § 2516(1). This is intended to permit deductibility of any unpaid portions of such arrangements as an indebtedness under I.R.C. § 2053(e).

Significantly, only the value of property transferred from one spouse to another spouse qualifies for the exception under I.R.C. § 2043(b)(2). This requirement was pointed out by the IRS in Technical Advice Memorandum 9527007 (July 7, 1995), in which spouses entered into an agreement in connection with their divorce under which the husband transferred property to an irrevocable trust that entitled the wife to, among other rights, all the income from the trust and principal distributions for her support, for the duration of her life. In addition, the wife was granted a testamentary limited power to appoint the trust assets remaining at her death to any person other than herself, her estate, or the creditors of either. The IRS ruled that the husband's estate was entitled to deduct the value of the wife's lifetime income interest and her right to principal distributions for her support, because these were transfers made to her for transfer tax purposes. No deduction was allowed, however, for the value of the wife's limited power of appointment, which she could exercise only in favor of persons other than herself, because the IRS considered this power a transfer of property made by the husband to the ultimate appointees and not a transfer to the wife as required for the exception under I.R.C. § 2043(b)(2) to apply. Conversely, the IRS ruled in Technical Advice Memorandum 9826002 (June 26, 1998) that a deduction was allowable for the full value of the trust property on the date of the husband's death when his former spouse was the only permissible recipient of trust income and principal and was granted a testamentary general power of appointment over the trust.

K. Federal Estate Tax: Deduction for Expenses, Indebtedness, and Taxes [§ 9.75]

1. In General [§ 9.76]

The deduction of funeral expenses, administration expenses, claims against the estate, unpaid mortgages, and other debts of the decedent for federal estate tax purposes is governed by I.R.C. § 2053. The test for deductibility rests on whether these items are allowable under state law.

2. Funeral and Last Illness Expenses [§ 9.77]

With respect to last illness and funeral expenses of a deceased spouse, section 859.49 specifically provides that such expenses may be paid by the personal representative of a deceased spouse, and if so paid, must be allowed as a proper expenditure of the estate, even though the surviving spouse could have been held fully liable for the expense. Accordingly, all funeral and last illness expenses should be payable entirely by the estate and thus deductible in full from a deceased spouse's taxable estate. *Compare Estate of Lee v. Commissioner*, 11 T.C. 141 (1948) (holding funeral expenses fully deductible against decedent's estate under Idaho law), with *Pfeiffer v. United States*, 310 F. Supp. 392 (E.D. Cal. 1969) (holding only one-half of funeral expenses deductible since surviving spouse's one-half of community property was also subject to administration, and expenses were chargeable against entire community). Following the *Pfeiffer* decision, California changed its statute to make clear that the funeral and last illness expenses of a deceased spouse would not be charged to the community share of a surviving spouse. The effectiveness of this law change to permit full deductibility was recognized by the IRS in Revenue Ruling 71-168, 1971-1 C.B. 271. Subsequent changes in California law now require administration of only the decedent's one-half of community property. *See* Cal. Prob. Code § 11446 (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. 21 of the 2010 Reg. Sess.; and propositions on the 6/8/2010 ballot).

3. Administrative Expenses [§ 9.78]

Historically, in community property states, the entire community estate (i.e., both spouses' halves) was subject to administration when one of the spouses died. That rule has been modified by statute in California and Nevada so that only the decedent's interest in community property is subject to administration. UMPA § 18 cmt. Wisconsin follows the limited administration pattern of California and Nevada. Wis. Stat. §§ 857.01, 861.01(1).

In states that subject the entire community property estate to administration, normally only one-half of the administration expenses will be allowable as federal estate tax deductions, since the decedent's interest is in only one-half of the community property. See *United States v. Stapf*, 375 U.S. 118 (1963); *Lang's Estate v. Commissioner*, 97 F.2d 867 (9th Cir. 1938); *Estate of Lee v. Commissioner*, 11 T.C. 141 (1948); *Estate of Orcutt v. Commissioner*, 36 T.C.M. (CCH) 746 (1977). The IRS has ruled that the surviving spouse's share of expenses incurred for the production or collection of income or for management, conservation, or maintenance in conjunction with administering the community estate will be deductible for income tax purposes under I.R.C. § 212. Rev. Rul. 55-524, 1955-2 C.B. 535.

Even in situations in which the entire community property estate has been subject to administration, all attorney fees incurred in connection with the settlement of tax liabilities incurred by the decedent's portion of the estate have been held fully deductible by the estate. *Lang's Estate*, 97 F.2d 867 (applying Washington law).

With respect to Wisconsin law, section 857.04(1) provides that all general expenses of administration are to be paid out of the decedent's interests in marital property assets and in assets other than marital property on a pro rata basis according to the value of those interests. Accordingly, general administration expenses should be deductible in full by the estate.

Section 857.04(2) indicates that, to the extent possible, the personal representative must pay "special expenses" attributable to the management and control of marital property assets from the marital property assets generating those expenses and must pay special expenses attributable to the management and control of the decedent's other property from the other property. Under this latter provision, special

expenses relating to the management and control of marital property assets are properly allocated one-half to the decedent's interest and one-half to the surviving spouse's interest. *See infra* § 12.55. Therefore, only one-half of the special expenses attributable to marital property assets should be deductible by the deceased spouse's estate for federal estate tax purposes. *See, e.g., Stapf*, 375 U.S. 118; *Vaccaro v. United States*, 55 F. Supp. 932 (E.D. La. 1944), *aff'd on other grounds*, 149 F.2d 1014 (5th Cir. 1945).

A forced-election estate plan may cause the surviving spouse's one-half of community property or marital property assets to be included in the probate administration when it otherwise would not be under state law. Under such circumstances, the debts and expenses chargeable to the surviving spouse's half of the community property have been held not deductible as claims against the estate or expenses of administering the estate. *Stapf*, 375 U.S. 118. This was true even though the will directed the payment of all the debts and expenses out of the decedent's estate. *Id.*

4. Debts and Claims [§ 9.79]

Section 859.18 contains elaborate debt-satisfaction rules with respect to obligations existing at the death of a spouse. *See infra* §§ 12.80–.131. It is likely that this state law scheme for the satisfaction of obligations at death will be determinative on the issue of deductibility of debts and claims for federal estate tax purposes. Accordingly, if a creditor is permitted to satisfy an obligation out of assets in a deceased spouse's estate and chooses to file a claim, amounts paid by the estate in satisfaction of the claim will be deductible for purposes of I.R.C. § 2053(a)(3), notwithstanding that the creditor might have satisfied the obligation in whole or in part out of assets of the surviving spouse. This follows from the fact that the Act contains no right of contribution as between spouses for family-purpose obligations. *See supra* § 8.36. Conversely, if the creditor's entire claim is satisfied by the surviving spouse, it is not clear whether some portion will be deductible under I.R.C. § 2053.

In other community property jurisdictions, the cases have held that since only one-half of community debts (as opposed to administration expenses and fees) are properly chargeable to the decedent's estate under general principles of community property law, only one-half may be

deducted. *Stapf*, 375 U.S. 118; *Lang's Estate*, 97 F.2d 867; Rev. Rul. 78-125, 1978-1 C.B. 292. Occasionally, this pattern has changed in cases in which different rules of debt satisfaction apply under state law. See, e.g., *Estate of Fulmer v. Commissioner*, 83 T.C. 302 (1984) (holding tort claims for shootings chargeable in their entirety against deceased husband's half of community property as his individual liability were deductible in full by his estate).

By the same token, separate debts of a decedent incurred or expended for the benefit of separate property are entirely chargeable against the decedent's separate estate and are also fully deductible for federal estate tax purposes. *Estate of Kerr v. Commissioner*, 14 T.C.M. (CCH) 178 (1955). The rationale of *Estate of Fulmer* and *Estate of Kerr* should apply to debts in Wisconsin that are not incurred in the interest of the marriage and the family, as well as to debts that were incurred before the determination date. See Wis. Stat. § 766.55(2)(c)1., 2., (d).

As indicated in section 9.78, *supra*, claims based on marriage agreements in which valuable community property rights are relinquished, or on property settlement agreements incident to divorce, may be deductible under I.R.C. § 2053(e) if the conditions of I.R.C. § 2043(b) and I.R.C. § 2516 are met.

L. Federal Estate Tax: Marital Deduction [§ 9.80]

1. In General [§ 9.81]

The federal estate tax contains an unlimited marital deduction for qualified interests in property that pass from a decedent to his or her surviving spouse. I.R.C. § 2056(a). For the purpose of determining deductibility, the federal estate tax marital deduction requires examination of the nature of the property interests transferred to the surviving spouse. To be deductible, the interest must be included in determining the value of the decedent's gross estate and must pass from the decedent to the surviving spouse. I.R.C. § 2056(a), (c). In addition, it must not be a "terminable interest" as described in I.R.C. § 2056(b) and Treasury Regulation § 20.2056(b)-1(b) and (c), or, if it is a terminable interest, it must be one that is deductible under Treasury Regulation § 20.2056(b)-1(d).

2. Terminable-interest Rule [§ 9.82]

Treasury Regulation § 20.2056(b)-1(b) defines a terminable interest as follows:

A “terminable interest” in property is an interest which will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency. Life estates, terms for years, annuities, patents and copyrights are therefore terminable interests. However, a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity or term for years, is not a terminable interest.

Under I.R.C. § 2056(b)(7), QTIP can qualify for the estate tax marital deduction if an appropriate election is made. Pursuant to the QTIP rules, the marital deduction is allowable for a surviving spouse’s life income interest in a trust, as long as the income must be distributed to the surviving spouse at least annually and the principal of the trust may not be appointed or distributed to any person other than the surviving spouse during his or her lifetime. Careful attention to the regulations under I.R.C. § 2056(b)(7) is necessary to ensure that the terminable-income interest passing to a surviving spouse under a QTIP trust will qualify for the estate tax marital deduction.

➤ **Caution.** It is not intended in this section to discuss the various types of property interests passing to a surviving spouse that will qualify for the federal estate tax marital deduction nor to discuss in detail the requirements that must be satisfied to qualify terminable-interest property for QTIP treatment. The marital deduction regulations are extensive, and the cases and literature on the subject are voluminous. Estate planning under the Act requires careful consideration of spousal arrangements to ensure that they qualify for the unlimited marital deduction. Failure to qualify an interest passing to a surviving spouse will result in that interest being taxable.

It is important to note that assets classified as the marital property of spouses, whether that classification occurs by operation of law, gift, written consent with respect to life insurance, marital property agreement, or court decree, will be treated as owned in equal shares by each of the spouses. Only one-half of each asset will be includible in the estate of the first spouse to die for planning purposes; conversely, the other half will be includible in the estate of the surviving spouse for

planning purposes. Estate planning considerations involving the marital deduction are discussed in chapter 10, *infra*.

The hazards of failing to create an interest that qualifies for the marital deduction are well illustrated by *Estate of Hedrick v. Commissioner*, No. 92-70785, 1994 WL 409713 (9th Cir. Aug. 5, 1994) (unpublished opinion), *rev'g* 64 T.C.M. (CCH) 249 (1992), an unpublished decision that involved the transfer of community property to a flawed joint revocable trust. The declaration of trust provided that the community and separate property of the decedent and his wife were to be held in trust during their joint lives and the life of the survivor. Upon the death of the survivor, all the property was to pass to charity. The declaration of trust failed to provide for any distribution of income to the surviving spouse during the survivorship period. It was unclear whether the trust could be revoked and the assets withdrawn by the survivor during his or her lifetime, a fact that was crucial to determination whether a marital deduction would be allowed, because in the absence of such a power of revocation, the trust would have constituted a terminable interest insofar as the decedent's wife was concerned. After a detailed consideration of the drafting history of the declaration of trust, the court held that the estate was entitled to a marital deduction for the decedent's share of community property transferred to the trust. The court concluded that the declaration of trust was ambiguous and was persuaded by extrinsic evidence that the spouses had intended that the trust remain revocable during the survivorship period and become irrevocable only upon the survivor's death.

Similar terminable-interest issues may arise when the spouses make arrangements for disposition of the spouses' property at the death of the survivor by a will substitute agreement that specifically provides that it is not amendable after the death of the first spouse. When a will substitute agreement is a third-party beneficiary contract, it likely will be regarded in the same light as joint, mutual, and contractual wills upon the death of the first spouse. Property transmitted to a surviving spouse subject to the terms of a joint, mutual, and contractual will has been held not to qualify for the marital deduction under I.R.C. § 2056. *See Batterton v. United States*, 406 F.2d 247 (5th Cir. 1968) (decided before the adoption of I.R.C. § 2056(b)(7)). Whether the interest passing to the surviving spouse under a will substitute agreement qualifies for the marital deduction depends on the rights and limitations to which the surviving spouse is subject under the terms of the agreement. Again, careful adherence to the QTIP rules of I.R.C. § 2056(b)(7) and the corresponding

Treasury regulations will be necessary if a marital deduction under that I.R.C. provision is desired.

If the terms of the will substitute agreement do not specifically negate the surviving spouse's right to amend the agreement with regard to the property to be disposed of at the surviving spouse's death, it is possible that the interest passing to the surviving spouse may qualify for the marital deduction under I.R.C. § 2056(b)(5) as a life estate coupled with a general power of appointment. *See* Treas. Reg. § 20.2056(b)-5(g). *But see Estate of Field v. Commissioner*, 40 T.C. 802 (1963); *Estate of Stockdick v. Phinney*, 65-2 U.S.T.C. (CCH) ¶ 12,351 (S.D. Tex. 1965); Tech. Adv. Mem. 9023004 (June 8, 1990). These cases and the ruling held that even though the surviving spouse under a Texas joint and mutual will had the power to use and consume the property or even give it away during her lifetime, the inability to appoint the entire property to herself or her estate necessitated the conclusion that the interest in property received by the surviving spouse did not qualify for the marital deduction under I.R.C. § 2056(b)(5). For a contrary result from a common law jurisdiction, see *Estate of Parry v. United States*, 91-2 U.S.T.C. (CCH) ¶ 60,075 (D. Utah 1991).

3. Interests Passing to Surviving Spouse by Elective Share [§ 9.83]

Property elected by a surviving spouse under the augmented deferred marital property election of section 861.02 should be treated as nonterminable property passing to the surviving spouse and thus should qualify for the estate tax marital deduction.

The augmented deferred marital property election under section 861.02 allows a surviving spouse to elect to receive a one-half interest in the assets making up the couple's *augmented deferred marital property estate*, which consists of both spouse's probate and nonprobate deferred marital property, including transfers made to third parties within two years of the death of the first spouse to die. The surviving spouse's augmented deferred marital property election is satisfied with a pecuniary amount. The election presents two issues for purposes of determining whether the elective share qualifies for the federal estate tax marital deduction:

1. Whether the elective share received by the surviving spouse pursuant to the election is an interest in property passing from the deceased spouse to the surviving spouse for purposes of Treasury Regulation § 20.2056(c)-1(a); and
2. Whether the elective share is a nonterminable interest.

In cases in which the surviving spouse's election under state law is against the decedent spouse's will or other instrument, and the surviving spouse forfeits the benefits under the will or other instrument, the Treasury regulations take the position that the forfeited benefits (which presumably pass to others) are deemed not to pass from the decedent to the surviving spouse, and the interest to which the surviving spouse is otherwise entitled under state law is deemed to be substituted. Specifically, Treasury Regulation § 20.2056(c)-2(c) provides as follows:

Effect of election by surviving spouse. This paragraph contains rules applicable if the surviving spouse may elect between a property interest offered to her under the decedent's will or other instrument and a property interest to which she is otherwise entitled (such as dower, a right in the decedent's estate, or her interest under community property laws) of which adverse disposition was attempted by the decedent under the will or other instrument. If the surviving spouse elects to take against the will or other instrument, then the property interests offered thereunder are not considered as having "passed from the decedent to the surviving spouse" and the dower or other property interest retained by her is considered as having so passed (if it otherwise so qualifies under this section). If the surviving spouse elects to take under the will or other instrument, then the dower or other property interest relinquished by her is not considered as having "passed from the decedent to his surviving spouse" (irrespective of whether it otherwise comes within the definition stated in paragraph (a) of this section) and the interest taken under the will or other instrument is considered as having so passed (if it otherwise so qualifies).

This approach, whereby otherwise qualifying property interests actually received by a surviving spouse are treated as having passed from the decedent, thus qualifying them for the federal estate tax marital deduction, seems to apply in any situation in which the surviving spouse of a Wisconsin decedent is forced to make an equitable election under section 853.15. This approach could also be taken in situations in which an election is made in the decedent's will or other instrument.

The augmented deferred marital property election under section 861.02 is intended to provide protection for a surviving spouse when a significant portion of the couple's property consists of deferred marital property (for example, when the couple has moved to Wisconsin from a common law state). Thus, the amount elected by a surviving spouse is directly analogous to a support allowance or award. Treasury Regulation § 20.2056(c)-2(a) specifically recognizes that "[a]n allowance or award paid to a surviving spouse pursuant to local law for her support during the administration of the decedent's estate constitutes a property interest passing from the decedent to his surviving spouse."

Accordingly, such an allowance qualifies for the marital deduction if it is not a terminable interest. This is one possible analytical approach to the treatment of the amount elected by the surviving spouse under sections 861.02.

A number of cases have considered the terminable-interest treatment of a surviving spouse's elective interest in the deceased spouse's property. It has been held that even though the right of election is subject to formal actions in accordance with the requirements of local law or of the will, this fact does not prevent the interest passing to the surviving spouse from qualifying for the marital deduction. *Estate of Tompkins v. Commissioner*, 68 T.C. 912, 918 (1977); *Estate of Mackie v. Commissioner*, 64 T.C. 308, 311 (1975), *aff'd per curiam*, 545 F.2d 883 (4th Cir. 1976); *Hawaiian Trust Co. v. United States*, 412 F.2d 1313 (Ct. Cl. 1969); Tech. Adv. Mem. 8727002 (Mar. 16, 1987). The U.S. Tax Court, in *Estate of Mackie*, characterized rights of election by statute and those rights of election encompassed by a decedent's will as "a difference without a distinction." *Estate of Mackie*, 64 T.C. at 312. The fact that the surviving spouse might die before making the election did not result in the elected property being a terminable interest, because "once elected, the bequest is nonterminal and, therefore, deductible." *Estate of Tompkins*, 68 T.C. at 918.

Many estate plans drafted for Wisconsin couples will involve wills or revocable trusts making a provision for a surviving spouse, and further providing that the provision terminates (or is directly reduced) if the surviving spouse elects to receive property under section 861.02. Posing an election of benefits to a surviving spouse by itself does not disqualify the property offered as a terminable interest. Tech. Adv. Mem. 8735003 (May 10, 1987); Priv. Ltr. Rul. 9233033 (Aug. 14, 1992); Priv. Ltr. Rul. 9244020 (Oct. 30, 1992); Priv. Ltr. Rul. 9036040 (Sept. 7, 1990); Priv.

Ltr. Rul. 8936009 (Sept. 8, 1989) (all holding that interest passing to surviving spouse was not nondeductible terminable interest, notwithstanding that it was subject to condition that spouse not contest decedent's will).

In *Estate of Mackie*, 64 T.C. 308, the decedent's will bequeathed to his surviving spouse the right to select from his residuary estate properties that were sufficient to obtain the maximum allowable marital deduction. The will provided that the spouse could exercise the right to accept or reject the bequest in whole or in part by delivering a written statement to the personal representative within four months after the testator's death. The IRS contended that the bequest to the spouse was a nondeductible terminable interest, because persons other than the spouse would receive the property if and to the extent that she did not exercise the right of selection. It further contended that the requirement of acceptance of the bequest made the gift conditional. The Tax Court rejected these contentions and found that the surviving spouse had an absolute right to take outright a specified portion of the decedent's estate. Having exercised that right, she received property that passed to her from the decedent within the meaning of I.R.C. § 2056(a) and (c) and that did not constitute a terminable interest within the meaning of I.R.C. § 2056(b). *Id.* at 314.

Similarly, in *Estate of Neugass v. Commissioner*, 555 F.2d 322 (2d Cir. 1977), the surviving spouse was given a life estate in the decedent's entire art collection, coupled with a right to take absolute ownership of any item in the collection within six months following the decedent's death. The court held that the arrangement described alternative bequests, and that the surviving spouse's election to take absolute ownership clearly qualified for the marital deduction.

The posing of alternative bequests is closely analogous to an election to take against the will under state law. The surviving spouse in effect is put to a choice: take either provision A or provision B but not both. Treasury Regulation § 20.2056(c)-2(c) treats whatever interest is elected by the surviving spouse as having "passed from the decedent to the surviving spouse" and treats the relinquished interests as not having so passed. The logic of applying this position to "private" elections was adverted to in *Estate of Tompkins*, 68 T.C. 912, in which the United States Tax Court stated: "There is no substantial difference between an elective testamentary bequest of a nonterminable interest which relates back to the testator's death and a spouse's election against a will under

State law. Both qualify for the marital deduction so long as the interest actually passing is nonterminable.” *Id.* at 916; *see also Estate of Mackie*, 64 T.C. at 312; *Estate of Neugass*, 555 F.2d at 328.

This position was also followed in Revenue Ruling 82-184, 1982-2 C.B. 215, in which the IRS ruled that the marital deduction was available when the decedent gave his surviving spouse the choice of receiving a life income interest in a testamentary trust or an outright bequest of \$50,000 instead of the life income interest. The election had to be made within six months of death. Because the surviving spouse had the absolute right to elect to take a specific portion of the decedent’s estate (i.e., the \$50,000) within a reasonable time, and because that right arose at the moment of the decedent’s death, the spouse’s election of the \$50,000 was not a terminable interest and qualified for the marital deduction.

The crucial factor in Revenue Ruling 82-184 (as well as the cases cited) appears to be that the surviving spouse in each case elected to receive what in fact was a nonterminable outright interest in property. The requirement of making the election was viewed as a procedural requirement similar to making an election against the will under state law. The previously cited cases and rulings further demonstrate the desirability of having the estate planning documents provide that the election must be made within six months following the decedent’s death, which also prevents treatment of the interest received as a terminable interest. *See, e.g.*, Treas. Reg. § 20.2056(b)-3(b). Accordingly, there is substantial authority for the proposition that, in situations in which a testator or trust settlor gives his or her surviving spouse alternative elective provisions that must be exercised within six months of the testator’s or trust settlor’s death, and the provision actually elected by the surviving spouse provides a nonterminable interest, the marital deduction will be allowed for the property interests passing to the surviving spouse.

Is the augmented deferred marital property estate share elected by a surviving spouse under section 861.02 a terminable interest? It seems certain that the answer should be no. The size and extent of the surviving spouse’s election against the augmented deferred marital property estate under section 861.02 is fixed and ascertainable as of the moment of death of the first spouse to die. Only the ministerial task of classifying the couple’s assets is necessary before the election can be made. The surviving spouse alone (or his or her guardian) may exercise the election within six months after the deceased spouse’s death. Wis.

Stat. § 861.08(1). The surviving spouse receives a specific dollar amount that is not subject to divestiture upon subsequent remarriage and may be freely consumed by the surviving spouse during lifetime or disposed of by the surviving spouse at death. Accordingly, section 861.02 can be appropriately characterized as conferring an elective ownership interest in the surviving spouse in the deferred marital property subject to the election. It follows that the amount received under the section 861.02 augmented deferred marital property election should qualify for the marital deduction as other than a terminable interest.

Assuming that the augmented deferred marital property estate share received by a surviving spouse pursuant to section 861.02 is treated as a qualifying interest for purposes of the marital deduction, the question arises as to whether such share is subject to and will be reduced by estate taxes. This issue is important, because under I.R.C. § 2056(b)(4)(A), the marital deduction will be reduced for any federal or state death taxes payable out of qualifying interests passing to a surviving spouse.

Under section 861.05(3), the value of deferred marital property included in the augmented deferred marital property estate must be reduced by an equitable proportion of funeral and burial expenses, administrative expenses, other charges and fees, and enforceable claims. The Drafting Committee Notes to section 861.05(3), however, specifically provide that “[w]ith respect to ‘other charges and fees,’ it is expected that the property transferred under the election will qualify for the marital deduction and therefore should not bear any of the tax obligation of the estate.” See Howard S. Erlanger, *Wisconsin’s New Probate Code—A Handbook for Practitioners* app. C, at 45 (1998). Thus, the augmented deferred marital property estate share passes to the surviving spouse free of any federal or Wisconsin estate taxes imposed by reason of the deceased spouse’s death and should qualify in full for the marital deduction.

4. Valuation of Encumbered Interests Passing to the Surviving Spouse [§ 9.84]

Pursuant to I.R.C. § 2056(b)(4)(B) and Treasury Regulation § 20.2056(b)-4(b), if a property interest passing from the decedent to the surviving spouse is encumbered in any manner, or if the surviving spouse incurs an obligation imposed by the decedent in connection with the passing of the property interest, the value of the property interest

received by the surviving spouse is to be reduced by the amount of the obligation for purposes of determining the marital deduction. *See also United States v. Stapf*, 375 U.S. 118 (1963); Tech. Adv. Mem. 200131001 (Aug. 3, 2001) (holding that marital deduction for residue of wife's estate passing to husband must be reduced by amount transferred by husband to a trust after wife's death, when wife's will provided for diversion of residue to fund the trust, unless the husband funded trust with a specified amount).

Example (3) in Treasury Regulation § 20.2056(b)-4(b) sets forth the specific rule that, for purposes of computing the amount of the marital deduction in a forced-election estate planning situation, the value of property passing to the spouse that qualifies for the marital deduction is reduced by the value of any property relinquished by the surviving spouse. Thus, for example, the value of a decedent's assets passing to a qualifying trust created for the surviving spouse would typically be reduced by the value of the remainder interest in the surviving spouse's one-half of the community property transferred to that trust under the forced election.

The problem of reduction in the value of the marital deduction by the amount of an obligation imposed on a surviving spouse may also occur in situations other than forced-election estate plans. For example, assume that one spouse relinquishes substantial future marital property rights by executing an "opt-out" marital property agreement. The agreement requires the other spouse to make specific financial provisions at death for the first spouse. Is the value of an otherwise qualifying property interest passing to the first spouse under the other's estate planning documents reduced for marital deduction purposes following the death of the other spouse? The answer appears to be no, because the relinquishing spouse was not actually required to transfer any present and ascertainable property right, either at the time the agreement was entered into or later at the time of death. In support of this view, Revenue Ruling 68-271, 1968-1 C.B. 409, and Revenue Ruling 54-446, 1954-2 C.B. 303, hold that the relinquishment of marital rights by one spouse in the property or estate of the other in return for the other's contractual promise to make a financial provision by will is not adequate and full consideration sufficient to support a claim against the estate under I.R.C. § 2053, because of the express language of I.R.C. § 2043(b). However, the value of property to which the surviving spouse is entitled under the agreement (or under a will executed to effectuate it) is deemed to have

passed from the decedent to the surviving spouse and will qualify for the marital deduction if all other statutory requirements are satisfied. *Id.*

However, in the context of claims made under I.R.C. § 2053 with respect to rights arising under a marriage agreement, *Estate of Carli v. Commissioner*, 84 T.C. 649 (1985), held that when the spouses executed a premarital agreement in which the wife relinquished her presently enforceable community property rights in the husband's earned income, the relinquishment was adequate and full consideration for purposes of supporting a claim against the husband's estate under I.R.C. § 2053. This was true even though a mathematically accurate determination of the present value of the relinquished community interests was impossible when the agreement was entered into. The United States Tax Court presumed the value of the property interests exchanged under the premarital agreement to be equal through application of the rule it had previously adopted in *Estate of O'Nan v. Commissioner*, 47 T.C. 648, 663 (1967). See also *United States v. Davis*, 370 U.S. 65 (1962); *Philadelphia Park Amusement Co. v. United States*, 126 F. Supp. 184 (Ct. Cl. 1954). The logical extension of the rationale of *Estate of Carli* is that surrender of presently enforceable marital property rights by one spouse in the assets or future acquisitions of the other is an obligation equal in value to the financial provision received by the survivor. By virtue of Treasury Regulation § 20.2056(b)-4(b), this may have the effect of reducing the marital property deduction to zero and replacing it with a claims deduction under I.R.C. § 2053 for the value of the property to which the surviving spouse is entitled under the agreement.

M. Federal Gift Tax: Gift Transactions and Completed Gifts [§ 9.85]

1. In General [§ 9.86]

The federal gift tax is imposed on transfers of property by any individual. I.R.C. § 2501(a)(1). It is immaterial whether the transfer is in trust or otherwise, whether the gift is direct or indirect, or whether the property is real or personal, tangible or intangible. I.R.C. § 2511(a). Donative intent is irrelevant to the federal gift tax. If a gift of marital property is made to a third person, the gift is treated for federal gift tax purposes as made one-half by each spouse. For example, a gift of \$100,000 of marital property is considered a gift of \$50,000 by each

spouse, and each spouse must file a federal gift tax return. *See* Instructions to Form 709 (U.S. Gift and Generation-Skipping Transfer Tax Return).

For purposes of the federal gift tax law, a gift is not deemed complete until the donor's dominion and control ceases. Treas. Reg. § 25.2511-2(b). The gift tax regulations state that a gift is incomplete "in every instance in which a donor reserves the power to revest the beneficial title to the property in himself." Treas. Reg. § 25.2511-2(c). Therefore, the question of when certain gifts of marital property assets are deemed to be complete as a matter of state property law under the Act will thus be relevant in considering federal gift tax questions under the regulations.

Under section 766.51(4), the right to manage and control marital property assets permits gifts of that property subject to the remedies in chapter 766. The 1985 Trailer Bill Supplemental Nontax Note to section 766.51(4) states as follows:

[The] amendment clarifies that a gift of marital property to a [third] person by a spouse who has the right to manage and control the marital property is "subject to remedies provided under ch. 766". The revised language replaces the rule that the right to manage and control marital property permits gifts of that property "only to the extent provided in s. 766.53." The revised language assumes that, even if a remedy is available, the gift was made when the transfer occurred.

This language was intended to make clear that if a spouse has the right of management and control with respect to a marital property asset and makes a gift of it to someone else, the gift is complete when made; the nondonor spouse's rights in the asset are extinguished subject only to remedies granted under section 766.70 and other provisions of chapter 766. *See* chapter 8, *supra*, for further discussion of remedies.

Under section 766.53, a spouse who has the right to manage and control marital property assets may, acting alone, give a third person marital property assets if the amount given to the third person 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. No consent or joinder of the other spouse is necessary for such gifts, and no remedies arise in the other spouse with respect to such gifts. If, however, the amount of the gift exceeds the statutory limits in section 766.53, and both spouses do not "act together"

in making the gift, the nondonor spouse has remedies under section 766.70(6) against the donor spouse, the gift recipient, or both. As to what constitutes “acting together,” the 1985 Trailer Bill Supplemental Nontax Note to section 766.53 concludes as follows on the subject:

The rule does not require spouses to act simultaneously to be considered acting together; subsequent consent by the other spouse is sufficient. It is assumed that common law doctrines regarding consent, such as estoppel and ratification, apply. Further, it is assumed that, if subsequently consented to by a spouse, the gift was made when the original transfer occurred.

An action under section 766.70(6)(b) may seek to recover either the property that was the subject of the gift or a compensatory judgment equal to the amount by which the gift exceeded the statutory limits. If the recovery occurs during marriage, it is marital property; if it occurs after dissolution or the death of either spouse, it is limited to 50% of the former marital property and is the separate property of the recovering spouse. The nondonor spouse must commence the action within the earliest of (1) one year after he or she has notice of the gift; (2) one year after a dissolution of the marriage; or (3) the end of the period for filing claims under section 859.01 after the death of either spouse. Wis. Stat. § 766.70(6)(a). In certain cases involving unilateral transfers of marital property assets that are complete transfers during the life of the donor spouse, the other spouse may recover his or her one-half of the marital property assets from the gift recipients, but no later than one year after the first to occur of the donor spouse’s death or the nondonor spouse’s death. Wis. Stat. § 766.70(6)(b). The general rules concerning gifts to third parties are discussed in detail in section 4.36, *supra*.

➤ **Note.** In the following discussion, it is assumed that a unilateral gift of a marital property asset has been made by a spouse having the right of management and control, that the gift exceeds the statutory limits in section 766.53, and that there is no “acting together” in making it. The term *nondonor spouse* is used to refer to the spouse who does not have management and control rights with respect to the marital property asset that is the subject of the gift and who does not act together with the donor spouse in making it.

When the conditions of section 766.53 are not met, the nondonor spouse has statutory remedies. Two related questions will arise at this point for purposes of the federal gift tax. The first is when the gift of a marital property asset made by the donor spouse is deemed complete.

Section 766.51(4) clearly establishes that the gift of the entire marital property asset is made when the transfer occurs. *See* 1985 Trailer Bill Supplemental Nontax Note to section 766.51(4). The issue is whether the nondonor spouse's right to recover all or part of the asset as one of the remedies under section 766.70 is the same as a power reserved in the nondonor to revest the beneficial title to the property in himself or herself for purposes of Treasury Regulation § 25.2511-2(c). If it is, then as to the nondonor spouse's interest in the marital property asset, the gift would be incomplete until the statute of limitation for exercising the remedy expires. If it is not, then the gift will be complete when the transfer by the donor spouse occurs. The remedies under section 766.70 are all contingent on the exercise of judicial discretion and are not limited solely to recovery of the gift property from the donee. It seems probable that these remedies will not be regarded as being the same as an automatic and unfettered right on the part of the nondonor spouse to revest in himself or herself the beneficial title to all or part of the transferred marital property asset.

If, however, a unilateral gift of a marital property asset valued in excess of the statutory limits of section 766.53 is made when the spouses do not act together, and the gift is deemed to be incomplete for federal gift tax purposes (at least as to the portion subject to the nondonor spouse's remedy of recovery), a second question arises: has the nondonor spouse made a gift if he or she fails or refuses to invoke remedies under section 766.70? The issue is whether the acquiescence of the nondonor spouse under those circumstances, in itself, results in a gift of his or her marital property interest to the third parties.

These questions will have an impact in at least three situations: (1) outright gifts to individual parties, (2) outright gifts to charities, and (3) gifts in trust for the whole or partial benefit of third parties. Each of these situations will be dealt with separately.

2. Outright Gifts to Individuals [§ 9.87]

For the reasons discussed in section 9.86, *supra*, it appears that an outright unilateral gift of a marital property asset to an individual by a spouse having the right of management and control will be deemed complete for federal gift tax purposes when made. *See* Wis. Stat. § 766.51(4).

There is an admitted scarcity of authority on this question. One decision, however, bears indirectly on the issue by looking at the quantum of estate possessed by a nonconsenting spouse in the gifted property. In *Estate of Lucey v. Commissioner*, 13 T.C. 1010 (1949), the court upheld the commissioner's contention that, because the deceased wife had the right to revoke a gift unless the gift could be shown not to have been made in fraud of her rights, and no such showing was made, it would be proper to include one-half of the gift in her estate. The gift in question was the bargain sale of community property oil leases by the husband to a corporation that he owned as his separate property. The right to revoke the gift was asserted as the basis for inclusion of the community property interest in the estate of the nonconsenting spouse. If this position is tenable, then it would follow that there is no completed transfer to the donee as long as the nonconsenting spouse's complete right to revoke exists.

However, the right to revoke in *Estate of Lucey* is to be contrasted with the remedies afforded a nonconsenting spouse under section 766.70. Those remedies may be asserted against parties other than the donee (i.e., the donor) and against property other than the gifted property (i.e., a compensatory money judgment); they are not an absolute and unfettered right, because they must be granted by a court of law, consistent with procedural due process. As a result, they only remotely resemble reserved property rights of the kind described in Treasury Regulation § 25.2511-2(c).

To the extent that the donor spouse's unilateral gift of a marital property asset for any reason does not constitute a completed gift of the nondonor spouse's marital property interest, it seems clear that a gift by the nondonor spouse nonetheless will be deemed to occur if the nondonor does not take timely action to recover the marital property asset after receiving notice of the gift or within the applicable statutory time periods following dissolution of the marriage or the death of either spouse. Acquiescence by a nondonor spouse in a transfer of community property assets to third parties has been deemed to be a gift transfer of that spouse's one-half interest to the transferees. See *Whiteley v. United States*, 214 F. Supp. 489 (W.D. Wash. 1963).

➤ **Practice Tip.** If the gift is sufficiently large to require the filing of federal gift tax returns, and the nondonor spouse either executes a return reporting a gift of his or her one-half interest in the property or executes a consent to gift-splitting on the federal gift tax return of the

donor spouse (*see infra* § 9.99), there has probably been an “acting together” with respect to the making of the gift, which should relate back to the date of the gift. *See* 1985 Trailer Bill Supplemental Nontax Note to section 766.53. This should estop the nondonor spouse from later invoking remedies potentially available under section 766.70.

3. Outright Gifts to Charity [§ 9.88]

In theory, outright gifts to individuals (*see supra* § 9.87) and outright unilateral gifts to charity present similar issues, although no decided cases on the subject have been ascertained. The IRS apparently has not disallowed deductions for unilaterally made charitable contributions on joint income tax returns in community property states. Several reasons are suggested.

The first is that the vast majority of charitable contributions of married persons will be reported on joint income tax returns. Many taxpayers itemize their charitable gifts on Schedule A to Form 1040. Accordingly, if the nondonor spouse signs a joint income tax return that specifically describes the charitable contribution, that should evidence sufficient consent to constitute “acting together” in making the gift. The consent can properly be deemed to relate back to the date of the gift. *See* 1985 Trailer Bill Supplemental Nontax Note to section 766.53.

The second reason why charitable contributions made by a spouse with management and control should be deemed completed when made, for income tax purposes, is that the tax benefit rule is available to prevent revenue losses. If a deduction is claimed in one year, and the nondonor spouse subsequently attempts to recover the gift (assuming that his or her execution of a joint income tax return was not a sufficient consent to constitute “acting together” in making the gift), the recovered amount quite clearly would be subject to inclusion in the gross income of the spouses for the year of recovery under the tax benefit rule if it had reduced income subject to tax in the earlier year. *See* I.R.C. § 111(a); *see also* Rev. Rul. 76-150, 1976-1 C.B. 38.

Third, the Wisconsin statutory scheme that accords a spouse with management and control rights the power to make unilateral gifts of marital property assets (subject only to the nondonor spouse’s judicial

remedies) adds a further argument in favor of deductibility of charitable gifts when made. *See* Wis. Stat. § 766.51(4); *see also supra* § 9.80.

The *Tax Practitioner Newsletter* (Apr. 1988) of the District Director of the IRS, Milwaukee District, states the director's view that if a nondonor spouse signs a joint income tax return on which a gift of marital property assets is claimed as a charitable deduction, the nondonor's action in signing the return should be treated as a ratification or affirmation of the gift. That view raises the question whether the gift will be regarded as complete for tax purposes at the time of ratification (normally in a subsequent taxable year) or at the time the gift was in fact made. For further discussion, see DOR Publ'n 113, *supra* § 9.6, at 21.

It is not completely clear whether the IRS agrees that the nondonor spouse's statutory remedies in section 766.70(6) are not the same as an absolute property law right to revest the beneficial title to the donated marital property assets in the spouses or otherwise to revoke the gift. The discussion in DOR Publication 113, *supra* § 9.6, at 21, about the federal treatment of charitable gifts made by one spouse, is premised on the view that if one year passes after the nonconsenting spouse became aware of the gift, and that spouse took no steps to set it aside, the gift is deemed complete at that time. *See* Wis. Stat. § 766.70(6)(a). However, the legislative history to section 766.51(4), discussed in section 9.86, *supra*, makes it clear that a gift of a marital property asset made by a spouse having the right to manage and control the property is complete when made. All these factors would argue rather strongly against an IRS position that charitable gifts of marital property assets by one spouse are not completed when made.

➤ **Practice Tip.** The *Tax Practitioner Newsletter* suggests that, in many instances, the question of when the gift is complete will not be an issue, particularly if it is essentially a "timing question"—in other words, the question is not whether the charitable contribution deduction will be allowed, but only in which taxable year it will be allowed. The *Tax Practitioner Newsletter* suggests that "if the particular tax situation is similar in both years, it would not be appropriate for an audit adjustment to be made to shift the gift to the technically correct year."

4. Gifts in Trust to Third Parties [§ 9.89]

a. In General [§ 9.90]

Perhaps the most difficult situations involving completion of gifts are posed by unilateral transfers of marital property assets in trust. This is the result of the uneasy interface between the gift-recovery statute (section 766.70(6)) and the classification statute that provides that a transfer of marital property assets to a trust does not, “by itself,” reclassify the property. Wis. Stat. § 766.31(5). The interrelationship of those sections with respect to marital property assets transferred in trust by one or both spouses is discussed in detail in sections 2.102 and 4.36, *supra*. These statutes appear to apply regardless of whether the transfer is to a trust that is revocable by one or both parties, or to a trust that is (or becomes) irrevocable.

b. Revocable Trusts [§ 9.91]

For reasons discussed in section 9.65, *supra*, section 766.31(5) should control to prevent the completion of any unilateral gift to a third party of marital property assets placed in a revocable living trust during the joint lifetimes of the spouses, unless the revocable trust instrument meets all the requirements of a marital property agreement under section 766.58 and has the effect of reclassifying the transferred property or creating vested interests. The comment to section 4 of UMPA makes clear that the rule of section 766.31(5) is intended to apply to revocable trusts. A unilateral gift of marital property assets in trust by a spouse possessing the right of management and control, even when the settlor spouse reserves the sole right to revoke the trust during his or her lifetime, should not destroy the marital property character of the trust assets during the joint lifetimes of the spouses. *See Katz v. United States*, 382 F.2d 723 (9th Cir. 1967).

Upon the death of one of the spouses, however, if no further right to revoke the trust in whole or in part is retained by the survivor, a gift of the survivor’s share in the marital property assets will occur to any third-party beneficiaries of the trust. *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir. 1958). This gift will be deemed completed, at the latest, upon expiration of the survivor’s (or the survivor’s personal

representative's) right to recover the survivor's share of the marital property assets as specified in section 766.70(6)(b).

c. Irrevocable Trusts [§ 9.92]

Section 766.31(5) is neutral on its face, applying equally to transfers to irrevocable trusts as well as to revocable trusts. However, the "by itself" language of the statute implies that the fact of irrevocability, of joinder by both spouses, or of other elements, may bring about an immediate reclassification of marital property assets transferred to the trust, at least for property law purposes. *See supra* § 2.102.

If the irrevocability of a trust (even a trust granting the nonsettlor spouse an income or remainder interest) is sufficient to cause an immediate reclassification of marital property assets placed in the trust and thus to cause a gift of the vested interests passing to third-party beneficiaries of the trust, the gift of the marital property interests passing to third-party beneficiaries would be complete for federal gift tax purposes when the assets are transferred to the trust. *See supra* § 2.102.

If the irrevocable gift in trust is exclusively for the benefit of third parties, a reading of sections 766.31(5) and 766.51(4) leads to the conclusion that there is an immediate reclassification of the marital property assets placed in the trust. *See supra* § 2.101. This follows logically, because the managing spouse who is the settlor of the irrevocable trust could have made the same transfer outright to the donees as a completed gift, subject only to the nondonor's spousal remedies under section 766.70(6)(a). *See Wis. Stat. § 766.51(4)*. The immediate reclassification of the marital property assets at the time of the transfer in trust should constitute a completed gift to the third parties of both spouses' interests in the marital property asset. *See supra* § 2.102.

The leading case involving completion of unilateral gifts of community property assets in trust superficially appears to support a contrary view, but only because the nondonor spouse had an absolute statutory power of revocation. In *Harper v. Commissioner*, 6 T.C. 230 (1946), an income tax case, the tax court held that a gift of community property assets to an irrevocable trust by the husband did not constitute a completed gift under California law as long as the statute of limitation on the wife's statutory power to revoke the gift had not expired, unless the wife had given her prior written consent to the gift. Under the applicable

California law, the assets transferred in trust vested immediately in the donees, subject only to revocation of the gift by the wife and reinstatement of the assets as part of the community property.

Under Wisconsin law, a typical transfer of marital property assets to an irrevocable trust for the benefit of third parties will constitute a completed gift when made under section 766.51(4) unless circumstances suggest that reclassification and transfer of the property was not intended. *See supra* § 2.102. The nondonor spouse has no absolute right of revocation or recovery that can be exercised against the assets in the trust, but has statutory remedies that are invoked by commencing a court action against either the donor spouse or the donees. *See Wis. Stat. § 766.70(6)(a)*.

The issue of completion of unilateral gifts of marital property assets in trust is further complicated when the irrevocable trust holds life insurance policies on the life of the settlor. In those circumstances, if reclassification does not take place immediately upon the transfer (and it is believed that it does), and further, if marital property funds are used to pay premiums, all or a portion of the life insurance policies and proceeds will be classified as marital property under subsections 766.61(3)(d) and (f). *See supra* § 2.177; *see also supra* § 9.59 (for possible federal estate tax consequences). If life insurance paid for in part with marital property funds is one of the assets of the irrevocable trust, and the insured settlor dies, it is not clear whether the surviving spouse's remedies to reach the proceeds are subject to the short limitation period in section 766.70(6)(a) or the longer limitation period in section 766.70(6)(b). At the latest, a gift of the nondonor spouse's marital property interest in the trust to third-party beneficiaries becomes complete when the appropriate limitation period for commencing an action to recover that interest in the trust property expires. It is clear that when the surviving spouse's right to recover the marital portion of the proceeds expires, the gift to third parties is complete for federal transfer tax purposes. *Whiteley v. United States*, 214 F. Supp. 489, 493 (W.D. Wash. 1963).

If, for some reason, there is no reclassification of marital property assets transferred into an irrevocable trust for the benefit of third parties, and if the nondonor spouse dies before the death of the settlor spouse and before the applicable limitation period in section 766.70(6) has run, it appears that the remedy survives and may be exercised by the nondonor spouse's personal representative or special administrator until the limitation period expires. This right of action may properly be regarded

as an unliquidated claim or cause of action includible in the deceased nondonor spouse's gross estate under I.R.C. § 2033. *See, e.g., Estate of Houston v. Commissioner*, 44 T.C.M. (CCH) 284 (1982). Because the nondonor spouse does not have an absolute right of recovery, it is unlikely that he or she will be deemed to have a power of revocation under I.R.C. § 2038 with respect to one-half of any marital property asset in the trust, as was the case in *Estate of Lucey v. Commissioner*, 13 T.C. 1010 (1949). *See also supra* § 9.65. The same result would follow if the nondonor spouse died after the settlor spouse, but before the statute of limitation for recovery of gifts in section 766.70(6) had expired.

➤ **Practice Tip.** The foregoing discussion underscores the desirability of having the spouses act together in making large gifts to third parties, whether outright or in trust, since it achieves the highest degree of certainty with regard to the completion of gifts for tax purposes.

5. Gifts at the Death of One Spouse to Third Parties Under Will Substitute Agreements [§ 9.93]

There is a significant gift tax concern that could affect the use of will substitute agreements (*see supra* §§ 7.99–106) that purport to transfer the spouses' property to third persons at the death of the surviving spouse. In *Pyle v. United States*, 766 F.2d 1141 (7th Cir. 1985), the taxpayer and her husband executed a joint and mutual (i.e., contractual) will that purportedly gave each other a fee simple in all their property but that went on to spell out in great detail how their property was to be disposed at the death of the surviving spouse. The joint and mutual will imposed significant constraints on the survivor's ability to invade or dispose of the property during the survivor's lifetime. These restrictions were deemed to constitute an ascertainable standard for invasion under state law. Under these circumstances, the court found that when the survivor died, the contract became binding and a completed gift resulted to the third-party remaindermen named in the joint and mutual will.

The quandary posed for Wisconsin residents desiring to use a will substitute agreement is that section 766.58(3)(f) provides that, when a will substitute agreement purports to dispose of the spouses' property without probate at the death of the survivor, the surviving spouse may amend the will substitute agreement at any time after the death of the

first spouse with regard to property to be disposed of at the survivor's death, unless the will substitute agreement expressly provides otherwise. According to the 1985 Trailer Bill Original Nontax Note to section 766.58(3)(f), this provision is designed to avoid unintended hardship because of changed circumstances when the surviving spouse survives the deceased spouse for a substantial period of time. The provision implies that the surviving spouse may amend the terms of the agreement to allow the spouse to invade and consume the property or even assign the property to other persons.

Since many spouses who enter into will substitute agreements disposing of property at the death of the survivor will want assurance that the property will pass to the intended third-party beneficiaries and will not be diverted by the surviving spouse, it is likely that many such agreements will be drafted to provide either that they cannot be amended, or that invasion or consumption of the property by the survivor is strictly limited by an ascertainable standard. If an agreement is so limited and cannot be amended by the surviving spouse, then it appears to fall squarely within the *Pyle* holding, and completed gifts to third-party beneficiaries will result at the death of the first spouse.

Although there may be reasons for drafting will substitute agreements so that they cannot be amended or so that invasion or consumption of the property by the surviving spouse is limited by an ascertainable standard, it is worth noting that not including such provisions would appear to avoid gift tax liability for completed gifts to third-party beneficiaries at the death of the first spouse. *Estate of Lidbury v. Commissioner*, 800 F.2d 649 (7th Cir. 1986), involved a joint and contractual will executed by Illinois residents. However, unlike *Pyle*, 766 F.2d 1141, and a similar case, *Grimes v. Commissioner*, 851 F.2d 1005 (7th Cir. 1988), also involving Illinois law, the survivor in *Lidbury* was free to consume the spouses' property entirely during his lifetime; thus, the amount of property to which the Lidburys' children were entitled under the contractual will was too uncertain to trigger a gift tax at the death of the first spouse. Accordingly, it seems that a will substitute agreement that is drafted either to permit invasion or consumption of the property subject to the agreement by the surviving spouse, or to permit the survivor to amend the agreement as described in section 766.58(3)(f), should eliminate the possibility of a taxable gift at the death of the first spouse.

6. Relinquishment of Community Property Rights [§ 9.94]

A taxable gift may also occur in cases in which a surviving spouse relinquishes community property rights or no longer has a legal right to recover them. A common example is when a surviving spouse fails to claim his or her community property share of insurance proceeds, thus permitting them to pass to a trust in which the surviving spouse has a life estate. It has been said that “[the] election not to claim is in practical effect a transfer to others.” *Whiteley*, 214 F. Supp. at 493. See also *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir. 1958), in which a completed gift was deemed to occur when insurance proceeds passed to an insurance trust at the husband’s death, and the surviving wife had no legal right to recover her share from the trustee in the absence of fraud. That case also involved a deemed gift by the surviving wife of her community share of assets held in a revocable trust created by her husband. The trust was revocable solely by the husband during his lifetime, and the gift was held to occur upon his death. In both fact situations, the value of the gift is the value of the assets transferred, reduced by the life income interest retained by the survivor.

Execution of a written consent under section 766.61(3)(e) raises similar issues about relinquishment of marital property rights, either in property used to pay premiums on a life insurance policy or in the ownership interest or proceeds of the policy. To the extent provided, written consent can be used not only to consent to the designation of a beneficiary but also to relinquish or reclassify either all or a portion of the consenting spouse’s interest in the ownership interest and proceeds of the policy. If the wife names her son as beneficiary of a life insurance policy insuring her life and designating her as owner, and the husband makes a written consent, the consent can provide that the husband relinquishes his rights not only to the insurance proceeds when his wife dies, but also to all other ownership interests in the policy and proceeds as well, without regard to the classification of marital property assets used by the wife or another person to pay premiums.

The husband’s consent could also state that the policy (and assets used to pay premiums as well) is reclassified as the wife’s individual property, even if premiums are subsequently paid from other classifications of property. For federal gift tax purposes, the reclassification features of the written consent may result in a gift of the

husband's present marital property interest in the policy to the wife, valued as of the date of the consent. Further completed gifts will occur as premium payments are made from marital property assets and as cash values are added to the policy each year. These gifts should qualify for the marital deduction. If the written consent is irrevocable, it should follow that, because the husband made a gift to his wife at the time of the consent (or at the time of premium payments or the crediting of cash values), he would not be treated as making a gift to the third-party beneficiary when his wife dies.

With respect to *revocable* consents, section 766.61(3)(e) provides that unless the written consent provides otherwise, revocation does not operate retroactively to change the classification of any marital property assets that were already reclassified by the consent or in which the revoking spouse had previously relinquished an interest. This could result in a mixed bag of completed and uncompleted gifts. If the consent in the foregoing example were revocable and if the husband chose to revoke it, his relinquishment of either a marital property interest in property used by the wife to pay premiums or in cash value increases in the policy during the period before the revocation would nonetheless remain completed gifts to her. In addition, a revocable consent should effectively "purify" the policy of the husband's other ownership interest in the policy up to the point when the consent was revoked. Following revocation, a marital property component in the policy may be revived to the extent that the general classification rules in section 766.61 once again apply.

N. Federal Gift Tax: Valuation [§ 9.95]

1. In General [§ 9.96]

The general federal gift tax valuation rules in I.R.C. § 2512(a) and Treasury Regulation §§ 25.2512-1 to .2512-9 parallel those of the federal estate tax discussed at section 9.56, *supra*. Consistent with the idea that donative intent is not required for a taxable gift, I.R.C. § 2512(b), dealing with valuation of gifts, provides that if property is transferred for less than an adequate and full consideration in money or money's worth, the excess of the value of the property transferred over the value of the consideration received is deemed a gift.

2. Forced-election Transfers [§ 9.97]

Forced-election estate plan situations may involve “bargain sale” gifts. The federal estate tax consequences are discussed in section 9.73, *supra*.

As discussed in section 9.73, *supra*, there has been much debate among the federal circuit courts of appeal over whether the consideration deemed to have been transferred by the surviving spouse in a forced-election plan should be measured by the value of his or her remainder interest in the community property transferred (because the surviving spouse retains a life income interest in that property in addition to receiving a life interest in the deceased spouse’s half of the community property) or by the full, undiminished value of his or her one-half interest in the community property transferred. *Compare Gradow*, 11 Cl. Ct. 808 (holding that consideration flowing from surviving spouse consists of his or her full one-half interest in community property transferred), *with Estate of D’Ambrosio*, 101 F.3d 309 (holding that consideration flowing from surviving spouse should be measured by actuarial value of remainder interest in community property transferred). This determination is important, because the surviving spouse will be considered to have made a taxable gift to the remaindermen to the extent that the consideration deemed given by the surviving spouse under the forced-election plan is greater than the discounted present value of the life income interest received in the decedent’s one-half of the community property.

It may also be the case that a different valuation test applies in forced-election estate plans for gift tax purposes than for estate tax purposes, because of the operation of I.R.C. § 2702. Under section 2702, it would appear that the value of the surviving spouse’s retained income interest in his or her half of the community property should be disregarded if the remainder interest passes to members of his or her family (generally lineal descendants and siblings and their spouses). Consequently, the surviving spouse would be treated as having made a gift of the entire value of his or her share of the community property, less only the value of the life interest received from the deceased spouse’s share. The operation of section 2702 is described in Treasury Regulation § 25.2702-1(b) as follows:

Effect of Section 2702. If Section 2702 applies to a transfer, the value of any interest in the trust retained by the transferor or any applicable family

member is determined under § 25.2702-2(b). The amount of the gift, if any, is determined by subtracting the value of any interests retained by the transferor or any applicable family member from the value of the transferred property. If the retained interest is not a qualified interest ..., the retained interest is generally valued at zero, and the amount of the gift is the entire value of the property.

The result of I.R.C. § 2702 with respect to retained interests other than qualified interests (fixed annuities or unitrust amounts) is consistent with the approach taken in *Gradow*—namely, that the determination whether the surviving spouse has received full consideration is made by comparing the total value of the property transferred to the actuarially determined value of the life income interest received in the deceased spouse's property.

It should be noted that I.R.C. § 2702 will not apply if the remainder beneficiaries are not members of the surviving spouse's family. The rule for valuation of a gift under such circumstances is illustrated by *Commissioner v. Siegel*, 250 F.2d 339 (9th Cir. 1957), and *Estate of Bressani v. Commissioner*, 45 T.C. 373 (1966). In each of these cases, the value of the surviving widow's gift to the remainder beneficiaries was the value of her one-half of the community property assets passing to her husband's trust less the value of her retained life estate in that one-half, reduced by the value of the life estate she received in the decedent's one-half of the community property assets that were retained in the trust.

Robinson v. Commissioner, 675 F.2d 774 (5th Cir. 1982), *aff'g* 75 T.C. 346 (1980), provides an interesting variation on the forced-election theme. The court held that the completed gift of the surviving spouse's remainder interest did not occur until she released a limited power of appointment over the remainder that was granted to her under the terms of the trust for her benefit under her husband's will. The existence of the limited power prevented the wife's election to take under the will and the resultant transfer of her half of the community property to the trust from being treated as a completed gift at the time of the husband's death. Treas. Reg. § 25.2511-2(c). As a result, however, she was unable to reduce the value of her gift by the value of the life estate she had received several years earlier in her deceased husband's half of the community property. In the court's view, the earlier consideration (i.e., the receipt of a life estate) was not consideration for her wholly gratuitous subsequent release of the limited power of appointment.

3. Minority-interest Discounts [§ 9.98]

The minority-interest and fractional-interest discount issues involving marital property interests in closely held stock and real estate are discussed in detail in section 9.56, *supra*. The position of the IRS for federal gift tax purposes is set forth in Revenue Ruling 93-12, 1993-1 C.B. 202. As discussed in section 9.56, *supra*, discounts should be allowed for each spouse's one-half share of marital property that is gifted to a third party.

O. Federal Gift Tax: Gift Reporting and Gift Splitting in Gifts by Husband or Wife to Third Parties [§ 9.99]

Under the Act, each of the spouses owns an undivided 50% interest in each item of marital property. Wis. Stat. § 766.31(3). Accordingly, each spouse will be required to file a federal gift tax return for the value of his or her half of any marital property asset transferred by gift, if the value of that one-half exceeds \$13,000 (the annual gift tax exclusion amount under I.R.C. § 2503(b) for 2010) to any donee in any calendar year. For example, assume that a marital property asset with a value of \$30,000 is under the exclusive management and control of one spouse, and that the property is given outright by the managing spouse to a child. Further, assume that the other spouse has no objection to that gift and in fact concurs in it. Each spouse would file a federal gift tax return reporting a \$15,000 gift of his or her respective one-half interest in the asset. The taxable portion of such gift would be \$2,000 after applying the \$13,000 annual exclusion.

If the nondonor spouse does not agree to the gift, he or she should not be obligated to file a federal gift tax return with respect to his or her one-half of the transfer, particularly if the nondonor invokes (or intends to invoke) the remedies in section 766.70(6) by commencing a timely action. The danger for a nonconsenting nondonor spouse who files a federal gift tax return is that the return might be viewed as a ratification of the gift or an "acting together" with the donor spouse. *See supra* § 9.86.

Assuming that no other gifts are made by the spouses, if the total of the marital property assets transferred to the donee is, for example, \$20,000, no federal gift tax returns would be required of either spouse

because the respective gifts of each (\$10,000) are less than the \$13,000 annual exclusion. *See* I.R.C. §§ 2503(b), 6019(a). However, the \$13,000 annual exclusion does not apply to transfers that are not present interests in property. I.R.C. § 2503(b); Treas. Reg. § 25.2503-3.

In addition, each spouse would be obligated to file a federal gift tax return with respect to his or her present interest gifts of individual property assets or of predetermination date property assets that alone or in combination with marital property assets exceed \$13,000 to any donee in any calendar year. It is with regard to gifts of individual property and predetermination date property assets, rather than marital property assets, that the gift-splitting provisions of I.R.C. § 2513 may be relevant.

Under I.R.C. § 2513, both spouses may signify their consent to treat all gifts made during the calendar year by one spouse to any person (other than the other spouse) as though made one-half by each spouse. For purposes of I.R.C. § 2513(a), a person is treated as the spouse of another person only if he or she is married to that individual at the time of the gift and does not remarry during the remainder of the calendar year. Spouses consenting to split gifts of individual property assets or of predetermination date property assets for any calendar year are jointly and severally liable for the entire amount of gift tax imposed on each spouse for that year. I.R.C. § 2513(d).

The election to gift split under I.R.C. § 2513 must be signified by both spouses on a federal gift tax return (Form 709). The mechanics are spelled out in Treasury Regulation § 25.2513-2. Normally the donor spouse should file such a return when the present interest gifts to any one donee of individual property assets and predetermination date property assets, either alone or in combination with marital property assets, exceed the \$13,000 annual gift tax exclusion in any calendar year, because if the present interest gifts to each donee are less than that amount, gift splitting would not be necessary. A return should also be filed when future interest gifts in any amount have been made. The consenting spouse must file a return only if his or her present interest gifts to any one donee (including deemed gifts by reason of that spouse's consent to gift split) will exceed the \$13,000 annual gift tax exclusion, or if future interest gifts are involved.

The personal representative of a deceased spouse, or the guardian of a legally incompetent spouse, may signify the consent to gift split. Treas.

Reg. § 25.2513-2(c). A limited right of revocation of the consent is provided under I.R.C. § 2513(c).

If a nondonor spouse files a federal gift tax return with respect to a gift of marital property assets made by the donor spouse, or consents to gift split on the donor spouse's federal gift tax return, he or she will probably be deemed to have "acted together" with the donor spouse in making a gift for Wisconsin property law purposes. See 1985 Trailer Bill Supplemental Nontax Note to section 766.53; see also *supra* § 9.86. If the donor spouse makes the gift to a third person, and both spouses file federal gift tax returns reporting their respective halves of the gift, they have probably acted together for purposes of section 766.53. If the donor spouse erroneously reports the entire amount of the gift on his or her own federal gift tax return, and the nondonor spouse signifies his or her consent to gift split under I.R.C. § 2513, this, too, should be sufficient evidence that the spouses acted together in making the gift.

P. Federal Gift Tax: Transfers Pursuant to Property Settlements [§ 9.100]

The area of transfers in connection with releases or settlements of marital or property rights, whether before, during, or after marriage, has been fraught with gift tax hazards. In the context of the Act, these problems are likely to arise in conjunction with marital property agreements and divorce settlements.

As a general proposition, for purposes of I.R.C. § 2512(b), a release of property rights incident to marriage such as "dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the spouse's property or estate" is not considered "adequate and full consideration for money or money's worth" for any provision made for the relinquishing spouse by the other spouse. Treas. Reg. § 25.2512-8. Thus, property transfers in consideration of such releases have long been held to be subject to federal gift tax. *Commissioner v. Wemyss*, 324 U.S. 303 (1945); *Merrill v. Fahs*, 324 U.S. 308 (1945); Rev. Rul. 79-312, 1979-2 C.B. 29. This tax result follows whether the transfer pursuant to a marriage takes place before or after the marriage. The main difference, of course, is that since 1948, the federal gift tax marital deduction in I.R.C. § 2523, discussed in section 9.107, *infra*, potentially has been available to soften (or eliminate) the blow for gifts between spouses completed after the parties were actually married.

➤ **Note.** For gift tax purposes, the IRS has taken the position that support rights differ from marital rights, with the result that a spouse's release of support rights is sufficient consideration to bar gift tax to the extent of the value of those rights. Rev. Rul. 68-379, 1968-2 C.B. 414. This rule is relevant only in situations in which the support agreement does not fall within the time limitation of the special statute dealing with settlement agreements entered into incident to divorce. See I.R.C. § 2516.

Transfers in connection with divorce property settlement agreements historically also proved troublesome. Because of the availability of the federal gift tax marital deduction, the problem was not serious if the transfers could be carried out by the spouses before the entry of a divorce decree. Difficulties could and did occur after the entry of a divorce decree, because the federal gift tax marital deduction obviously was not available for transfers between former spouses. One alternative was to have the property transfers (whether or not made under an agreement) validated by incorporation in a final decree of a divorce court having the power to direct the disposition of the spouses' property, in which case the transfers would be considered judicially directed and not taxable gifts. *Harris v. Commissioner*, 340 U.S. 106 (1950). Further, a claim based on the decree would be deductible for federal estate tax purposes under I.R.C. § 2053 as a liquidated debt. Rev. Rul. 60-160, 1960-1 C.B. 374.

These problems led to the enactment of I.R.C. § 2516. This statute applies when a husband and wife enter into a written agreement relative to their marital and property rights, and divorce occurs within a three-year period beginning one year before the agreement was entered into. In such circumstances, any transfers of property or interests in property made under the agreement (1) to either spouse in settlement of his or her marital or property rights, or (2) to provide a reasonable support allowance for children of the marriage during their minority, are deemed to be transfers made for a full and adequate consideration in money or money's worth, regardless of whether the agreement is in fact approved by the divorce decree. Transfers that meet the I.R.C. § 2516 test with respect to transfers in settlement of marital or property rights will be deductible for federal estate tax purposes under I.R.C. §§ 2053(e) and 2043(b)(2). The procedures for specific disclosure of transfers coming within I.R.C. § 2516 are in Treasury Regulation § 25.6019-3(b). But see Technical Advice Memorandum 200011008 (Mar. 17, 2000), for an example of a transfer that did not qualify under I.R.C. § 2516; the IRS

held that payment of life insurance proceeds from a policy on the life of the divorced husband to adult children from the marriage was not made in settlement of marital or property rights for purposes of section 2516.

Q. Federal Gift and Estate Tax: Disclaimers [§ 9.101]

1. In General [§ 9.102]

The federal gift and estate tax rules with respect to disclaimers are spelled out in I.R.C. § 2518. The effect of making a *qualified disclaimer* for purposes of I.R.C. § 2518(a) is that the disclaimed interest in property is treated as though it had never been transferred to the disclaimant, thus avoiding all federal transfer taxation with respect to the disclaimer.

For a disclaimer to be qualified, and therefore not treated as a gift for federal gift tax purposes, it must comply with the requirements of I.R.C. § 2518 and the corresponding Treasury regulations. There are five basic requirements for a disclaimer to be qualified under I.R.C. § 2518: (1) it must be irrevocable and unqualified; (2) it must be in writing; (3) the writing must be delivered in a timely manner (generally within nine months of the event creating the property interest); (4) the disclaimant must not have accepted the interest disclaimed or any of its benefits; and (5) the interest disclaimed must pass without any direction on the part of the disclaimant. Treas. Reg. § 25.2518-2(a); *see also* Wis. Stat. § 854.13 (setting forth requirements for effective disclaimer in Wisconsin).

2. Marital Property Assets [§ 9.103]

A surviving spouse may disclaim the deceased spouse's marital property interest that passes to him or her, provided that an acceptance of the benefits of the disclaimed property is avoided. *See* Treas. Reg. § 25.2518-2(c)(5), Example (11). A disclaimer of the decedent's community property interest in a residence will not by itself be barred by the survivor's occupancy of the residence following death. Treas. Reg. § 25.2518-2(d)(4), Example (8). A surviving spouse, however, cannot disclaim his or her own one-half interest in marital property assets, if only because the surviving spouse is the transferor of his or her own one-half interest. *See* Rev. Rul. 83-35, 1983-1 C.B. 234; Treas. Reg. § 25.2518-2(c)(5), Example (10). It follows that an attempted disclaimer of both halves of a marital property asset by a surviving spouse after the

death of the first spouse, coupled with a transfer of the disclaimed asset to the person who would otherwise be entitled to receive the property, will constitute a gift by the survivor of his or her own one-half marital property interest.

In Private Letter Ruling 8624103 (Mar. 19, 1986), the IRS confirmed that the surviving spouse may execute a partial disclaimer of the decedent's community property interest in real estate without causing a taxable gift. The disclaimer was structured to disclaim an undivided interest in the real estate equal in value to the largest amount that could pass free of federal estate tax by reason of the unified credit and the credit for state death taxes.

3. Individual Property and Predetermination Date Property Assets [§ 9.104]

Does Wisconsin's statutory rule classifying the income from individual property assets and predetermination date property assets as marital property raise a question as to whether the spouse making a disclaimer of such property at death has already accepted its benefits during the marriage, thus causing the disclaimer to be nonqualified? Based on a private letter ruling issued by the IRS, the answer appears to be no. Specifically, in Private Letter Ruling 8212061 (Dec. 24, 1981), the IRS indicated that the presence of a community property interest in income from property during the marriage will not preclude a timely disclaimer by the surviving spouse upon the death of his or her spouse when the actual transfer of the property interest to the disclaimant did not occur until death.

The private letter ruling involved disclaimer of a contingent future income interest in a trust in Texas, which has an income rule similar to that in Wisconsin. During her marriage, the wife established an irrevocable trust, which reserved an income interest to her for life and provided for payment of income to her husband following her death unless she exercised a limited power of appointment to direct the trust assets to her issue. The wife and husband were later divorced, but the husband nevertheless remained a cotrustee. The wife died without having exercised the limited power of appointment, and under Treasury Regulation § 25.2511-2, the transfer of the interests in trust became complete. Under the laws of Texas, the husband had a community property interest in the wife's income from the trust during the period of

their marriage. The IRS determined that this interest did not give rise to an acceptance that later would bar the husband's disclaimer of his contingent successor income interest following the wife's death. The IRS further pointed out that acceptance could not become an issue until the wife's death, when the transfers of trust interests were deemed to be completed. Priv. Ltr. Rul. 8212061 (Dec. 24, 1981).

The result in Private Letter Ruling 8212061 is consistent with the analysis in *Estate of Wylie*, 610 F.2d 1282, discussed in section 9.62, *supra*. There should be no deemed acceptance of benefits from individual or predetermination date property assets by the surviving spouse solely because of the preexisting statutory right to a marital property interest in the income from the property. The right to a share of income arises by operation of law and requires no action on the part of the surviving spouse, unlike the typical case involving acceptance of benefits from a lifetime gift or a testamentary disposition. Moreover, the right to a share of income is totally terminable by the owner of the property during lifetime through execution of a unilateral statement, gifts to third parties, or reinvestment in nonincome-producing assets. These factors underscore the conclusions that there is likely to be no "acceptance" in the usual sense, as well as that the "benefits" during the owner spouse's lifetime are insubstantial, if not illusory.

4. Survivorship Marital Property Assets [§ 9.105]

For Wisconsin property law purposes, survivorship marital property is indistinguishable from other kinds of marital property during the joint lifetimes of the spouses; it is merely a form of holding marital property. *See* Wis. Stat. § 766.60(5)(a); *see also supra* § 2.250. Upon the death of one of the spouses, however, the ownership rights of the deceased spouse in the property vest solely in the surviving spouse by a nontestamentary disposition at death. *Id.*

As discussed in section 9.30, *supra*, the characteristics of survivorship marital property bear little resemblance to those of joint tenancy with right of survivorship other than the feature of survivorship. Each of the two joint tenants owns an equal interest *in the whole property* for the duration of the tenancy, and upon the death of one of the two, the interest of the deceased disappears and the survivor becomes the sole owner of the whole. *See* Wis. Stat. § 700.17(2). In contrast, the ownership interest of each spouse in assets classified as survivorship marital

property consists of a present undivided one-half interest in the property. Wis. Stat. § 766.31(3). When title to an asset is held as survivorship marital property, on the death of a spouse, the deceased spouse's undivided one-half ownership interest vests solely in the surviving spouse by a nontestamentary, nonprobate transfer. Wis. Stat. § 766.60(5). Moreover, a spouse's interest in a joint tenancy may be unilaterally severed and the right of survivorship destroyed during his or her lifetime, whereas this ordinarily cannot be done with survivorship marital property without action by both spouses.

For purposes of disclaimers under I.R.C. § 2518, a deceased spouse's interest in survivorship marital property assets should be regarded the same as any other marital property interest, and should be subject to disclaimer in the same manner and on the same conditions as marital property assets. *See supra* § 9.103. By statute, Wisconsin specifically authorizes a surviving spouse to disclaim the decedent spouse's interest in survivorship marital property. Wis. Stat. § 701.26(1)(b).

The regulations under I.R.C. § 2518 regarding the disclaimer of joint interests alleviate any possible concern that may exist with respect to the time period for making a qualified disclaimer of survivorship marital property. Although the regulations do not specifically mention survivorship marital property (or its analogue, community property with rights of survivorship), they do confirm the timing issue with respect to disclaiming the survivorship interest in jointly owned property that is not unilaterally severable.

Before the adoption of the regulations in 1997, the IRS had taken the position in a number of rulings that the time period for making a qualified disclaimer of a survivorship interest that was not unilaterally severable commenced upon creation of the tenancy and not at the decedent's later death. *See, e.g.*, Tech. Adv. Mem. 9208003 (Feb. 21, 1992) (involving Arkansas tenancy by entirety property); Tech. Adv. Mem. 9427003 (July 8, 1994) (involving Maryland tenancy by entirety property). The fact that survivorship marital property (like tenancy by the entirety property) is not unilaterally severable created concerns regarding the ability of a surviving spouse to disclaim a deceased spouse's interest in survivorship marital property upon the death of the first spouse.

These concerns were to put to rest, however, with the adoption of Treasury Regulation § 25.2518-2(c)(4)(i), which provides in pertinent part that

[a] qualified disclaimer of a survivorship interest to which the survivor succeeds by operation of law upon the death of the first joint tenant to die must be made no later than 9 months after the death of the first joint tenant to die regardless of whether such interest can be unilaterally severed under local law....

Example 8 under Treasury Regulation § 25.2518-2(c)(5) extends this application to tenancy-by-the-entirety property. The same rationale should also apply to a disclaimer by a surviving spouse of the deceased spouse's interest in survivorship marital property.

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

5. Marital Property Assets Transferred by Survivorship Will Substitute Agreement [§ 9.106]

The regulations under I.R.C. § 2518 do not contemplate the timing or extent to which a disclaimer may be made with respect to property passing under a will substitute agreement as authorized by Wis. Stat. § 766.58(3)(f) (or by the similar laws of the state of Washington). In Private Letter Ruling 9507017 (Feb. 17, 1995), however, the IRS considered a disclaimer with respect to property passing to the surviving spouse under a Washington community property agreement and concluded that “for purposes of section 2518(a)(2), the nine-month period for making the disclaimer of the decedent's one-half community property interest passing to surviving spouse under the community

property agreement commences on the date of death.” Similarly, it would seem clear that the time period for the making of a disclaimer by a Wisconsin surviving spouse of property passing under a will substitute agreement pursuant to section 766.58(3)(f) should commence upon the date of death of the first spouse to die.

R. Federal Gift Tax: Marital Deduction [§ 9.107]

1. Gifts Between Spouses [§ 9.108]

The gift tax marital deduction in I.R.C. § 2523 roughly parallels the federal estate tax marital deduction in language and in practice. An unlimited deduction is allowed to a donor for all gifts made during the calendar year to a donee who, at the time of the gift, is the donor’s spouse. I.R.C. § 2523(a). With certain exceptions, gifts of terminable interests in property do not qualify for this deduction. I.R.C. § 2523(b); Treas. Reg. § 25.2523(b)-1. The exceptions are for certain types of deductible terminable interests described in Treasury Regulation §§ 25.2523(d)-1 (joint interests) and 25.2523(e)-1 (life estate with power of appointment).

In rearranging or revising family estate plans, spouses may transfer property or property interests. Transfers also may occur either when one spouse makes additions or improvements to marital property assets with his or her individual property funds or when one spouse makes improvements to the individual property assets of the other spouse with marital property funds. While most of these transfers will involve entire properties or interests in property, it is possible that arrangements will be established that do not qualify for the federal gift tax marital deduction.

➤ **Caution.** It must be remembered that the federal marital deduction provision in I.R.C. § 2523 is not a blanket exemption of transfers to a spouse. Care should be exercised in making sure that transfers to a spouse are of a nature that qualifies for the marital deduction. If there are any future interest gifts or transfers to a spouse that do not qualify for the gift tax marital deduction, then a gift tax return must be filed.

2. Special Rules for Gifts to a Spouse Who Is Not a United States Citizen [§ 9.109]

Under I.R.C. § 2056(d), the estate tax marital deduction for transfers of property interests to a surviving spouse who is not a citizen of the United States is effectively denied unless the property passes to the surviving spouse in a qualified domestic trust. Attributes of a qualified domestic trust are described in detail in I.R.C. § 2056A.

A parallel provision under I.R.C. § 2523(i) disallows the gift tax marital deduction for lifetime transfers to noncitizen spouses. However, I.R.C. § 2523(i)(2) creates a special rule to generate the equivalent of a \$100,000 annual exclusion for gifts to a noncitizen spouse, provided that the gift would otherwise qualify for the federal gift tax marital deduction. Since 1998, the \$100,000 annual exclusion for gifts to a noncitizen spouse has been indexed for inflation. For 2010, the amount is \$134,000. Rev. Proc. 2009-50, 2009-45 I.R.C. 617.

If spouses domiciled in Wisconsin are contemplating the execution of an opt-in marital property agreement of the type described at sections 7.151 or 7.175, *supra*, and the noncitizen spouse has substantially fewer assets than the other spouse, caution must be exercised to avoid creating a major taxable gift when the opt-in agreement is executed. For example, if the citizen spouse owns individual property or predetermination date property assets valued at \$1 million before execution of the marital property agreement and the noncitizen spouse owns similar assets with a value of \$100,000, the execution of an agreement classifying all or substantially all of the spouses' property as marital property will result in a gift to the noncitizen spouse of \$450,000 ($\$1,000,000/2 - \$100,000/2 = \$450,000$). Under I.R.C. § 2523(i), the amount of such gift in excess of the then annual exclusion amount would be treated as a taxable gift subject to federal gift tax. Thus, executing a marital property agreement may trigger either an immediate gift tax liability or possibly require the use of a substantial portion of the donor spouse's \$1 million lifetime gift tax exemption that was intended to shelter transfers to the donor's children or other family members.

➤ **Note.** This gift tax problem apparently does not occur when the noncitizen spouse passively becomes the owner, by operation of law, of an undivided one-half community property interest in property because he or she resides in a community property jurisdiction. *See*,

e.g., Rev. Rul. 74-284, 1974-1 C.B. 276; *see also Fernandez v. Wiener*, 326 U.S. 340 (1945).

IV. Wisconsin Transfer Taxes [§ 9.110]

As discussed in section 9.55, *supra*, in 2001 Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (“the 2001 Act”), which made extensive changes to the federal estate and gift tax regime, including a reduction in estate tax rates and a substantial incremental increase in the federal estate tax exemption. Standing alone, the increase in the federal estate tax exemption would have meant declining estate tax revenue to Wisconsin and other states with a pick-up estate tax system which imposes a state estate tax equal to the maximum state death credit allowed for federal estate tax purposes.

In response to the 2001 Act’s reduction and scheduled repeal of the state death tax credit, Wisconsin revised its estate tax law to provide that, effective October 1, 2002, the federal state death tax credit and the federal estate tax exemption to be used for purposes of determining Wisconsin estate taxes for deaths occurring from October 1, 2002 through December 31, 2007, must be computed under the federal estate tax law in effect on December 31, 2000. The federal state death tax credit and the federal estate tax to be used for purposes of determining Wisconsin estate tax for deaths occurring after December 31, 2007 must be computed under the federal estate tax law in effect on the date of the decedent’s death. Wis. Stat. § 72.01(11m), (11n). Accordingly, under current law, the imposition of a Wisconsin estate tax will be dependent upon the status of the federal estate tax.

Historically, there have been no special provisions contained in the Wisconsin estate tax law to accommodate the Act or the system of community property ownership it creates. No such provisions have been necessary because Wisconsin’s estate tax, since the enactment of the Act, has been imposed upon property that is subject to the federal estate tax. The application of the Act’s system of community property will presumably continue to be interpreted consistently with federal estate tax law principles under any future version of the Wisconsin estate tax that may be enacted.