FROM COMMON LAW PROPERTY TO COMMUNITY PROPERTY: WISCONSIN'S MARITAL PROPERTY ACT FOUR YEARS LATER

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It is now more than six years since Governor Anthony Earl signed the Wisconsin Marital Property Act (WMPA)[1] which made Wisconsin the nation's ninth[2] community property state, and over four years since

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1. Act of Apr. 4, 1984, 1983 Wis. Act 186, 1983 Wis. Laws 1153, *amended by* Act of Oct. 22, 1985, 1985 Wis. Act 37, 1985 Wis. Laws 574 (Trailer Bill I), *amended by* Act of Apr. 23, 1988, 1987 Wis. Act 393, 1987 Wis. Laws 1483 (Trailer Bill II). The original act was signed April 4, 1984, and was effective January 1, 1986. Trailer Bill I was signed on October 22, 1985, and effective January 1, 1986; hence the amended provisions in the original act never took effect. Trailer Bill II was signed April 23, 1988, and became effective May 3, 1988. *See infra* discussion at 713-14 and accompanying notes.

2. Aside from Wisconsin, there are eight community property states: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas and Washington. For a history of the establishment of community property systems in these states, see W.Q. DEFUNIAK & M.J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY §§ 37-53, 55-91 (2d ed. 1971).

Because the Wisconsin statutes (and the Uniform Act) refer to the adoption of a *marital property* system rather than a *community property* system, there was initially some question as to the community property status of the Wisconsin system, especially for federal tax purposes. This point was clarified for state law purposes by section 766.001 of the Wisconsin statutes, adopted as part of Trailer Bill I, which states that "It is the intent of the legislature that marital property is a form of community property." Soon after the enactment of WMPA, Internal Revenue Service officials informally recognized that WMPA would transform Wisconsin into a community property state. Boykoff, *Wisconsin Tax Practice and the Marital Property Act*, 68 MARQ. L. REV. 424, 427 (1985). This was formally recognized by the IRS in Revenue Ruling 87-13, 1987-1 C.B. 20.

However, some commentators still do not recognize that there are now nine community property states. *See, e.g.*, Comment, *Uniform Probate Code Section 2-202: A Proposal to Include Life Insurance Assets Within the Augmented Estate* 74 CORNELL L. REV. 511 (1989): Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 691 (1990). In addition, *American Jurisprudence 2d*, which includes references to articles on WMPA and UMPA, does not include text noting that Wisconsin is now the ninth community property state. *See* 1990 pocket part to 15A AM JUR. 2D *Community Property*, § 116 (1990).

Several Federal Reserve Board rulings and proposed rulings recognize Wisconsin as a community property state. *See, e.g.*, Federal Reserve System "Equal Credit Opportunity Intent to Preempt Wisconsin Law," 51 Fed. Reg. 35, 521 (Oct 6, 1986), 12 C.F.R. § 202; preemption determination, 52 Fed. Reg. 35, 537 (Sept. 22, 1987), 12 C.F.R. § 202 Reg. B.

One factor which contributes to the confusion over whether Wisconsin is a community

WMPA became effective. Except for some common law property states which temporarily switched to community property solely for income tax reasons in the 1940s,[3] Wisconsin is the first state with a long history as a common law property jurisdiction to become a community property jurisdiction for married persons.[4] It is also the first state (and to date the only state) to adopt a property system based on the Uniform Marital Property Act (UMPA).[5]

As an aid to the common law property states which are considering the adoption of UMPA and those community property states which are considering adoption of specific UMPA rules, this Article reviews the Wisconsin experience under WMPA. Part I briefly describes the events which produced Wisconsin's version of UMPA and its subscquent amendments, and identifies the major differences between UMPA and WMPA. Part II describes the differences between WMPA and Wisconsin's divorce law, some confusion about the intcrrelationship between these two different areas of law, and the contents of a

property state is, of course, the use of the term "marital property," as well as some comments to UMPA suggesting that marital property is a unique system of property law, different from both community and common law property systems. Another is the fact that, unlike most of the other community property states (all but Texas), under UMPA and WMPA for most purposes management and control remains *title* based. However, UMPA and WMPA are based on equal vested *ownership* of marital property, and it is this spousal ownership rule, and not the management and control rules, that is the essential feature of a community property system. *See* Reppy, *The Uniform Marital Property Act: Some Suggested Revisions for a Basically Sound Act*, 21 HOUS. L. REV. 679, 683 (1984) (criticizing the use of the terms "marital property" and "individual property" instead of the more traditional terms "community property" and "separate property").

3. Between 1939 and 1948, six common law property states adopted community property systems in order to provide married residents with the federal tax advantages of community property. *See* Note, *Epilogue to the Community Property Scramble: Problems of Repeal*, 50 COLUM. L. REV. 332, 332-37 (1950). These enactments were either repealed soon after the initiation of the joint return (Revenue Act of 1948, Pub. L. No. 471 62 Stat. 111 1948) or declared unconstitutional.

4. The community property system eventually adopted in Wisconsin is like that of the other eight American community property states in that the shared property consists of "acquests" during the marriage. This system came to the United States from Spain and France.

There are other community property systems, however, including a general or universal system (Roman-Dutch law) under which *all* property of both spouses is community property. W.Q. DEFUNIAK & M.J. VAUGHN, *supra* note 2 at § 1. Another variation is a system of "deferred community property" which classifies property as community property only when the marriage ends by divorce or death. (The comment to section 17 of UMPA refers to the "deferred" community property concept at dissolution.)

Community property is believed to have its origin with the Teutonic people where both spouses shared in all gains arising during marriage. 15A AM. JUR. 2D *Community Property*, § 1 at 630, n.1 (1976). The community property system was brought into Western Europe by the Visigoths and in turn introduced onto the North American continent in the territories acquired by Spain and France. W.Q. DEFUNIAK & M.J. VAUGHN, *supra* note 2 at § 3.

5. 9A U.L.A. 97 (1983). Wisconsin did not in fact adopt UMPA, but many provisions of WMPA are identical to or closely parallel the UMPA provisions. The key differences are discussed at *infra* notes 29-49 and accompanying text. Many commentators erroneously assume that Wisconsin adopted UMPA.

current legislative proposal to clarify the relationship between the WMPA rules (which govern rights during marriage and at death) and the separate rules governing divorce.[6] Part III discusses the impact of WMPA upon two major issues regarding credit: the granting of consumer credit by financial institutions and the collection practices of the Internal Revenue Service for obligations arising before marriage or during periods of marriage during which WMPA did not apply. Part IV reviews issues in an important new area of law encouraged by WMPA: the drafting and enforcement of marital property agreements. Part V discusses some current concerns which may result in further amendments to WMPA. Part VI summarizes some implications of the Wisconsin experience for other jurisdictions.

I. Wisconsin Legislative History

A. Why Wisconsin?

In retrospect, we can identify several circumstances which contributed to Wisconsin's adoption of a community property system. First, the need for reform was part of public discussion and legislative debate for a number of years. In 1974, the Governor's Commission on the Status of Women[7] held six meetings throughout Wisconsin on the topic of "Homemaking and the Family: Changing Values and Concerns." Although many of the issues articulated at these meetings related to divorce, a number concerned rights during marriage and at death.[8] In 1977, Wisconsin divorce reform legislation was enacted.[9] The new statutory rules governing property division at divorce ignored title-based ownership and incorporated concepts of contribution based upon the principle of marriage as a partnership.[10] Thus, while

6. The core of WMPA is new Chapter 766, together with implementing provisions in the probate code and elsewhere. Wiseonsin's divorce law is contained in Chapter 767.

7. The Commission was created by Governor John W. Reynolds in 1964 to advise him on issues relating to women. It followed the pattern established at the national level by President Kennedy, when he established a similar commission in 1961. The Commission had approximately 30 members, mostly women, representing diversity in geographical region, economic status and race. Members served at the pleasure of the Governor. Shortly following his becoming Governor on January 1, 1979, Lee Dreyfuss abolished the Commission. Subsequently, the legislature established a Women's Council by statute, WIS. STAT. § 15.107(11) (1987-1988). The Council reports directly to the legislature biennially.

8. In addition, there was a legislative consensus as early as 1975 that all Wisconsin statutes should be gender-neutral. Chapter 94 of the Laws of 1975 made systematic changes throughout the statutes to make language gender neutral and chapter 184 of the Laws of 1975 specifically reformed Wisconsin's rape law.

9. Act of Oct. 15, 1977, Ch. 105, Laws of 1977, 1977 Wis. Laws 560 (effective Feb. 1, 1978).

10. WIS. STAT. § 767.255 (1987-1988). Wisconsin's rules for distribution of property at divorce are a "hybrid" form of equitable distribution. They begin with a presumption of equal division of all property other than that aequired by gift or inheritance but then require

other states were still debating divorce reform in the late 1970s and 1980s,[11] after Wisconsin's 1977 divorce legislation was passed, the time was ripe in Wisconsin for consideration of the related issues of rights during marriage and at death.[12]

Wisconsin's divorce legislation made divorce reform a low visibility issue–in contrast to its high visibility in many other jurisdictions, where it is often still the most controversial aspect of family law legislation. Wisconsin gave special significance and visibility to the principle of marital partnership by incorporating it into divorce law. Supporters of further reform argued that if this principle is appropriate when a marriage ends by divorce, it is at least equally appropriate during the marriage and when a marriage ends by death. To pursue this possibility, an ad hoc study committee sponsored by the Gover-

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the court to consider a list of equitable factors, including need, to see whether the presumed distribution should be varied.

Distribution of spousal property at divorce without regard to title or property ownership during marriage follows from the conception of marriage as a partnership and attempts to recognize homemaking and childrearing contributions as well as financial contributions. *See* Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269, 1282-83 (1981); H. JACOB, THE SILENT REVOLUTION 4-5 (1988); K. GRAY, REALLOCATION OF PROPERTY ON DIVORCE 22-67 (1977); Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 829; Younger, *Marital Regimes: A Story of Compromise and Demoralization, together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 69-77 (1981).

11. For a discussion of the history of divorce reform in general and New York in particular, *see* Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFFALO L. REV. 375 (1988-89).

12. American common law property jurisdictions have traditionally attempted to recognize a surviving spouse's claims to some share of the wealth accumulated by a married decedent through intestacy laws (where there is no will) and through an "elective share" (where there is a will directing a significant share of the decedent's assets to third parties). These protections for surviving spouses are based upon an inflexible formula which does not take into account the length of the marriage. Moreover, many of the common law property states' rules apply only to probate property.

Even the most finely tuned common law protections give thc surviving spouse a share of someone else's property (the decedent's) and none directly recognize an *ownership* interest bascd upon contribution. As a consequence, the order of death in common law property states is critical. If thc spouse who dies first does not have assets titled in that spouse's name, there is no property to pass on to others, irrespective of that spouse's contributions to family assets. *See, e.g.*, Rasmusscn v. Oshkosh Savings & Loan Ass'n, 35 Wis. 2d 605, 151 N.W.2d 730 (1967) (holding that a deeedent wife's savings from a family expense allowance provided by her husband belonged to him and not to their children who were named beneficiaries of the accounts).

Finally, titled-based ownership rules of common law property states, although appearing to be gender-neutral, favor wage carners and do not recognize homemaking contributions. Thus, there is no common law property mechanism which permits a spouse without asscts titled in that spouse's name, and without significant wage income, to transact business for the couple on an equal basis with the titled spouse. Even common law jurisdictions with a well- devcloped doctrine of "necessarics" fail in this regard. *See* 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, 8-17 (1985).

nor's Commission was established in 1976.[13] The committee helped develop a bill proposing a community property system for Wisconsin which was introduced into the legislature in late 1979.[14] Subsequent legislative proposals for community property were considered in the 1981[15] and 1983 legislative sessions.[16] Thus, there was significant Wisconsin legislative history—forty-seven drafts in all—preceding WMPA's enactment in 1984.

Second, Wisconsin's adoption of community property principles was facilitated by the existence of other jurisdictions as models. Drafters could look to the statutory provisions, case law and established practices of the existing community property jurisdictions. Moreover, the fact that the system was already in place in eight states, which included approximately one quarter of the American population and which in general had rapidly expanding populations, made the shift to community property appear more feasible. In addition, by the time that Wisconsin and UMPA drafters were seriously considering the community property model, the community property states had themselves gone through important legislative reform. While spouses' ownership rights in community property had always been equal,[17] husbands had generally enjoyed exclusive management and control rights over community property.[18] Starting with Texas in 1967 and ending with Louisiana in 1980, the community property states amended their statutes to provide for some variation of equal management and control.[19] Thus, although community property ownership rules always provided an attractive alternative model, the reform of traditional male management and control rules within the American community property states made community property a more realistic and appealing alternative to the common law property system.

Third, adoption of the UMPA by the National Conference of

13. The ad hoc committee was composed of legislators, University of Wisconsin faculty and staff, practitioners and members of citizens groups such as the Wisconsin League of Women Voters. One of the authors of this Article (Weisberger) was a member of the committee. Representative Mary Lou Munts was another member. She became a key sponsor of community property legislation.

14. A.B. 1090, 1979-1980 Wis. Legis. (1980); S.B. 474, 1979-1980 Wis. Legis. (1980). The proposed system was initially called "marital partnership property." Assembly Bill 1090 was introduced in the state assembly by 55 representatives, over half of that body.

15. A.B. 370, 1981-1982 Wis. Legis. (1981); S.B. 272, 1981-1982 Wis. Legis. (1981). The proposed system was called "marital property" in these bills.

16. A.B. 200, 1983-1984 Wis. Legis. (1983); S.B. 105, 1983-1984 Wis. Legis (1983).

17. But see the history of the development of community property rules in California: Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 UCLA Rev. 1 (1976). Until 1927, a wife had only an "expectancy interest" in community property. Although she had "ownership" rights, she had no meaningful control over either her separate or community property. Her consent was not

Commissioners of Uniform State Laws (NCCUSL)[20] lent legitimacy to the call for fundamental change in common law property rules. In 1979, an UMPA drafting committee was established by NCCUSL.[21] This committee determined at a relatively early stage in its deliberations to recommend a community property system. After a number of drafts, a final version of UMPA was adopted by NCCUSL in July 1983.[22] This development had an immediate effect in Wisconsin.

Fourth, the legislative activity in support of the community property model did not follow party lines. In the fall of 1983, just after a final version of UMPA was adopted, a bipartisan group of prominent Wisconsin legislators interested in legislation based upon UMPA began to meet regularly. Thus, the stage was set for a strong vote in favor of marital property, particularly in the state Senate;[23] it also meant that when the key opponent in the state Assembly became Governor of the state, the chance of repeal of the legislation was small.[24]

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needed for any community property transactions. Moreover, the husband had control over his wife's dispositions at death because his consent was needed to validate her will.

18. For a history of the treatment of wives' management and control rights in community property states, see Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U. L. REV. 211, 214-19 (1973).

19. There are a variety of joinder rules in the equal management states; *see e.g.* W. REPPY & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 215 (1982).

Texas' form of management and control (which is akin to UMPA and WMPA) operates on a "separate but equal" principle. Under section 5.22(a) of the Texas Family Code:

> During marriage, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single, including but not limited to: personal earnings; revenue from separate property; recoveries for personal injury; and the increase and mutations of, and the revenue from all property subject to his or her sole management, control, and disposition.

Dual management is required when sole management is lost because of comingling.

20. NCCUSL was established in 1889 when the New York Bar Association appointed a special committee on uniformity of laws. The Committee was authorized to examine certain subjects of national importance that seemed to show conflict among the laws of the several commonwealths, to ascertain the best means to effect an assimilation or uniformity in the laws of the states.

NCCUSL is now a confederation of state interests. Its purpose remains service to state government and improvement of state law through the adoption of uniform laws on topics within state legislative control.

21. The UMPA Drafting Committee was appointed as a result of a recommendation from a 1977 NCCUSL special committee to study concurrent ownership of property. It received no directive or charter other than the title of its work should include the terminology "marital property." Cantwell, *Drafting the Uniform Marital Property Act: The Issues and Debate*, 21 HOUS. L. REV. 669 (1984); Cantwell, *The Uniform Marital Property Act: Origin and Intent*, 68 MARQ. L. REV. 383 (1985).

22. In addition, the House of Delegates of the American Bar Association approved UMPA at their August, 1984, meeting "as an appropriate act for those states desiring to adopt the substantive law suggested therein." *American Bar Association OKs Uniform Marital Property Act*, 53 U.S.L.W. 1027 (Aug. 14, 1984).

23. Substitute Amendment 1 to Assembly Bill 200, introduced on September 27, 1983, was the version of WMPA based upon UMPA. The vote in the Senate on March 8, 1984 was 27-5. The vote in the Assembly on March 22, 1984 was closer, 59-38.

24. Although Tommy Thompson, WMPA's main opponent in the Assembly, be-

Fifth, the legislative supporters of WMPA were greatly assisted by members of the Wisconsin Women's Network, a highly organized umbrella coalition of Wisconsin organizations and individuals. The Network[25] gave a high priority to its support of WMPA. Members contacted virtually all legislators on numerous occasions to lobby for WMPA's passage, both as representatives of the Network and as constituents. The League of Women Voters of Wisconsin also played an active role.

Finally, while there was opposition to all the legislative proposals based upon community property, the major Wisconsin protagonists, particularly the State Bar of Wisconsin, agreed that significant modifications were needed to make married persons' property rights more equitable during marriage and at death.[26] Beginning in 1981, the opponents of a community property approach supported a "common law alternatives" approach.[27] Briefly, this approach relied heavily upon

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came Governor in 1987, his successful Republican "ticket-mate" for Attorney General, former State Senator Donald Hanaway, was one of WMPA's leading supporters. There was little discussion of WMPA during the campaign.

25. The Wisconsin Women's Network is headquartered in Madison, Wisconsin and was founded in 1976. Its stated goal is to ensure that women's issues become—and remain—a priority of Wisconsin lawmakers. Currently the Network is a coalition of approximately 100 organizations and 1000 individuals.

26. For the position of the State Bar of Wisconsin, see Minutes from the Board of Governors Meeting December 5, 1980. This is unlike the situation in other states which are considering legislation based on UMPA, such as Indiana and Connecticut, where some opponents, including some lawyers' groups, have questioned the need for any reform. *See* Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807.

27. The 1981 "common law alternatives" legislative proposal (Assembly Bill 284 and Senate Bill 666) included the following provisions:

1) authorized a judicial partition of spousal property during marriage, using existing Wisconsin divorce law factors;

2) required creditors to extend unsecured credit up to $2,000 per creditor to a spouse not otherwise creditworthy based upon the creditworthiness of the other spouse. If a required notice was sent by the creditor, the other spouse was liable for all debts incurred;

3) made both spouses equally liable for reasonable and necessary family expenses;

4) increased the intestate share of a surviving spouse;

5) increased the surviving spouse's statutory elective share from one-third to one-half of the net probate estate; and

6) authorized written interspousal property agreements.

A.B. 284, §§ 21, 25, 33, 35-38, 1981-1982 Wis. Legis (1981); S.B. 666, §§ 21, 25, 33, 36-38, 1981-1982 Wis. Legis. (1981).

The 1983 "common law alternatives" legislative proposal (Assembly Bill 376 and Senate Bill 240) included most of the provisions that were in 1981 Assembly Bill 284 and added some new provisions. The two main areas changed were credit and protections for spouses at death. As to credit, the $2000 limit per creditor was removed. Instead the liability of the non-applicant spouse was limited to that spouse's Wisconsin adjusted gross income for the year prior to the one in which the debt was incurred. At death, where there was intestacy, the surviving spouse was given a choice between an increased intestate share and a property division using divorce law standards. The right to elect against the decedent's will was changed

Wisconsin's rules governing property division at divorce, while otherwise retaining the common law property system's basic reliance on ownership rules based upon title. The proponents of this approach were not able to garner significant support for it, perhaps because their proposals were without precedent in any jurisdiction.[28]

B. How Does WMPA Differ from UMPA?[29]

In adopting its marital property system, the Wisconsin legislature significantly modified several UMPA rules. For this reason, we believe it to be *incorrect* to say that "Wisconsin adopted UMPA." Instead we refer to the Wisconsin legislation as the "Wisconsin Marital Property Act," or "WMPA."

One Wisconsin modification concerns the situation in which one spouse causes the value of *nonmarital* property to appreciate substantially, due to the investment of substantial labor or effort without "reasonable compensation." Since the compensation, if received, would have been marital property, the general principle applied here is that the component of the asset that results from this "active appreciation" should also be marital property. Under UMPA, a marital property component of such an asset is recognized only when a spouse expends labor or effort on nonmarital property owned by the *other* spouse.[30] WMPA broadened the UMPA rule by including active appreciation generated on nonmarital property by the efforts of *either* spouse.[31] This small but important change makes Wisconsin law consistent with the general rule in the other American community property jurisdictions[32]

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to a right to have a property division, using divorce law standards. Finally, a decedent spouse was given a right by will to direct his personal representative to initiate a post death property division action, using divorce law standards, if the will also designated beneficiaries for the property so awarded. This latter provision was drafted so that when the lesser propertied spouse died first, that spouse would have a right to will a portion of the marital assets owned by the surviving spouse. A.B. 376, §§ 20, 22, 25, 30, 48-52, 56, 1983-1984 Wis. Legis. (1983); S.B. 240, §§ 13, 23, 25, 30, 46, 49-56, 1983-1984 Wis. Legis. (1983).

28. However, an "opt-in" version of community property (requiring both spouses to agree) passed the Assembly in late 1983. Assembly Amendment 27 and 28 to Substitute Amendment 1 to A.B. 200, 1983-1984 Wis. Legis. (1983).

29. The discussion of WMPA in this section is based not just on the original 1984 legislation, but includes the 1985 and 1988 amendments. For discussion of the amendment process, *see* notes *infra* 50-54 and accompanying notes.

30. UMPA § 14(b), 9A U.L.A. (1983).

31. WIS. STAT. § 766.63(2) (1987-1988). This section is otherwise based upon UMPA. The statutory language does not define "substantial" labor, "substantial" appreciation, or "reasonable" compensation. A comment to UMPA § 14(b) states that "the rule ... articulates a bias against creation of marital property." One particularly interesting issue of interpretation concerns active appreciation to the spouses' home or vacation property, when one or both spouses occupy the premises. Can the fair market value of the use of the premises be "reasonable" compensation, thus precluding recognition of a marital property component pursuant to the subsection?

32. Unlike other community property states, Texas uses a reimbursement remedy

and increases the amount of property potentially classified as marital property.

On the other hand, two Wisconsin changes serve to reduce the amount of marital property of the spouses. The first is the adoption of a version of the "Louisiana fruits" rule. UMPA follows the traditional community property rule (adopted in Texas, Idaho and Louisiana) and classifies the income or "fruits" of a spouse's nonmarital property (for example, interest on bank accounts, dividends from stocks, and net rents from real estate) as marital property.[33] A 1985 WMPA amendment modified the UMPA rule to allow the spouse owning the nonmarital property to reclassify unilaterally the fruits as the owning spouse's individual property.[34] The other change that potentially may reduce the amount of marital property relates to deferred employment benefits.[35] Under UMPA, each spouse owns a one-half vested interest in the marital property component of the deferred employment benefits of *either* spouse, during life and at either spouse's death. WMPA, by contrast, incorporates a terminable interest rule when the non-employee spouse dies first.[36] This rule terminates any marital property interest of the decedent spouse in a deferred employment benefit plan associated with the employment of the surviving spouse.[37]

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rather than a community ownership remedy. Under the reimbursement remedy, the community is reimbursed only for the value of the time and effort expended by either or both spouses to increase the value of separately owned property, less any renumeration received during marriage. *See, e.g.*, Jensen v. Jensen ("Jensen III"), 665 S.W.2d 107 (Tex. 1984) (reimbursement remedy in divorce).

33. Under the Spanish community property system, spouses contributed to the marital partnership and shared in the gains, including the use of all separate property owned before marriage or acquired during marriage. Rents and profits of separate property were owned by the community. (Louisiana permitted a spouse to opt out of this latter rule by filing a declaration claiming rents and profits as the separate property of the spouse who owned the underlying property.) In contrast to this traditional rule, five community property states followed the early lead of California, which held that it was unconstitutional to characterize the rents and profits of a wife's separate property as community property. George v. Ransom, 15 Cal. 322 (1860). The rule that rents and profits of separate property are also separate property is now called the "Ameriean rule". *See* W. REPPY & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 131-37 (1982).

34. Under WIS. STAT. § 766.59 (1987-1988), a spouse may unilaterally execute a written statement which designates income from that spouse's nonmarital property as individual property rather than marital property. Income includes rents, or interest and dividends from stock; it does *not* include wages. The provision is prospective only, and only spouses (in contrast to a person about to marry) may execute the statement. Failure to notify the other spouse within five days is a breach of the good faith management and control duty of the spouse executing the statement.

35. Deferred employment benefit plans are defined under WIS. STAT. § 766.01(4) (1987-1988), as programs in which compensation or benefits from employment are expressly deferred to a later date. They include pensions, profit sharing or stock-bonus plans, employce stock-ownership or stock purchase plans, savings or thrift plans, annuity plans, qualified bond-purchase plans, self-employed retirement plans, and simplified employee pension and deferred compensation agreements or plans. The term as defined does not include individual retirement accounts.

36. WIS. STAT. §§ 766.31(3); 766.62(5) (1987-1988).

37. This rule is *not* reciprocal; the surviving spouse's interest in the benefit plans

Another way in which WMPA departs from UMPA involves stricter enforcement standards for marital property agreements. Under UMPA, there are different standards for enforcement of a marital property agreement depending upon whether the agreement is executed prior to a marriage (to take effect upon marriage) or during the marriage.[38] In contrast, WMPA uses a single standard for enforcement, based on the more rigorous during marriage rules in UMPA. In addition, unlike UMPA, Wisconsin law does not allow waiver of WMPA's financial disclosure requirements.[39]

With respect to credit, the UMPA and Wisconsin rules are similar in effect. WMPA, however, added some specific rules to facilitate access to credit[40] by a spouse who wishes to rely upon the couple's marital property, including the future income of the other spouse. Under both UMPA and WMPA, virtually all the couple's marital property (as well

associated with the decedent spouse's employment is not terminated. This modification reflects a 1980 public debate on this issue before a Wisconsin legislative committee. The prevailing side emphasized the hardship the surviving spouse would face if the non-employce spouse could will that spouse's marital property interest in the surviving spouse's deferred employment benefits to third parties.

Three community property states have considered some form of the terminable interest rule for retirement benefits. Washington rejected the terminable interest doctrine in Farver v. Department of Retirement Systems, 29 Wash. App. 138, 629 P.2d 903 (1981), in 1981 and the law has not changed since that time.

Texas also rejected the terminable interest rule. In Allard v. French, 754 S.W.2d 111 (Tex. 1988), the Texas Supreme Court held that one-half of the (surviving) husband's retirement benefits were properly included in his wife's probate estate and that the terminable interest rule did not apply because the husband's retirement benefits were community property.

> [I]n light of the settled marital property rule in Texas that a spouse has a community property interest in that portion of the retirement benefits of the opposite spouse earned during their marriage, the retirement benefits in this case were properly characterized as community property, and thus, one half of such benefits was properly included in the wife's estate.

Id. at 114. *Cf.* Hoppe v. Godeke, 774 S.W. 2d 368 (Tex. App. 1989) (involving the surviving spouse's annuity under the Federal Civil Service Retirement Act).

Under case law, California developed a terminable interest rule which was applied to cut off the community property interest of the non-employee spouse in community property deferred employment benefits regardless of the order of death. *See* Benson v. City of Los Angeles, 60 Cal. 2d 355, 33 Cal. Rptr. 257, 384 P. 2d 649 (1963); *In re* Estate of Allen, 108 Cal. App.3d 614, 166 Cal. Rptr. 653 (1980); Chirmside v. PERS, 143 Cal. App. 3d 205, 191 Cal. Rptr. 605 (1983). In 1986, the legislature abolished the rule for division of property at divorce. CAL. CIV. CODE § 4800.8 (West Supp. 1987). California courts have assumed that the 1986 legislation abolished the terminable interest rule at death as well. *See, e.g.*, Powers v. Dept of Water and Power Employees Retirement Disability Death Benefit Ins., 218 Cal. App.3d 626, 267 Cal. Rptr. 350 (1990).

38. UMPA section 10(g) contains its enforcement standards for premarital agreements.

39. However, WMPA does not necessarily require written disclosure; for example, "notice" of the other spouse's property and obligations is sufficient. WIS. STAT. § 766.58(6)(c) (1987-1988); UMPA § 10(f), (g), 9A U.L.A. 121-22 (1983).

40. WMPA's special rules apply to unsecured credit and credit where the security is the item purchased. They do *not* apply to secured credit generally. *Compare* WIS. STAT. §§ 766.51(1m), 766.56(1) (1987-1988) *with* UMPA § 8(a), (b), 9A U.L.A. 117 (1983).

as the incurring spouse's nonmarital property) is available to satisfy a family purpose or marital obligation incurred by either of them.[41] UMPA assumes that creditors want to extend as much credit as possible and, therefore, that creditors will not distinguish between a credit application by the non- or low-wage earning spouse and an application by the spouse who is the primary wage earner. WMPA adds some special rules to help ensure equal access to credit by the spouse with the lesser (or no) income and by the spouse whose name is not on the document of title of a marital property asset.[42]

The final significant difference[43] between UMPA and WMPA concerns the status of joint tenancy under the marital property system. UMPA and WMPA state that all property (including, but not limited to, joint tenancies) acquired by the spouses while WMPA does not apply to their marriage—typically, before their "determination date"[44]—

41. UMPA § 8(b)(ii), 9A U.L.A. 117 (1983); WIS. STAT. § 766.55(2)(b) (1987-1988) (satisfaction of family purpose or marital obligations). Under both acts, there is a statutory presumption that all obligations incurred by a spouse during marriage are family purpose or marital obligations. UMPA § 8(a), 9A U.L.A. 117 (1983); WIS. STAT. § 766.55(1) (1987-1988). WMPA alone states that if the incurring spouse signs a separate statement indicating the obligation is or will be a family purpose or marital obligation, then the statement serves as conclusive evidence of that classification as between that spouse and the creditor. WIS. STAT. § 766.55(1) (1987-1988). The statement does not affect any interspousal right or remedy, however.

42. There are two separate rules in WMPA to accomplish this: WIS. STAT. §§ 766.51 (1m), 766.56(1) (1987-1988). For descriptions, see *infra* text accompanying notes 71-75. These two distinct approaches have been sometimes referred to as a "belt and suspenders" approach. Their purpose is to enhance *access* to credit. The rules do not expand the pool of property available for satisfaction of marital obligations which already includes all of the couple's marital property (except certain business property excluded under WIS. STAT. § 766.51 (1m) (b) (1987-1988)) and all of the incurring spouse's nonmarital property.

43. There are other WMPA modifications or additions to UMPA but the listing above covers the major ones. Some of the others include a special rule for satisfaction of tort obligations (WIS. STAT. § 766.55(2)(cm)(1987-1988); "tattletale" notice to the other spouse when one spouse receives an extension of family purpose or marital credit (WIS. STAT. § 766.56(3)(b) (1987-1988); multiple party account provisions (WIS. STAT. ch. 705 (1987-1988)); deferred marital property rights (WIS. STAT. §§ 861.02 -861.13 (1987-1988)); intestacy rules (WIS. STAT. § 852.01 (1987-1988)); treatment of debts at death (WIS. STAT. § 859.18 (1987-1988)), post-probate administration support allowance for a needy surviving spouse (WIS. STAT. § 861.35 (1987-1988)); and remedies beyond those provided in UMPA (WIS. STAT. § 766.70(4)-(8) (1987-1988)). Since WMPA repealed and recreated the statutory chapter that had included Wisconsin's Married Women's Property Acts (originally enacted in 1850), a concise version of those acts was incorporated into WMPA. WIS. STAT. § 766.97(2) (1987-1988). Other subsections of section 766.97 contain the state's equal rights statute (originally enacted in 1921) and a new subsection abolishing the common law right of one spouse to compel domestic or sexual services of the other.

44. The concept of "determination date" is important in UMPA and WMPA because it determines when coverage by the Act is triggered. UMPA and the original version of WMPA define a couple's determination date as the last of three events to occur: (1) marriage or (2) 12:01 a.m. on the date of establishment of "a marital domicile" in the state or (3) the effective date of the Act (in Wisconsin January 1, 1986).

Trailer Bill II (*see infra* discussion at note 53) eliminated UMPA's concept of "marital domicile" and provided that *both* spouses must be domiciled in Wisconsin before the marital property law applies. Thus, if only one spouse becomes a Wisconsin domiciliary there is no simply remains "as is." But what forms of holding are allowed for property acquired while WMPA *does* apply? Both UMPA and WMPA recognize survivorship marital property as a special form of marital property holding which vests complete ownership in the asset in the surviving spouse without probate.[45] However, UMPA leaves open the question of whether new joint tenancies (using marital or nonmarital property) can be created while the Act applies. WMPA resolves this issue by declaring that any property which spouses attempt to acquire between themselves as joint tenants while WMPA applies to their marriage is instead survivorship marital property.[46] Next, WMPA addresses the situation in which marital property is added to a pre-determination date joint tenancy between the spouses—for example, a couple may make payments on a mortgage using marital property, where the property was acquired many years before in joint tenancy. In that situation, to the extent that the incidents in joint tenancy and marital property conflict, WMPA states that the incidents of joint ten-

determination date. WIS. STAT. § 766.03(1)-(2) (1987-1988), provides that the act first applies to spouses on their determination date and continues to apply "during marriage." WIS. STAT. § 766.01(8) (1987-1988), defines "during marriage" as a period beginning on the determination date and during which *both spouses* remain domiciled in the state. If marital property rules no longer apply because of a change in domicile, this does not by itself affect the property rights or interests already acquired under WMPA. WIS. STAT. § 766.03(3), (5) (1987-1988).

45. UMPA § 11(e), 9A U.L.A. 124 (1983); WIS. STAT. § 766.60(5)(a) (1987-1988) (first sentence). This form of holding must be created by title; testamentary formalities are not required. In addition, under UMPA § 10(c)(6), 9A U.L.A. 121 (1983); WIS. STAT. § 766.58(3)(f) (1987-1988), a marital property agreement may provide that any or all spousal (marital or nonmarital) property will pass non-probate to a person, trust or entity designated in the agreement. When this provision is used to pass marital property to the surviving spouse, it becomes the substantial equivalent of survivorship marital property, although it does not necessarily provide insulation from claims of creditors at death.

Survivorship marital property is a form of holding *marital property*. As a result it does not raise the income tax basis issues which have been noted in conjunction with attempts by some community property states to combine community property with joint tenancy. *See, e.g.*, WASH. REV. CODE § 64.28.040 (1990) (effective January 1, 1985, but applicable to all joint tenancies) which states: "Joint tenancy interests held in the names of a husband and wife ... are presumed to be their community property.... Any such interest passes to the survivor of the husband and wife as provided for property held in joint tenancy, but in all other respects the interest is treated as community property." For a discussion of the income tax basis issues raised by this type of legislation, see Parks, *Critique of Nevada's New Community Property with Right of Survivorship*, 10 COMMUNITY PROP. J. 5 (1983) (noting the Nevada legislation provides that one spouse may unilaterally sever that spouse's interest and thus extinguish the right of survivorship, an attribute of common law joint tenancy).

Preliminary rulings from the IRS concerning Wisconsin's survivorship marital property indicate that the IRS will apply community property basis rules to this property at the death of the first spouse. For an analysis of basis and other estate planning issues and opportunities under WMPA, see H. ERLANGER, F. PATZER, K. REINECKE, MARITAL PROPERTY, TAXATION, AND ESTATE PLANNING IN WISCONSIN (forthcoming 1990); for a more general discussion of basis considerations under community property, see Randall, *Of Visigoths, Community Property, Death, and Income Tax Basis* 25 GONZ. L. REV. 237 (1989-90).

46. WIS. STAT. § 766.60(4)(b)l.a (1987-1988). There is a parallel rule classifying the property as marital property when a married couple attempts to acquire the property as tenants in common. WIS. STAT. § 766.60(4)(b)1.b (1987-1988).

ancy, including the right of survivorship, prevail.[47] Finally, a general rule in UMPA states that if both spouses' names are on a document of title, and there is no indication to the contrary, then the property is held as marital property without survivorship. Wisconsin modifies this rule to state that *if the property is the couple's homestead* at the time of acquisition, then under that document of title the property would be held as survivorship marital property.[48] In addition to these three rules governing property owned exclusively by the spouses, WMPA contains special rules governing joint tenancies owned by a spouse and third party or parties.[49]

C. Amendments to WMPA

When WMPA was originally passed in 1984, its legislative sponsors acknowledged the need for a technical amendments or "trailer" bill to be enacted prior to the law's effective date of January 1, 1986. Therefore, on June 18, 1984, a Special Legislative Council Committee on Marital Property Implementation was appointed to review WMPA to determine "if further clarification of the Act is necessary in order to ensure a smooth transition to and implementation of the marital property system."[50] The Legislative Council, upon recommendation of its Special Committee, introduced an extensive technical amendments bill (Trailer Bill I) on April 10, 1985. Despite an unexpected delay, amendments were signed into law on October 22, 1985 with the same January 1, 1986, effective date as the original WMPA legislation.[51]

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47. WIS. STAT. § 766.60(4)(a) (1987-1988). Prior to the enactment of this 1985 WMPA amendment (Trailer Bill I), there had been concern that the decedent's interest in the marital property portion would be subject to probate. There is a parallel rule in the same subsection for conflicts between the incidents of tenancy in common and marital property.

48. Prior to WMPA's effective date, Wisconsin law stated that, if a document of title described the owners as husband and wife (or the owners were in fact married to each other), the property was owned as a joint tenancy with the right of survivorship unless the instrument of transfer indicated an intent to create a tenancy in common. WMPA repealed this section (WIS. STAT. § 700.19(2) (1983-1984)) prospectively because it was inconsistent with WMPA's presumption of marital property. However, there was legislative concern that deeds, particularly homestead deeds, would continue to be drafted for and executed by spouses without any indication of whether they wish a survivorship feature. Accordingly, for homesteads only, the special WMPA rule provides for survivorship marital property where the transfer document is silent as to a contrary intent. Anecdotal information confirms that there were grounds for the legislature's concern. According to one informal calculation, over 95% of homestead deeds recorded in 1989 in one county (near Milwaukee) named husband and wife as grantees without any indication of the form of property holding or ownership the grantees wished.

49. WIS. STAT. § 766.70(6)(b) (1987-1988).

50. The Committee consisted of nine members, including legislators from both parties in both houses and three public members. Its work was carried out primarily through its Technical Review Subcommittee (consisting of the three public members) which consulted with the Marital Property Committee of the State Bar of Wisconsin. One of the authors of this Article (Weisberger) was a public member of the Committee and chaired the Technical Review Subcommittee.

51. Trailer Bill I was not passed until after a Conference Committee substitute

Fourteen months after WMPA went into effect, the Special Committee was reestablished to consider additional amendments. As a result of the Special Committee's work (in consultation with the State Bar's Marital Property II Committee[52]), Trailer Bill II was passed by the legislature and signed into law effective May 3, 1988.[53] But, since additional amendments were being proposed even after the 1988 amendments had been adopted, a Special Committee was again established on May 25, 1988. Its Technical Review Subcommittee was divided into two working groups, one to review the relationship between the marital property law and the divorce laws, and the other to consider "general issues." Both groups reviewed (and are in the process of reviewing) proposed amendments in consultation with the State Bar's Marital Property II Committee.[54] The existence of the Special Committee and its consultation with the State Bar have been key elements in permitting systematic, coordinated and nonpartisan review of proposed WMPA amendments.

II. WMPA IS NOT A DIVORCE LAW: BUT DO PEOPLE BELIEVE THAT?

When the Legislature enacted WMPA, it did not intend to change Wisconsin's divorce law. Wisconsin's comprehensive divorce reform rules, including changes in the rules regarding property division and spousal maintenance, had been enacted in 1977 while Wisconsin was a common law property state. When WMPA was considered by the legislature, there was little need to change those provisions because

amendment was drafted in September 1985. Key changes made by Trailer Bill I are summarized in Wisconsin Legislative Council, Report No. 5 to the 1985 Wisconsin Legislature (May 1985).

52. A Special Committee of the State Bar of Wisconsin, informally called the "Marital Property II Committee," was reestablished and held its first meeting in June 1987. Its function was to review and comment upon proposals for amendments to WMPA. Subcommittees were formed in the following areas: real estate; probate and estate planning; family law; and creditors' rights. The Committee is still in existence. Weisberger serves as a member of the Committee.

Minutes of meetings of the Marital Property II Committee and its subeommittees (as well as its predecessor committee, Marital Property I) are on file in the offices of the State Bar of Wisconsin.

53. Act of Apr. 23, 1987, 1987 Wis. Act 393, 1987 Wis. Laws 1483. The major (non-tax) features of Trailer Bill II were: (1) clarification that WMPA did not apply when only one spouse was domiciled in Wisconsin (WIS. STAT. § 766.01(5)(b), (8) (1987-1988)); (2) two statutory marital property agreement forms (WIS. STAT. §§ 766.588, 766.589 (1987-1988)); and (3) statutory "buy-sell" provisions (WIS. STAT. §§ 857.015, 861.02(2) (1987-1988)). For a detailed discussion of the 1988 amendments, see Weisberger, *Wisconsin's Marital Property Act: The 1988 Amendments*, 15 COMMUNITY PROP. J. 61 (1989). *See also* Wisconsin Legislative Council, Report No. 20 to the 1987 Wisconsin Legislature (Mar. 14, 1988).

54. See *infra* notes 61-66 and accompanying text, for amendments considered in 1989 and 1990 by the Special Committee and State Bar Committee.

they already incorporated the concept of marriage as a partnership as well as the concept of economic need following dissolution. Moreover, UMPA itself is not intended to affect the law of divorce in adopting jurisdictions; instead it is to take a divorcing couple to "the door of the divorce court" where division could be equal or equitable, depending upon the policy preference of the jurisdiction.[55] In Wisconsin, official legislative committee comments emphasized the differences between divorce law and the new marital property rules.[56] In particular, Wisconsin divorce law includes more than just marital property in the group of assets divisible at divorce and also applies the principle of equitable division.[57] Nevertheless, many people (including some lawyers and judges) erroneously believed—and some continue to believe—that WMPA rules apply not only during the marriage and at death, but also for purposes of characterization and property division at divorce. This unfortunate confusion has several sources. First, prior to the enactment of WMPA, many court opinions in Wisconsin referred to property divisible at divorce as "marital property" or as the "marital estate." This followed the practice in many common law property states of referring to property divisible at divorce as "marital property;" indeed in some states the term is so defined by statute.[58] Second, possibly because of the publicity surrounding divorces of celebrities in the entertainment industry, many people's perceptions of community property rules at divorce have been shaped by California rules, which require

55. UMPA prefatory note, 9A U.L.A. 97 (1983).

56. Furrh, *Divorce and the Marital Property Act: The Wisconsin Cases*, 15 COMMUNITY PROP. J. 41, 43-45 (1989) (Wisconsin legislative history). Prior to the enactment of Trailer Bill I, the legislature rejected proposals to make spousal agreements which met marital property enforcement standards (WIS. STAT. § 766.58 (1987-1988)) binding at divorce under § 767.255(11) (1987-1988). Assembly Amendment 26 to Assembly Substitute Amendment 1 to 1983 Assembly Bill 200 and Assembly Amendment 6 to Senate Substitute Amendment 1 to 1983 Assembly Bill 200, authored by Representative Prosser, offered in the Assembly on October 19, 1983 and in Senate on Mareh 13, 1984. The proposed change to section 767.255(11) was: "Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; *A valid marital property agreement under ch. 766 is* binding upon the court. *Any other written agreement described in this subsection is binding upon the court if* the terms of the agreement are equitable as to both parties. The court shall presume . . . ."

57. WIS. STAT. § 767.255 (1987-1988).

58. In New York, for example, marital property is defined in the divoree statute as:

> all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in an agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.

N.Y. DOM. REL. § 236 (McKinney Supp. 1990) In Illinois, marital property is defined in the divorce statute as "all property acquired by either spouse subsequent to the marriage," with some exceptions which are referred to as "non-marital property." ILL. ANN. STAT. ch. 40, ¶ 503 (Smith-Hurd Supp. 1980).

an equal division of community property and do not permit any division of separate property.[59] Third, aside from the particular result in California, there seems to be a general perception that divorce law allows each spouse to keep whatever she owned during the marriage. This perception continues in spite of the fact that this was not the case in Wisconsin even before the 1977 divorce reform; nor is it the case in many other common law property jurisdictions. Finally, the problem of misunderstanding in this area has been exacerbated by some erroneous statements in academic literature and judicial opinions.[60]

A working group of the 1989-90 Legislative Council Special Advisory Committee recently completed an in-depth examination of the question of whether Wisconsin divorce law and marital property rules should be brought closer together. The working group recommended that they be kept separate, and the Legislative Council voted unanimously to introduce legislation that will, if passed, reaffirm the separation of divorce and marital property law and articulate the differences between them.[61] Under the proposed legislation, an express statement of the distinct character of divorce law would be added to Wisconsin's divorce chapter. The proposed statement provides that it is the intent of the legislature that the chapter governing actions affecting the family, including divorce, not be controlled by the marital property chapter and related statutes unless expressly provided.[62] In addition, the proposed legislation would distinguish the system of property characterization at divorce by creating the categories of "divisible" and "non-

59. The divorce law of another community property jurisdiction, Washington, which provides for equitable division of community property and separate property at divorce, has not received any publicity. *Compare* WASH. REV. CODE § 26.09.080 (1989) *with* CAL. CIV. CODE § 4800 (West Supp. 1987).

60. For example, a 1986 article in the *Marquette Law Review* discusses whether WMPA (chapter 766) or the divorce statute (chapter 767) will govern the treatment of the "fruits" of individual property at divorce. The author theorizes that Wisconsin divorce courts might treat unilateral statements executed by one spouse under WMPA section 766.59 (which declare the fruits of nonmarital property to be individual property, when ordinarily the fruits of property of *any* classification are marital property) as applicable to the division of property at divorce. Bascom, *Irreconcilable Differences: Income from Separate Property Under Divorce Law and Under Wisconsin's Marital Property Act*, 70 MARQ. L. REV. 41, 41-43 (1986). However, Wisconsin's divorce law itself requires that such a change only be made by an equitable, bilateral agreement.

For an example of a court decision which articulates the differences, see *Rodak v. Rodak*, where the issue before the court concerned the divisibility at divorce of pension rights which were brought to the marriage. Under WMPA, those rights would not be marital property. WIS. STAT. § 766.62 (1987-1988). But under Wisconsin's divorce law, property brought to the marriage is part of the couple's divisible property, although the origin of the property is a factor which the court may use to vary the statutory presumption of equal division. WIS. STAT. § 767.255(2). Rodak v. Rodak, 150 Wis. 2d 624, 627-30, 442 N.W.2d 489, 491-92 (Ct. App. 1989).

61. A.B. 965, 1989-1990 Wis. Legis. (1990). *See* Wisconsin Legislative Council, Report No. 21 to 1989 Wisconsin Legislature (Mar. 1990).

62. A.B. 965 § 12 (creating a new section 767.003).

divisible" property, without reference to classification under marital property. Finally, cross references would be added to the statute on marital property agreements, to indicate expressly that any provisions in an agreement that relate to property division at divorce or to spousal support or maintenance after divorce are subject to the divorce chapter.

Aside from the direct conflict between some of WMPA's classification rules and the rules governing property division at divorce,[63] there are other interrelationships between the two bodies of law where statutory clarifications have been proposed. Legislation introduced in 1990 by the Legislative Council also addressed the effect of marital property law on child support, maintenance and family support obligations incurred in connection with a divorce when one, or both, of the former spouses remarry. It had been assumed by a number of WMPA proponents that a support obligation arising from a divorce would be considered a premarital obligation in the context of any subsequent marriage; thus remarriage would be a neutral event in relation to the obligation, with the possible exception of consideration of the new marriage as part of the total economic circumstances for purposes of revision of obligations.[64]

Since judicial treatment of the issues did not remove all uncertainty, explicit statutory treatment appeared desirable, particularly in view of their importance to many parties. The proposed legislation explicitly treated remarriage as a neutral event for the determination and satisfaction of child and spousal post-divorce maintenance obligations.[65] The proposed amendments did not, however, foreclose the

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63. See *supra* note 60 for differences between chapters 766 and 767 on the classification or eharacterization of property brought to a marriage and differences regarding treatment of the "unilateral statement." Another major difference relates to the enforcement of spousal agreements. Under WIS. STAT. § 766.58(6) (1987-1988), to be enforceable a marital property agreement must be: (1) the product of fair and reasonable disclosure, under the circumstances (or each party must have "notice of the other party's assets and liabilities"); (2) exeeuted voluntarily; and (3) not unconscionable when executed. Under WIS. STAT. § 767.255(11) (1987-1988), a written spousal agreement is enforceable at divorce unless it is inequitable; all agreements are presumed equitable. Comparing the statutory language, there are two main differences: (1) the standard of "unconscionable" versus "inequitable", and (2) the time at which the standard will be applied: at execution or at enforcement. *See* Button v. Button, 131 Wis. 2d 84, 388 N.W.2d 546 (1986).

64. Two Wisconsin Supreme Court deeisions supported this assumption to some extent. *See* Poindexter v. Poindexter, 142 Wis. 2d 517, 419 N.W.2d 223 (1988): Burger v. Burger, 144 Wis. 2d 514, 424 N.W.2d 691 (1988). Abitz v. Abitz, 155 Wis. 2d 161, 455 N.W. 2d 609 (1990), reduces the need for legislative action in this area. *See infra* notes 65 and 66.

65. Under 1989 Assembly Bill 935:

(1) Wisconsin's percentage child support standards are to be applied only against the obligated person's property that is not marital property and that portion of marital property which would have been the obligated person's but for the marriage or remarriage. In other words if a person with a child support obligation is married to a person who does not share that obligation, the percentage standards are applied to the assets and income of the obligated

ability of the court to look at the total economic circumstances of the spouses for purposes of revisions of obligations, as established by prior law. Due to a tight 1990 legislative schedule, neither the bill clarifying the relationship between Wisconsin's marital property law and divorce law, nor the one clarifying the effect of WMPA on the amount and satisfaction of support obligations, was passed. Because they have—at least to date—been noncontroversial, it is expected that they will be reintroduced and passed in the 1991 session.[66]

Another area relating to the interaction of marital property and divorce law which has been identified as possibly needing legislative attention is the interspousal remedies which are available under WMPA,[67] but which are not available once a divorce proceeding has commenced. However, a State Bar committee, after an intense discussion of the issue, reached a consensus that: "giving further specific authority to the family court commissioner or specifically including statutory authority for other § 766.70 remedies during the pendency of a divorce would create a two-edged sword. Such changes would create

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person, determined without regard to WMPA;

(2) the above rule also applies to the revision of existing support obligations; and

(3) the property available to satisfy a support obligation for a child not of the current marriage or for a former spouse would be the same property available for satisfaction of a premarital obligation under WMPA: the obligated spouse's nonmarital property and that spouse's portion of marital property that would have been his or her property but for the marriage.

For further discussion of these issues, see Note, Burger v. Burger: *Stepparent Child Support Liability in Wisconsin*, 1990 Wis. L. Rev. 881.

66. In light of two 1990 Wisconsin Supreme Court decisions in the child support area, however, the need for legislative clarification for marital property and child support issues seems less pressing. (These decisions were announced after the Legislative Council had completed its work.) In Abitz v. Abitz, 155 Wis. 2d 161, 455 N.W. 2d 609 (1990), a father sought revision of a divorce judgment to require his former wife to pay child support after her remarriage. (The parents had joint custody with the primary physical custody given to the father.) The trial court computed the amount of revised child support by adding the mother's income to her new spouse's income, dividing by two, and multiplying the quotient by the standard percentage used to determine support for one child. Since this amount did not exceed the mother's actual gross income, the court then ordered that it be satisfied from that part of her marital property which would have been her property but for the marriage, as specified in WIS. STAT. § 766.55(2)(c)1 (1987-1988) (satisfaction of premarital obligations).

The Court of Appeals reversed and remanded and the Wiseonsin Supreme Court affirmed that decision. The court held that WMPA's rule for satisfaction of premarital obligations did not preclude a court, under prior case law (Miller v. Miller, 67 Wis. 2d 435, 227 N.W. 2d 626 (1975)), from reviewing the total economic circumstances of the parties. However it clearly stated that WMPA did not apply to the determination of the mother's income, because of the different principles underlying WMPA and child support statutes. Thus, the trial court's broad discretion in revising child support orders was reiterated while at the same time the court was very clear in holding that the remarried, obligated parent's gross income must be calculated as if that parent had remained single.

In reaching its conclusion in *Abitz*, the court relied on its recent decision in A.L.W. v. Outagamie County Dep't of Social Servs., 153 Wis. 2d 412, 451 N.W. 2d 416 (1990), which considered an analogous issue.

67. WIS. STAT. § 766.70 (1987-1988).

too many duties for attorneys, provide fertile ground for malpractice claims, and increase fees for divorce (which are already fairly high). The costs of change would likely be far greater than the benefits realized."[68]

III. Marital Property and Creditors

A. Financial Institutions and Determination of Creditworthiness

Under Wisconsin's pre-1986 common law property rules, creditors relied on the title-based system of property ownership. In general, the creditworthiness of a married applicant was determined by that spouse's income, assets, liabilities and current expenses. Under the federal Equal Credit Opportunity Act, creditors could not discriminate on the basis of sex or marital status. However, it was not discriminatory to grant credit to a wage earning spouse and deny it to a homemaking spouse who did not own property, nor to make more credit available to the spouse with the higher wage than to the one with the lower wage.[69]

One issue of great concern to many proponents of WMPA was the expansion of access to "family purpose" or "marital obligation" credit[70] for the spouse with fewer resources. A goal of WMPA was to provide equal access to credit based on "family assets [marital property owned by the spouses] and income [marital property generated by one or both spouses]," regardless of which spouse applies for the extension of credit. Under Wisconsin's new system, credit granting practices are affected in two ways: indirectly through the expansion of property available for satisfaction of family purpose obligations, and directly by several provisions requiring creditors to grant equal access to credit.

The first special credit provision is located in WMPA's section dealing with management and control.[71] It specifically provides that either spouse may manage and control *all* marital property, regardless of how the property is titled, when applying for credit for a family purpose or marital obligation.[72] According to an official note, the pur-

68. Minutes of April 18, 1990 Joint Meeting of Family Law Subcommittee of Marital Property II Committee and Family Law Section Committee to Review the Family Code. *See* Haack v. Haack, 149 Wis. 2d 243, 440 N.W.2d 794 (Ct. App. 1989) (upholding differences between chapter 766 and chapter 767 on available remedies).

69. 15 U.S.C.S. § 1691 (Law Co-op. 1982 & Supp. 1990).

70. WMPA (following UMPA) categorizes obligations depending on their purpose and when they were incurred. Each category has a distinct debt satisfaction rule. Wis. Stat. § 766.55 (1987-1988).

71. Wis. Stat. § 766.51(1m) (1987-1988).

72. There are certain exceptions for business interests. Wis. Stat. § 766.51(1m) (1987-1988) refers to exceptions listed in Wis. Stat. § 766.70(3)(a)-(d).

pose of this provision is to trigger the applicability of Regulation B of the federal Equal Credit Opportunity Act.[73] At the time, Regulation B forbade creditors from requiring a married applicant to obtain the other spouse's signature if the spouses resided in a community property state that had equal management and control over community property and the community property (along with the applicant spouse's separate property) was sufficient to meet the creditor's normal standards. Regulation B has since been amended, but arguably the change does not affect the application of the WMPA provision.[74]

A second, and independent, special provision in WMPA requires that when a married person applies for credit, the creditor must consider the couple's marital property (along with the applicant's nonmarital property) as available for debt satisfaction in the same manner

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73. The note to WIS. STAT. § 766.51(1m)(b) (1987-1988) states that "[t]he provision is included to clarify that each spouse has management and control of marital property . . . for purpose of the application of § 202.7(d)(3) . . . of Regulation B." Act of Oct. 22, 1985, 1985 Wis. Act 37, § 85, 1985 Wis. Laws 574, 580.

Except for the purpose of obtaining credit, management and control of marital property in Wisconsin is generally determined by title or possession. WIS. STAT. § 766.51(1) (1987-1988).

74. As a result of recent litigation involving interpretation of Regulation B, U.S. v. ITT Consumer Fin. Co., 816 F.2d 487 (9th Cir. 1987), Regulation B has been amended so that "a creditor may require applicant's spouse to sign the instruments necessary to create a valid security interest in the property" (including future income of the applicant's spouse) under applicable state law. 12 CFR § 202.7(d)(4)1 (1990).

There is some reason to believe that Wisconsin courts (or the Seventh Cireuit) will treat WMPA's special credit provisions diffcrently from the Ninth Circuit on the facts in *ITT*. First, only one of Wisconsin's special credit provisions, section 766.51(1m), relies upon Regulation B as originally promulgated. A second and independent credit provision, section 766.56(1), requires a creditor to determine creditworthiness of a married credit applicant for family purpose obligations in the same manner as it determines creditworthiness of an unmarried applicant when considering the property available for satisfaction of the obligation upon default. Under this second provision, a strong argument may be made that the future incomes of both spouses must be considered by a creditor in determining the creditworthiness of a married credit applicant, regardless of whether that future income is classified as marital property.

Second, while the Ninth Circuit decision responded to what it identified as legitimate creditor concerns about the unavailability of the non-applicant spouse's future income to satisfy an obligation upon divorce or upon the non applicant spouse's change of domicile to a common law property jurisdiction, WMPA has provisions that address these concerns. WMPA, unlike laws in the other community property states, contains special provisions that increase a creditor's ability to collect upon default after a divorce (section 766.55(2m)) or after the non-applicant spouse's move to another (particularly a common law property) jurisdiction (section 766.55(7) and accompanying special committee note). WMPA also contains a special provision whicb, upon the death of the incurring spouse, continues to make the income of the surviving spouse available for debt satisfaction to a creditor who regularly extends credit, if the income would have been available prior to the incurring spouse's death. WIS. STAT. § 859.18(3) (1987-1988). In view of these provisions, a Wisconsin court or the Seventh Circuit easily could reach a different conclusion than the Ninth Circuit in *ITT* and might conclude that, for the purpose of obtaining credit under WMPA, future income of the non-incurring spouse is marital property or, alternatively, one spouse's signature is sufficient to require a creditor, upon request, to consider both spouses' future incomes in determining the applicant's creditworthiness.

that the creditor considers property that is available to satisfy an unmarried person's debt.[75] Thus, to the extent that a creditor takes into account the income and other property of an unmarried person, as "property . . . available to satisfy the obligation," the creditor must take into account the income and marital property of a married applicant and his spouse. Since future income typically is the primary factor that a creditor considers in determining creditworthiness for unmarried applicants, this provision in WMPA was drafted to require that the future income of both spouses be similarly considered in determining the creditworthiness of a married applicant.

Empirical research[76] supports the observation that, since WMPA became effective, only some financial institutions have changed the way in which they determine creditworthiness for married applicants. Financial institutions that continue to focus exclusively on the financial circumstances of the applicant spouse, while ignoring the marital property held or generated by the nonapplicant spouse, reduce access to credit for lower- or non-wage earning spouses. Such institutions are subject under WMPA to state civil fines for discrimination.[77] Other creditors have changed their practices, but in the wrong direction. This latter group customarily requires both spouses to sign the credit documents, thus preventing either spouse from obtaining credit alone, and also making all property—both marital and nonmarital—of *both* spouses available for satisfaction of the obligation. This requirement is a clear violation of the federal Equal Credit Opportunity Act as well as WMPA.[78]

Perhaps more surprising, some Wisconsin financial institutions have continued to inquire only about the existing obligations of the applicant spouse, ignoring obligations of the non-applicant spouse.[79] This omission cuts against the interests of those financial institutions. The non-applicant spouse's creditors may reach *all* marital property (in addition to the incurring spouse's nonmarital property) for family purpose or marital obligations incurred while the Marital Property Act applies to the marriage. It is difficult to speculate why some creditors have failed to inquire about the existing obligations of the non-incurring spouse, in light of the direct impact these obligations may have on the creditworthiness of an applicant spouse.[80]

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75. WIS. STAT. § 766.56(1) (1987-1988).

76. Weisberger & Wolek, *WMPA and Credit: An Empirical Study of Financial Institutions*, May 1989, WISCONSIN LAWYER, at 20.

77. WIS. STAT. § 766.56(4)(a) (1987-1988) (referring to § 138.20).

78. As noted above, Regulation B of the Equal Credit Opportunity Act limits the situations in which the signature of the non-applicant spouse may be required. Even the *ITT* case (discussed at *supra* note 74) permitted a creditor to require the other spouse's signature only on an instrument making that spouse's *income* available to the creditor upon default.

79. Weisberger & Wolek, *supra* note 76.

80. Some financial institutions have engaged in other practices which are either

B. IRS and Satisfaction of Pre-WMPA or Premarital Obligations

While there has been little litigation regarding debt satisfaction under WMPA,[81] much of the controversy to date regarding debt satisfaction has centered on the collection practices of the Internal Revenue Service. The IRS has taken a very aggressive position regarding the satisfaction of federal tax obligations of one spouse, where these obligations were incurred during a period in which WMPA did not apply.[82]

When one spouse has an obligation incurred before marriage or while married but before January 1, 1986 (the effective date of WMPA), WMPA has a special rule designating which property is available for satisfaction of that debt.[83] The obligated property includes the debtor spouse's nonmarital property and other property which would be solely owned by the debtor but for WMPA. WMPA's approach looks to the property that would have been available to the creditor for satisfaction of the debt, given the marital status of the debtor and the law at the time the obligation was incurred. This approach makes available to the

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contrary to WMPA or contrary to the institutions' own interests. A number of institutions failed to inquire about the state of domicile of the applicant's spouse; some refused to make any loans which were not stated to be for a family purpose, even when the applicant spouse had sufficient nonmarital property to support a creditworthiness determination; a few institutions attempted to secure the advantages of the signed, separate statement which serves as conclusive evidence between creditor and debtor that the obligation is for a family purpose (section 766.55(1)), but failed to meet the requirements of that section; and a few creditors required all applicants, whether married or not, to sign the family purpose statement! *See* Weisberger & Wolek, *supra*, note 76.

81. More litigation may be anticipated in a few years. Two interesting cases have been decided to date. One is Park Bank-West v. Mueller, 151 Wis. 2d 476, 444 N.W. 2d 754 (Ct. App. 1989). The issue in *Mueller* was whether a bank could satisfy a consumer credit loan against the surviving wife as a marital obligation even though (1) the bank failed to give the appropriate "tattletale" notice as required by section 766.56(3) and (2) the wife was unaware of the loan or her husband's signing of a separate statement that the obligation was a marital obligation (section 766.55(1)). The appellate court held that even though the bank violated the law by failing to give notice to the spouse of the debtor, it was only subject to the statutory penalty ($25 forfeiture pursuant to section 766.56(4)(b)) and retained its right to reach marital property held by the surviving spouse. As dicta, the court suggested that the legislature may wish to reevaluate whether the $25 penalty is sufficient, given the serious consequences which flow from failure to notify in cases such as this.

In another case, an unpublished state trial court decision, ITT Financial Services v. Graf, No. 88-CV-574 (LaCrosse Circuit Ct. Feb. 24, 1989), the court addressed the issue of whether Wisconsin's "necessaries" doctrine survived enactment of WMPA. The court held that it did, noting WMPA's amendment to section 765.001(2) stating that "no spouse may be presumed primarily liable for support expenses under this subsection." For further support, the court cited United States v. Connecticut, 645 F. Supp. 44 (E.D. Wis. 1986), which held a wife liable for legal fees for criminal defense representation incurred by her husband and cited the doctrine of necessaries as modified by WIS. STAT. § 765.001(2) (1987-1988). It also noted but did not rely upon WMPA's express provision for the satisfaction of *support* obligations (in contrast to marital obligations) in WIS. STAT. § 766.55(2)(a).

82. For a discussion of the applicability of WMPA, see *supra* note 44. See also *infra*, notes 84-85.

83. WIS. STAT. § 766.55(2)(c)1, 2 (1987-1988).

creditor all the marital property generated by the debtor spouse (which would have been that spouse's solely owned property), but leaves all the marital property generated by the non-debtor spouse untouched.

There is, however, an alternate way of conceptualizing what spousal property should be available for satisfaction of a debt incurred during a period when WMPA did not apply to the marriage. This other approach looks at the debtor spouse's current vested property interests; it makes available the debtor spouse's nonmarital property, as well as half of all the marital property, no matter which spouse generated it. This alternative approach does not allow access to the non-debtor's interest in marital property (or that spouse's nonmarital property). Under WMPA, a creditor with a pre-WMPA or pre-marriage obligation is generally limited to the first approach.[84] Under no circumstances is a creditor given the right under WMPA to satisfy an obligation by taking advantage of both approaches.

In the years immediately after WMPA became effective, the IRS appeared to take the position that all "pre-determination date"[85] delinquent tax obligations of married taxpayers[86]—even when incurred by only one spouse—would be treated as family purpose or marital obligations. Under this approach, the IRS would have access to the debtor spouse's nonmarital property plus *all* the couple's marital property. This approach may be called a "200%" approach to marital property, because it asserts a claim to not just 100% of the debtor spouse's interest in marital property (as determined by either of the two approaches to debt satisfaction noted above) but also 100% of the non-debtor spouse's interest. The IRS has muted but not completely abandoned this position, which it believes "may still be viable depending upon subsequent court decisions."[87]

84. The vast majority of obligations incurred while WMPA does not apply to a marriage will be obligations incurred before marriage or during marriage but before WMPA became effective. However, couples who were married outside Wisconsin and moved there after January 1, 1986, or who were married and subject to WMPA but who subsequently had one spouse establish domicile elsewhere, would not be covered by the rule stated in the previous paragraph and cited in the previous note. Due to an apparent drafting oversight, the latter situations are not covered by WMPA; however it is likely the rule of section 766.55(2)(c) will be applied.

85. As discussed *supra* in note 44, the determination date is the date WMPA first applies to a marriage. Typically, a "pre-determination date obligation" will refer to one relating to an event either before marriage or during marriage but before January 1, 1986, the effective date of WMPA. However, as *supra* note 44 points out, it is possible to have a determination date after 1985 even if one were married before 1986, and to have periods after the determination date when WMPA does not apply. Nonetheless, for ease of presentation, in the discussion that follows we will assume that the spouses have a typical determination date. Hence we will focus on the rule of section 766.55(2)(c)1 and 2.

86. The discussion throughout this section assumes that the delinquent taxpayer, if married for the period for which the delinquency relates, filed a separate return or is solely liable for another reason. If a joint return was filed, the spouses would have joint and several liability, and all property of both spouses would be available.

87. Wisconsin Department of Revenue, Pub. No. 113, Federal and Wisconsin

The IRS's current position regarding its access to property to satisfy a premarital or a pre-determination date obligation of a delinquent married taxpayer is a hybrid of the state law embodied in WMPA and the original IRS position. Under all approaches, IRS claims access to all nonmarital property of the debtor spouse, a noncontroversial position. With respect to marital property, IRS now takes a "150%" approach to the satisfaction of premarital or pre-determination date obligations, claiming access to *all* marital property generated by the debtor spouse *plus* the debtor's one-half interest in marital property generated by the non-debtor spouse.

This hybrid approach appears to have been successful in litigation to date. However it should be noted that in two recent cases the taxpayer and spouse appeared pro se; thus these issues may not have been thoroughly briefed.[88] Also, in at least one Wisconsin situation involving pre-determination date liability incurred by one spouse, the regional IRS office administratively determined not to pursue its levy against the income of the non-obligated spouse, who was the primary support for several minor children.

One argument for the IRS's "150%" approach is that statutes such as Wisconsin's, which limit satisfaction for pre-determination date obligations, are subject to federal preemption.[89] The two preemption cases in the area of federal tax collections which the IRS relies upon are *United States v. Overman*[90] and its companion case, *In Re Ackerman*[91] both Ninth Circuit Court of Appeals decisions.

In each of these cases, the husband incurred a federal tax liability prior to marriage. Following marriage, the IRS sought collection of the debt from the husband's one-half interest in community property assets. The husband challenged the levy on the grounds that state law at that time contained provisions making all community property immune from liability for a spouse's premarital obligations. The Ninth Circuit held that the IRS was entitled to reach the husband's one-half interest in the proceeds of the sale of community property assets. The court agreed with the IRS that the provision of state law excluding community property from satisfaction of pre-marital obligations was merely an exemption statute which was not binding on the IRS.[92] It is ap-

Income Tax Reporting Under the Marital Property Act 18 (1989) [hereinafter Federal and Wisconsin Income Tax Reporting].

88. *See* Medaris v. United States, 64 AFTR 2d 89-5574 (Tex. 1989) and Vorhies v. Z. Management, Inc., 87-1 USTC 2 9200, 59 AFTR 2d 87-658 (W.D. Wis. 1987).

89. The key case on preemption in the general area of federal tax collection is United States v. Bess, 357 U.S. 51 (1958) (involving a levy against a delinquent taxpayer's interest in the cash surrender value of a life insurance policy).

90. 424 F.2d 1142 (9th Cir. 1970).

91. 424 F.2d 1148 (9th Cir. 1970).

92. For an analysis of IRS collection practices under California law, see State Bar of California Tax Section News, Summer 1990, at 14-15.

parently this portion of the *Overman/Ackerman* holdings that the IRS relies upon for its current position that, despite the express provisions of WMPA, it is entitled to reach the debtor spouse's interest in the marital property generated by the non-debtor spouse.

There are several serious weaknesses in the IRS's "150%" position. First, the court in *Overman* and *Ackerman* took special pains to stress that the IRS's right to reach the couple's community property did not include a right to the non-debtor spouse's interest in the proceeds resulting from the forced sale of the couple's community property. IRS's right to sale proceeds was limited expressly to the obligated taxpayer's interest in the property. "The Government cannot claim from the proceeds of sale more than that share of the proceeds attributable to the taxpayer's half of the community interest in the asset."[93] The Ninth Circuit cases thus support a "100%" approach, not a "150%" approach.

Second, *Overman* and *Ackerman* were decided at a time when the state of Washington expressly shielded all community property from debt satisfaction for premarital obligations (a so-called "marital bankruptcy" statute). In contrast, WMPA shields only the marital property generated by the non-debtor spouse, while making *all* the marital property generated by the debtor spouse available for satisfaction of pre-determination date obligations. This feature makes it very difficult to characterize the WMPA provisions as a state exemption statute not binding upon the IRS.

Third, while the IRS seeks to collect pre-determination date tax delinquencies from the debtor spouse's interest in marital property generated by the non-debtor spouse, it also seeks to collect its delinquencies from *all* the marital property generated by the debtor spouse. To justify this approach, the IRS appears to be relying upon the very WMPA section which it also claims is preempted, a posture that seems contradictory.

Published statements by the IRS based upon its "150%" approach will have decreasing significance as tax delinquencies of Wisconsin spouses married before 1986 are resolved. However, they will continue to be important for the collection of premarital obligations.[94] As long as the IRS's aggressive collection practices in this area continue, taxpayer challenges may be expected. As a result, it is possible (one would hope probable) that the courts will limit the IRS to one of the "100%" rules, preferably WMPA's rule for the satisfaction of premarital and pre-1986 obligations, described above.[95]

93. *Overman*, 424 F.2d at 1146.

94. Published statements by the IRS will also be important for post-marriage, post-1985 obligations of persons for whom the obligation was incurred during a period when one or both spouses was not domiciled in Wisconsin. For persons who are married and subject to WMPA, virtually any post-determination date tax liability of either spouse would be a family purpose or marital obligation, for which all marital property (plus all nonmarital property of the incurring spouse) would be available.

95. There are other issues which may be raised in connection with the IRS' Wis-

IV. Marital Property Agreements

In Wisconsin, as in other states, spousal agreements regarding rights at death have been enforced for many years.[96] Until the enactment of WMPA, however, there were no statutory standards for the coverage or enforceability of these agreements, and there were doubts about enforceability during the marriage. Under WMPA, spouses[97] may contract about any or all of a broad range of property issues, affecting their property relationships during marriage, at death and even after death.[98] Many WMPA provisions track those of UMPA.[99]

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consin collection practices after 1985. One involves due process concerns relating to the notice to the taxpayer (and the taxpayer's spouse where marital property is involved) which may be required for levies against income. Is notice to one spouse sufficient when the marital property interest of the other spouse is directly affected? What constitutes sufficient notice to either a taxpayer or the taxpayer's spouse when there is a levy against marital property? One case that raises the issue of constitutionally adequate notice and hearings is Anderson v. White, 888 F.2d 985 (3d Cir. 1989).

96. Weisberger, *Spousal Property Agreements: An Evolving Concept in Wisconsin and Elsewhere*, 96 Wis. Women's L.J. (forthcoming 1990).

97. In addition to spouses, persons about to marry may execute an agreement (to be effective upon marriage). Wis. Stat. § 766.58 (1987-1988). However, recall that both spouses must be domiciled in Wisconsin for WMPA, and hence its marital property agreement provisions, to apply. *See supra* note 44.

98.

> (3) Except as provided in s.s. 766.15, 766.55 (4m), 766.57 (3) and 859.18 (6), and in sub. (2), in a marital property agreement spouscs may agree with respect to any of the following:
>
> (a) Rights in and obligations with respect to any of either or both spouses' property whenever and wherever acquired or located.
>
> (b) Management and control of any of eithcr or both spouscs' property.
>
> (c) Disposition of any of either or both spouses' property upon dissolution or death or upon the occurrence or nonoceurrence of any other event.
>
> (d) Modification or elimination of spousal support, except as provided in sub. (9).
>
> (e) Making a will, trust or other arrangement to carry out the marital property agreement.
>
> (f) Providing that upon the death of either spouse any of either or both spouses' property, including after-acquired property, passcs without probate to a designated person, trust or other entity by nontestamentary disposition. If a marital property agreement provides for the nontestamentary disposition of property, without probate, at the death of the 2nd spouse, at any time after the death of the first spouse the surviving spouse may amend the marital property agreement with regard to property to be disposed of at his or her death unless the marital property agreement expressly provides otherwise and exeept to the extent property is held in a trust expressly established under the marital property agreement.
>
> (g) Choice of law governing construction of the marital property agreement.
>
> (h) Any other matter affecting either or both spouses' property not in violation of public policy or a statute imposing a criminal penalty.

Wis. Stat. § 766.58(3) (1987-1988).

99. UMPA § 10, 9A U.L.A. 121 (1983). There are some differences between UMPA and WMPA marital property agreements in addition to those already noted. *See supra* notes 38 and 39 and accompanying tcxt. *Compare* Wis. Stat. § 766.58(3)(f) (1987-1988) *with* UMPA § 10(c)(6), 9A U.L.A. 121 (1983) (so-called "Washington will" provisions).

A. Enforcement

Although WMPA's section on marital property agreements includes a subsection on enforcement standards,[100] these provisions leave a number of questions unanswered. Under WMPA, the burden is upon the spouse resisting enforcement to prove that the agreement was either "unconscionable when made,"[101] not "voluntarily executed," or made without reasonable financial disclosure "under the circumstances." Each of these standards has been the subject of litigation in Wisconsin and elsewhere in cases dealing with enforcement of pre-WMPA spousal agreements.[102] Although there has been some pressure to include some specific statutory guidance, these statutory enforcement standards are not defined in either WMPA or UMPA.[103]

In addition to the three stated standards for enforcement, an UMPA comment relevant to interpretation of WMPA[104] states that "ordinary contract defenses not specifically ruled out by the Act . . . remain available."[105] Thus the defenses of undue influence, fraud, misrepresentation, mutual mistake and the existence of substantial and unforeseeable change in circumstances between the time of execution and time of enforcement all remain viable. The "substantial and unforeseeable change" defense is especially important, because it allows examination of the circumstances of the spouses at the time of enforcement, in contrast to the statute's focus on unconscionability at the time of execution. While there is some precedent for the use of this defense in divorce disputes, particularly for issues relating to post-divorce support or maintenance,[106] courts in a number of jurisdictions have typically rejected this defense when dealing with enforcement of spousal agreements at death.[107] It is difficult to predict how this issue will be resolved, in light of the specific UMPA comment.

100. Wis. Stat. § 766.58(6) (1987-1988). We will refer to agreements enforceable under this section as "regular" marital property agreements.

101. Although there is no WMPA definition of "unconscionable," section 766.58(8) tracks UMPA and states that unconscionability is for the court to decide as a matter of law. WMPA goes on to state that if both parties are represented by a single legal counsel or if one party is represented and the other is not, these circumstances do not by themselves make an agreement unconscionable or otherwise affect its enforceability. An official note observes that this section does not address ethical considerations of representation under the lawyers' code of professional responsibility. Wis. Stat. Ann. § 766.58 comment (West Supp. 1990).

102. Weisberger, *supra* note 96.

103. For examples of some statutory language added to UMPA to clarify some of its terms, see Weisberger, *supra* note 96.

104. To the extent that WMPA provisions are based upon UMPA language, UMPA comments are relevant to the interpretation of WMPA.

105. UMPA § 10 comment, 9A U.L.A. 122 (1983). Absence of consideration is the only ordinary contract defense eliminated by the statute.

106. Weisberger, *supra* note 96.

107. *Id.*

B. Statutory Agreement Forms

One way in which Wisconsin has expanded the UMPA provisions regarding marital property agreements is by providing statutory agreement forms. The original statutory form, the Statutory Individual Property Classification Agreement (SIPCA),[108] was effective from the date of execution (or the date of application of WMPA, whichever was later), until no later than December 31, 1986. It required no financial disclosure and, like "regular"[109] marital property agreements, required no formalities beyond signing by both spouses.[110] Under the agreement, all property of the spouses was classified as the individual property of the "owner," with ownership determined by pre-WMPA common law property rules. However, at death the surviving spouse retained elective rights to property that would have been marital property under WMPA but for the statutory agreement. Termination of the statutory agreement at the end of 1986 was prospective only; it did not affect property classified under the agreement, unless it was intentionally or inadvertently reclassified.

Interest in statutory agreements continued after the SIPCA was no longer available. The concept of a statutory agreement form, particularly one that did not require asset and liability disclosure, was viewed as an important estate planning option by some practitioners and laypersons, particularly for couples moving into the state.[111] Critics argued, however, that a statutory agreement form might be used improperly when one or both spouses did not fully appreciate the legal consequences of the document, especially if there was no financial disclosure. In 1988, the legislature adopted two new statutory agreements which reflect these competing concerns: a statutory terminable marital property classification agreement (STMPCA)[112] and a statutory terminable individual property classification agreement (STIPCA).[113] The forms are intended to be used exactly as presented in the statutes; any alteration of the language invalidates the document as a statutory agreement, although an altered agreement form may still be enforceable if it qualifies as a "regular" marital property agreement.[114]

108. WIS. STAT. § 766.587 (1987-1988) (added by Trailer Bill I).

109. *See supra* note 100.

110. Classification under a STIPCA does not affect property division at divorce or post-divorce maintenance or child support. WIS. STAT § 766.589(6) (1987-1988). As with all marital property agreements, classification under the STIPCA does affect creditors unless they have notice as specified in the statutes. WIS. STAT. § 766.589(1)(b) (1987-1988).

111. The new statutory agreements accommodate the need of persons moving into the state or persons about to marry by providing that the agreements may be executed in advance, to become effective after marriage or when both spouses are domiciled in the state. WIS. STAT. §§ 766.588(1)(a), (3)(a), 766.589(1)(b), (3)(a) (1987-1988).

112. WIS. STAT. § 766.588 (1987-1988).

113. WIS. STAT. § 766.589 (1987-1988).

114. WIS. STAT. §§ 766.588(9) (intro. and notiee 11) and 766.589(10) (intro. and

A number of the rules regarding the new statutory agreements are the same as those regarding "regular" marital property agreements or the transitional SIPCA agreement. Like the SIPCA, the new statutory agreements do not affect rights at divorce or other spousal support rights. Like all marital property agreements, the new statutory agreements cannot adversely affect a child's right to support or affect a creditor unless the creditor was furnished with a copy of the agreement prior to the extension of credit or the creditor had actual knowledge of the adverse terms of the agreement.[115] Further, aside from particular rules regarding financial disclosure (discussed below), the agreements are subject to the general rules regarding enforceability.[116]

The major differences between the new statutory agreements and the general rules governing "regular" marital property agreements concern execution, financial disclosure and termination. Execution of the statutory agreements require not just the signatures of both spouses, but authentication or acknowledgment.[117] Financial disclosure must satisfy a complex set of rules. Full disclosure is not required, but failure to disclose affects the duration of the agreement. The statutory agreement form includes a schedule for financial disclosure; if that form is not completed, the agreement terminates three years from the date it was signed.[118] In addition, if the financial disclosure schedule is completed but the information supplied by a spouse does not provide "fair and reasonable disclosure under the circumstances," then the maximum duration of the agreement may be limited to three years, depending on the other spouse's desire and ability to prove the inadequate disclosure.[119] If the spouses complete the disclosure portion of the statutory agreement form appropriately, the agreement continues until a spouse dies, the marriage ends in divorce, or the statutory agreement

notice 12) (1987-1988). The major factor that would affect the status of a statutory agreement under the "regular" marital property agreement rules is financial disclosure. There is also some question as to whether the unilateral termination provision in the statutory agreements (discussed below) would be valid in a "regular" agreement, because of the requirement that a "regular" agreement be "amended or revoked only by a later marital property agreement," except under a special post-death circumstance. *Compare* WIS. STAT. §§ 766.588(4), 766.589(4) (1987-1988) *with* §§ 766.58(4), 766.58(3)(f) (1987-1988).

115. WIS. STAT. §§ 766.55(4m), 766.56(2)(c) (1987-1988).

116. WIS. STAT. §§ 766.588(5), 766.589(5) (1987-1988).

117. WIS. STAT. §§ 766.588(2), 766.589(2) (1987-1988).

118. WIS. STAT. §§ 766.588(3)(a), 766.589(3)(b) (1987-1988).

119. WIS. STAT. §§ 766.588(5)(b), 766.589(5)(b) (1987-1988). Note that this rule applies even if there was actual notice of the spouse's property and obligations from other sources. Ironically, a spouse with actual notice may be in a better position to prove inadequate disclosure on the statutory financial disclosure form than a spouse without that notice, and thus be better able to limit the duration of the agreement, if he or she desires.

STMPCA and STIPCA each are accompanied by an official note indicating that other ordinary contract defenses remain available (citing UMPA's section 10 comment).

Act of Apr. 23, 1988, 1987 Wis. Act 393, § 21 note, 1987 Wis. Laws 1483, 1494. *See supra* note 105 and accompanying text.

is revoked, amended or supplemented by a "regular" marital property agreement. Irrespective of financial disclosure, the agreement can be unilaterally terminated by either spouse.[120] A termination form is provided as part of the statutory agreement form; termination is prospective and does not affect property reclassified by the statutory form.

The STMPCA is comprehensive in its scope, classifying *all* property of the spouses, including property acquired in the future, as marital property.[121] The STIPCA is less comprehensive. It reclassifies only the spouses' marital property, including marital property which may be acquired in the future, as the individual property of the owning spouse.[122]

During the marriage, reclassification of marital property as individual property under a STIPCA primarily affects the management and control of the property (including the right to make unlimited gifts to third parties), and the rights of creditors (if timely notice is given to the creditor). At the death of a spouse, the surviving spouse retains all marital property reclassified as that spouse's individual property under the agreement; in addition, the surviving spouse has elective rights relating to the marital property which has been reclassified as the decedent's individual property under the agreement.[123]

Although proponents of statutory agreements believe that they will be widely used, as yet there is no way to determine the extent of the use (or misuse) of the forms by lawyers or unrepresented parties.

C. Dual Representation

One of the issues of special concern in drafting marital property agreements under WMPA (and spousal agreements generally) is the ethical propriety of "dual representation"—one lawyer representing both spouses. Although Wisconsin practice generally requires separate representation when a marital property agreement contains a provision

120. WIS. STAT. §§ 766.588(4), 766.589(4) (1987-1988). The agreement terminates 30 days after notice of termination is given. During the interim period, there is a duty to act in good faith with respect to property reclassified by the agreement.

121. WIS. STAT. § 766.588(1)(b) (1987-1988). Note that all previously acquired property that is reclassified as marital property by this agreement will retain this new classification, even if the agreement terminates after three years because of inadequate financial disclosure.

122. WIS. STAT. § 766.589(1)(b) (1987-1988). Ownership is determined by the name on the document of title, if there is one, or as if the property were acquired by an unmarried person, where there is no document of title. WIS. STAT. § 766.589(1)(a) (1987-1988).

123. WIS. STAT. § 766.589(7) (1987-1988). Property that would have been marital property but for the agreement is combined with "deferred marital property" (property that would have been marital property but for the fact that it was acquired during a period when WMPA did not apply to the marriage) for purposes of an election against probate property (section 861.02, subject to a bar under section 861.13) and an election relating to non-probate property (sections 861.03 and 861.05, subject to a cutback under section 861.07).

regarding division of property at divorce or regarding post-divorce maintenance,[124] WMPA offers no guidance on the issue in the non-divorce, estate planning context, where the need for separate representation is less apparent.[125]

In addition, aside from the question of when separate representation is necessary, the related issue of what form separate representation should take is beginning to be recognized and discussed. When a second attorney has been asked to represent onc party in negotiating an agreement or in reviewing an already drafted agreement, what is the appropriate adversarial role for that attorney? Confrontational representation without the client's express direction may not be desired by the client and may not be in the client's best interests.

There is also the question of the scope of representation. Generally the "second attorney" reviews a marital property agreement by making a de novo analysis of the property rights of each party absent any agreement, in order to be able to analyze its effect on the rights being modified or waived. Unless the attorney has explained in advance the need for these legal services, attorney fees may become an area of dissatisfaction or dispute.[126]

D. Informed Consent

Pre-WMPA case law emphasized enforceability standards such as voluntariness, substantive fairness and adequate financial disclosure. However, prior law only occasionally touched the "informed consent" issue—the need for a spouse who is giving up valuable rights to understand the significance of those waivers.[127] Because WMPA provides new property rights and liabilities for both spouscs, it is even more urgent now than previously that both spouses have a clear understanding of their rights and the legal effect of the agreement.

E. Marital Property Agreements and Income Reclassification in the Year of Divorce

Both the IRS and the Wisconsin Department of Revenue have been emphatic that they will not recognize a marital property agreement

124. WIS. B. BULL., June 1984, at 88.

125. For a thoughtful discussion of the multiple factors to be considered in the determination of whether dual representation is appropriate, see CHRISTIANSEN, HABERMAN, HAYDON, KINNAMON, MCGARITY, & WILCOX, MARITAL PROPERTY LAW IN WISCONSIN at ch. 14 (2d ed. 1990).

126. Although confidentiality rules do not permit inspection of grievances submitted to the Attorneys Board of Professional Responsibilities, some Wiseonsin practitioners have reported to the authors that several client grievances have been filed over "excessive" legal fees for reviewing marital property agreements.

127. "Informed consent" has been discussed in various judicial decisions as an aspect of voluntariness, financial diselosure, or substantive fairness. Weisberger, *supra* note 96; text accompanying note 106.

for tax purposes to the extent that the agreement retroactively reclassifies spousal income.[128] This has been a particular problem when, as part of a divorce settlement (or during the pendency of the divorce), spouses wish to agree that each will report that spouse's "own" income for an entire tax year, even when the agreement is made late that year. For the period that the agreement is retroactive, the taxing authorities insist that each spouse filing separately and (or former spouse) report income earned during marriage based upon marital property rules; that is, that each spouse report that spouse's half interest in *all* marital property. In most cases, the IRS and Wisconsin Department of Revenue position reduces the overall tax burden of a divorced couple,[129] but couples often prefer to take on the additional tax burden for noneconomic reasons: they may not wish to have any further financial dealings with one another after the divorce; they may wish to avoid tax liability apportionment disputes; they may fear that a former spouse will either not provide any information or provide incomplete or erroneous information.

As Wisconsin family law practitioners have become more aware of this issue, they have been able to avoid the problem by drafting an appropriate prospective marital property agreement. In addition, a proposal has been made for a statutory agreement form to cover this situation. This concept has received preliminary approval from State Bar Committee members and a draft is expected to be reviewed for possible legislative action in 1991. Such a statutory agreement form would assist couples who wish to minimize divorce costs and year of divorce tax reporting controversies; it also should assist the taxing authorities by providing a standardized (although not required) form for this situation.[130] As with all agreements, however, both spouses must be willing to give informed consent; sometimes, a spouse will try to use the tax law as a "bargaining chip."

V. Other Issues Currently under Consideration in Wisconsin

Several substantive areas, as well as some more technical ones, continue to be reviewed by the Special Legislative Committee on Marital Property Implementation in consultation with the State Bar's Mar-

128. Federal and Wisconsin Income Tax Reporting, *supra* note 88, at 9-12.

129. "Most of the time it is more desirable to have the effective date of the divorce occur before the end of the year to obtain single taxpayer rates on each half of the community income . . . Careful projections can effect considerable tax savings." 1 Divorce Litigation (January 1990) (*Community Property Alert* supplement).

130. Since such an agreement is not appropriate for all divorcing couples (particularly in view of probable higher taxes), the inclusion of "warnings" for those interested in using the statutory form will be particularly important.

ital Property II Committee.[131] The two most important substantive issues under current consideration involve the rights of the surviving spouse. The first concerns WMPA's intestacy rule *when the decedent is survived by a spouse and at least one issue who is not also the issue of the surviving spouse.*[132] Under these circumstances, the surviving spouse receives *under intestacy* the following from the decedent's net estate: one-half of the decedent's individual property and one-half of the decedent's unclassified property which is not deferred marital property (sometimes referred to as "would have been individual property").[133] The surviving spouse retains the right to make deferred marital property elections against probate and non-probate property.[134] All issue of the decedent share the remaining net estate—including the decedent's full one-half interest in marital property—taking by representation when they are not all of the same degree.[135]

This intestacy provision has been criticized on the basis that it is unduly complicated. If the decedent leaves unclassified probate property, that property must be divided into deferred marital property and property which would have been the decedent's individual property. The surviving spouse receives fifty percent of the "would have been individual" property outright under intestacy, but can only receive a one-half interest in the deferred marital property by affirmative election. Moreover, this election must be asserted in a timely and appropriate manner[136] and it may be completely barred if the surviving spouse has received at least one-half of a group of assets (such as the decedent's interest in life insurance proceeds, annuities and jointly owned property).[137] Thus, while the surviving spouse has an intestacy entitlement

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131. *See supra* notes 50 and 52 and accompanying text.

132. WIS. STAT. § 852.01(1)(a)2 (1987-1988).

133. WMPA only classifies property acquired after the determination date, while both spouses are domiciled in Wisconsin. (*See* discussion *supra* note 44.) All other property is "unclassified." Unclassified property can be categorized into property that would have been individual or would have been marital, had WMPA applied at the time the property was acquired. During the marriage, unclassified property is treated as though it were individual property. WIS. STAT. § 766.31(9) (1987-1988). At death, property of the decedent that would have been marital is defined as "deferred marital property" (WIS. STAT. § 851.055 (1987-1988)) and the surviving spouse may have elective rights to deferred marital property owned by the decedent.

134. WIS. STAT. §§ 861.02(1) (election against probate deferred marital property), 861.03 (election against certain non-probate deferred marital property) (1987-1988). The probate elective right is subjcct to a bar under section 861.13 while the non-probate elective right is subject to reductions under section 861.07. For more detailed discussion of these elections, the bar, and the reduction, see *infra* notes 137, 140-143 and accompanying text.

135. WIS. STAT. § 852.01(1)(b) (1987-1988).

136. WIS. STAT. § 861.11 (1987-1988).

137. WIS. STAT. § 861.13 (1987-1988). Almost the entire section setting forth the bar was part of Wisconsin's pre-WMPA rules and was applicable to Wisconsin's prior common law elective right of a surviving spouse. WIS. STAT. § 861.02(1) (1987-1988) makes it clear that this election is in addition to the surviving spouse's clective rights regarding certain

to one-half of the decedent's individual and would have been individual property (as well as a vested ownership right in all marital property in the marriage), there is no such entitlement to any of the decedent's deferred marital property, a policy result which is difficult to justify.

The original justification for this rule was that—at least in the situation where the decedent left issue who are not also the issue of the spouse—intestacy treatment of the decedent's deferred marital property should be similar to the treatment where the decedent left a valid will. Where there is a valid will, the surviving spouse is required to exercise election rights (subject to the bar), unless the deferred marital property was left to that spouse. This similarity in treatment was not extended, however, to the intestacy situation where the decedent was survived by a spouse and only issue of the marriage. In that situation, the intestacy statute gives the entire net probate estate, including any deferred marital property, to the surviving spouse.[138]

Discussions of this issue to date have revealed that there are supporters for simplification and supporters for retaining the existing rule. Therefore, the future is uncertain for a proposed amendment which would give the survivor (when the decedent left any issue who were not also issue of the surviving spouse) one-half of the decedent's deferred marital property under intestacy without the need for an election, and without the possibility of having the election barred. There is some irony in the present rule since one key rationale for WMPA's intestacy rules was an argument made by the late Professor Richard W. Effland.[139] He urged the adoption of Arizona's intestacy rules (which differed significantly from rules in the other community property states particularly regarding who received the decedent's interest in community property) because they minimized property classification disputes. In particular, where the decedent left issue who were not also issue of the surviving spouse, the Arizona surviving spouse receives half of the decedent's separate property. Since the surviving spouse already owned a half interest in the couple's community property and received a half interest in the decedent's probate separate property, classification disputes within the decedent's family did not arise.

The second key substantive area under discussion concerns simplification of the deferred marital property elections. The existing stat-

nonprobate deferred marital property of the decedent under section 861.03. Similarly, section 861.03 expressly states that rights under that section are in addition to elective rights under section 861.02(1). For a detailed discussion on both deferred marital property elections, see Erlanger & Weisberger, *New Probate and Non-Probate Property Elections Under Wisconsin's Marital Property Act, Part I*: (Probate Election), 59 WIS. B. BULL. October 1986, at 25; and *Part II*: (Non-Probate Election), 59 WIS. B. BULL. November 1986, at 13.

138. WIS. STAT. § 852.01(1)(a)1 (1987-1988).

139. Professor Effland was a professor at the University of Arizona School of Law and a former professor of law at the University of Wisconsin.

utes are the product of two distinct historical roots. The probate election, including the bar, is a direct substitution for Wisconsin's prior common law property elective share.[140] In contrast, the non-probate election, including the concept of a reduction, is based upon the Uniform Probate Code's augmented estate provisions.[141] The two approaches are not conceptually compatible. Various proposals have been made to either combine the elections or at least make them more consistent. In addition, there have been criticisms about the valuation rules in the two elections, both with respect to valuation decisions made by the legislature, and ambiguities that remain.[142] It is possible that in the 1991 legislative session, acceptable proposals will be developed which simplify the elections and resolve many of the valuation problems.[143]

In the numerous official and unofficial discussions which have taken place in recent years conceruing these and other issues related to WMPA, it is clear that two distinct approaches have emerged. Some people prefer precise statutory answers to as many issues as possible, while others are willing to let practice and case law flesh out the statutory generalizations. Increasingly, the latter view seems to be prevailing, in contrast to the initial years after the passage of WMPA when there was more pressure to provide legislative clarification.

VI. WMPA's Future

At the present time, several states are seriously considering adoption of a version of UMPA. The two states most likely to follow Wisconsin's lead are Connecticut and Indiana, jurisdictions with growing support from legislators and grassroots organizations like the League of Women Voters and the American Association of Retired Persons. In each of those jurisdictions, legislative study committees have been formed with possible legislative action targeted for 1991.

What can be learned from the Wisconsin experience? First, UMPA should be carefully reviewed to see what provisions should be tailored to the adopting state's history and priorities. For example, in Wisconsin, equal access to credit was a very high priority. In addition, the Louisiana fruits rule (whereby a spouse owning nonmarital property may unilaterally declare the income from that property as individual property) and the terminable interest rule for deferred employment benefits were two modifications of UMPA that were important to

140. Wis. Stat. §§ 861.03, 861.07(2) (1983-1984) (repealed effective January 1, 1986).

141. Unif. Probate Code §§ 2-201—2-207, 8 U.L.A. 74-87 (1983).

142. *See* Erlanger & Weisberger, *supra* note 137.

143. One current proposal would eliminate the bar to the probate deferred marital property election and substitute a reduction similar to that of the nonprobate election.

broaden the acceptability of the new system. These may be less important issues in other jurisdictions.

Second, there is a need to mesh the adopting state's version of UMPA into its existing laws governing creditors, bank accounts, real estate transactions and, most important, probate administration. Thoughtful drafting of supplementary provisions to UMPA in these areas will go a long way in easing transition problems.

Third, it is important that following adoption, a process be put in place whereby proposals for clarification or modification may be reviewed in a systematic, nonpartisan and comprehensive way. It is critical that this process include diverse representation from the practicing bar, since the marital property law not only affects estate planning practitioners but also the family law, creditor/debtor, real estate and litigation segments of the bar. Moreover, even within the various specialities, it is important that there be representation by practitioners with diverse types of clients since, for example, attorneys representing wealthy estate planning clients may have different concerns and perspectives than attorneys representing clients with modest estates.

Fourth, it is important to encourage empirical studies designed to find out the "law in action" implementation of UMPA. In this area, there is still much to do in Wisconsin. Although there have been some limited studies seeking information about practices of lawyers drafting marital property agreements and financial institutions in extending credit,[144] much more research is needed in order to understand how this (and other) statutory reform actually translates into new practices.[145]

Finally, there is a strong need to mount a comprehensive educational campaign so that married persons as well as couples about to marry have at least a general understanding of their rights under the new property system.[146] The new law will only have its intended effect if rights under the statute are asserted.[147] There is also a need for

144. *See* Weisberger, *supra* note 96; Weisberger and Wolek, *supra* note 76.

145. For the past two years, law students at the University of Wisconsin have done some preliminary empirical research into probate files, recording marital property agreements, retail merchant credit granting practices, real estate practices reported by title company personnel, and information provided by life insurance agents to prospective customers about marital property and life insurance. One of the most interesting projects involved interviewing applicants for marriage licenses in Dane County (where Madison is located). These interviews indicated that most of the applicants were unaware that Wisconsin was now a community property state, and of those who were aware of WMPA, the majority believed that it was a law requiring the equal division of property at divorce.

146. It has even been suggested that couples about to marry receive an instruction booklet and take a required test about property rights of married persons—just as persons applying for a driver's license receive an information booklet and take a driver's written test. If this proposal is worthwhile, it would be equally valuable in a common law property jurisdictions.

147. A member of one working group of the Special Legislative Council Committee on Marital Property Implementation reports that she responded to a solicitation by an out-

professionals (such as lawyers and accountants) and industries (such as real estate, life insurance, creditors and financial institutions) which are affected by the law to provide accurate information to their clients and customers. In Wisconsin, it appears that some groups have relied solely upon media reports to provide this information. In addition, some groups provided their members with excellent programs when WMPA went into effect, but have not provided continuing education since. State professional and trade associations necessarily play an important role in providing training programs and materials to assure a competent level of knowledge about the law among those responsible for its implementation.

VII. CONCLUSION

Some WMPA (and UMPA) opponents have described its adoption as a "revolution" and conclude that Wisconsin's current law is a "mess." We believe that if it were a revolution, it was a quiet one, and for a number of marriages it was a "non-event," particularly in light of its title-based management and control rules.[148] Although Wisconsin's move from common law property to community property rules does represent a profound change in legal philosophy governing property rights during marriage and at the death of a spouse, that change generally tracks widely accepted changes to divorce law in all the common law property states. While the profound nature of the change was emphasized in the legal and lay literature around the time of WMPA's 1984 adoption and 1986 effective date, the dust has largely settled in many areas. Both Legislative Council attorneys who have staffed the various Special Committees on Marital Property Implementation[149] report that the volume of inquiries from legislators, legislative aides, attorneys and members of the public about marital property issues has decreased enormously from 1984-86 levels. With the exception of the issue of child support when the obligated parent has remarried,[150] the infrequent calls now mostly seek answers to technical questions. The current chair (and longstanding member) of the State Bar's Marital Property II Committee[151] reports that the number of issues which have

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of-state financial institution for a credit card. Her application indicated she was a homemaker but listed her physician husband's (marital property) income and stated that Wisconsin was a community property state. Her application was denied several times on the basis of "insufficient income." She made repeated protests and eventually received a credit card in her own name.

148. *See, e.g.*, Erlanger, Hughes & Weisberger, "*Estate Planning under Wisconsin's Marital Property Act: for Happily Married Clients with an Intact Family and Typical Assets*" WIS. B. BULL., Feb. 1986, at 14.

149. The Senior Staff Attorneys are Don Dyke and Janice Baldwin.

150. For proposed legislation to clarify the relationship between marital property rules and this aspect of child support, see *supra* note 65 and accompanying text.

151. The current chair of the Marital Property committee is Attorney Peggy Podell of Milwaukee.

been brought to the Committee's recent attention has declined significantly from the initial year of the Committee's formation. Similarly, a Milwaukee practitioner[152] stated recently in a public lecture on WMPA and real estate transactions that in preparation for his presentation, he called seven prominent Milwaukee practitioners and "did not get one problem." He noted that most of the current issues affecting his practice were also pre-WMPA issues, "problems we have lived with before." He emphasized the important new planning opportunities under the Act, stating that "many of the people who led the resistance against WMPA are waffling now" because of the estate planning opportunities, such as the opportunity to create marital property and achieve new income tax basis for both spouses' interests at the death of either spouse.

As the years go on, Wisconsin couples will own more and more marital property and will be obligated for more and more family purpose or marital debts. The impact of WMPA upon estate planning, debt collection, probate and bankruptcy will become more obvious and better understood. Like many other areas of the law, lawyers will be playing an important role in the public's understanding and response while at the same time clients and their experiences will affect the ways lawyers respond. Wisconsin's experience with WMPA illustrates how legal reforms may be enacted and the continuing process of education and lawyering that is needed in order to implement legislative policy goals.

152. Attorney Paul Meissner, Ralph M. Hoyt Lecture, University of Wisconsin Law School (Nov. 30, 1989).