THE WISCONSIN MARITAL PROPERTY ACT: HIGHLIGHTS OF THE WISCONSIN EXPERIENCE IN DEVELOPING A MODEL FOR COMPREHENSIVE COMMON LAW PROPERTY REFORM*

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* Research for this article was made possible by grants from the Law School and the Graduate Research Committee of the University of Wisconsin. This article is the first of two which explore various substantive provisions of the Wisconsin Marital Property Act. It focuses upon issues relating to property classification, management and control, and marital property agreements. The second article will address issues relating to spousal obligations and the effect of the new legislation at the death of a spouse.

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INTRODUCTION

In March 1984, when the Wisconsin Legislature adopted its version of the Uniform Marital Property Act, Wisconsin became the first American common law property state to replace its well-established rules governing the property rights of married persons with the reformed community property rules of the Uniform Act.[1] The Wisconsin choice of a comprehensive alternative model for marital property followed years of studying the shortcomings of the common law property rules and the advantages of many of the existing rules in the eight American community property states. Adoption of the Wisconsin Marital Property Act reflects a fundamental policy determination that it is desirable to replace common law definitions of marital rights and responsibilities and the implementing property rules with a definition of marriage as a partnership between equals and property rules consistent with that definition.

Since the Wisconsin Act incorporates many of the provisions of the Uniform Marital Property Act, its adoption also reflects a policy favoring uniformity for state property laws. All the issues of concern to Wisconsin marital property reformers, however, were not resolved by the selection of the Uniform Marital Property Act as the model for legislative reform. The Wisconsin Marital Property Act varies in some respects from the Uniform Marital Property Act. It is not only instructive, therefore, to explore the reasons why a common law property state such as Wisconsin has chosen to adopt a form of community property. It is also useful to examine which provisions of the Uniform Marital Property Act have been

1. The Wisconsin Marital Property Act is 1983 Wisconsin Act 186 and becomes effective on January 1, 1986. In this article, it is generally referred to as the Wisconsin Act.

incorporated into the Wisconsin Act without modifications and where Wisconsin has made modifications.

This article highlights the Wisconsin experience in developing a model for comprehensive reform of marital property law. It is written with three distinct groups of readers in mind. One group is composed of those who want to know why Wisconsin became the first state to adopt a version of the Uniform Marital Property Act, what are the roots and major themes of the Wisconsin legislation, and why certain policy choices were made. This article is also written for those in other common law property states where there is or will be legislative consideration of the adoption of the Uniform Marital Property Act.[2] This second group of readers wants to know the range of marital property alternatives that is available, particularly the American community property systems, the Uniform Marital Property Act and Wisconsin's recently enacted Marital Property Act. A detailed analysis of the various alternative models and an explanation of the policy choices incorporated into Wisconsin's legislation should be helpful to this group. The third group of readers is composed of those in community property jurisdictions where proposals for fine tuning or modification of certain community property rules may be considered.[3]

Part I of this article identifies the defined goals for comprehensive reform of common law rules governing the property rights of married persons. Part II discusses alternatives to a common law property system, particularly community property principles which provide a distinct and attractive alternative model to common law property doctrines. Part II also examines the Uniform Marital Property Act, which selectively incorporates community property principles and rules as the basis of its unique, comprehensive system of "marital property." Part III provides a brief history of events which led to the adoption of 1983 Wisconsin Act 186, Wisconsin's version of the Uniform Marital Property Act, in 1984. Part IV identifies three guiding principles which unite key provisions of the Wisconsin Marital Property Act. It also discusses a number of important policy choices that confronted the Wisconsin Legislature during its deliberations on various marital property reform proposals. The enumerated issues provide a convenient summary of major legislative issues relating to property classification, management and control, and marital property

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2. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Marital Property Act on July 28, 1983. *See infra* notes 56-60 and accompanying text. In this article, it is frequently referred to as the Uniform Act. The Uniform Act is presently being considered in over a dozen common law property states including Connecticut, Illinois, Indiana, Kansas, Michigan, Minnesota, Missouri and New York.

3. *E.g.*, Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L.J. 771, 771-79 (1982); Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 Hastings L.J. 229, 233-34, 288-91 (1982); Effland, *Arizona Community Property Law: Time for Review and Revision*, 1982 Ariz. St. L.J. 1, 1-3, 37; Marple & Quilliam, *The Uniform Marital Property Act for Texas?*, 47 Texas B.J. 906, 912-14 (1984).

agreements that states considering marital property reform legislation should address.

I: Beyond Divorce Reform: Why Marital Property Reform in Wisconsin and Other Common Law Property States?

However else one characterizes the institution of marriage—whether from a romantic, literary viewpoint or from the viewpoint of a cultural anthropologist trying to explain the effects of marital roles, whether as a status or contract relationship or a mixture of both—marriage involves important property relationships between spouses. Property issues, particularly those relating to ownership of assets and liability for obligations, become especially prominent when a marriage terminates by death or by divorce. These same issues as well as management and control rights are important to both spouses during the on-going marriage.

In recent years a movement for basic reform of the traditional legal rules which govern property rights of married persons in American common law property states has been fueled by a growing awareness that the existing rules are fundamentally inconsistent with the modern belief that marriage is a partnership between equal persons, both of whom contribute to the accumulation of property during a marriage and both of whom act on behalf of the marriage with third parties.[4] Accordingly, this reform movement has goals which reach far beyond those previously accomplished by the various nineteenth century Married Women's Property Acts that restored to married women many property rights not recognized during marriage under traditional common law property rules. It also has goals which transcend those of protective legislation designed to safeguard the rights of some spouses at the end of marriage by redefining the pool of spousal property subject to division at divorce[5] or by ensuring a widow or

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4. *See, e.g.*, Bartke & Zurvalec, *The Low, Middle and High Road to Marital Property Reform in Common Law Jurisdictions*, 7 Community Prop. J. 200, 200-01, 204-07 (1980); Cantwell, *Man + Woman + Property = ?—Pondering the Marital Equation*, 6 The Prob. Law. 1, 75 (1980); Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 Creighton L. Rev. 71, 76, 84 (1979); Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 Ohio St. L.J. 558, 584 (1974); Kulzer, *Law and the Housewife: Property, Divorce, and Death*, 28 U. Fla. L. Rev. 1, 47-48 (1975); M. Melli, Legal Status of Homemakers in Wisconsin (1977); Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. Rev. 1, 2 (1977).

The late Professor Richard W. Bartke, with academic and practitioner experience in common law and community property states, was an early supporter and wrote a number of articles advocating the idea of common law states experimenting with the marital sharing concepts. He first made the suggestion in *Marital Property Law Reform: Canadian Style*, 25 Am. J. Comp. L. 46, 84-85 (1977). Another early supporter was Professor Mary Moers Wenig. *See* Wenig, *Sex, Property and Probate*, 9 Real Prop., Prob. and Tr. J. 642, 651 (1974).

5. *See* Cantwell, *supra* note 4 at 62-64; Foster & Freed, *Family Law in the Fifty*

widower a greater share of the decedent's property at death.[6] Proponents of comprehensive reform of the common law property system propose fundamental changes in the principles and definitions from which the legal rules governing property rights of married persons derive.

Specifically, supporters of marital property reform in common law property states generally agree that comprehensive legislation must address the following four areas:[7]

States: An Overview, 16 Fam. L.Q. 289 (1983); Krauskopf, *Marital Property at Marriage Dissolution*, 43 Mo. L. Rev. 157, 158 (1978); Younger, *Marital Regimes: A Study of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 Cornell L. Rev. 45, 52 (1981). *See also* the Uniform Marriage and Divorce Act (U.L.A.) § 307 (1970).

6. *See* Volkmer, *Spousal Property Rights at Death: Re-evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 Creighton L. Rev. 95, 104-10. (1983). The majority of American common law property states have increased protections for the surviving spouse, both in testacy and intestacy. During the twentieth century, dower, the basic protection at death for wives under the traditional common law, has typically been broadened into a statutory share of the decedent's property for either a surviving wife or husband. Georgia is the only state without dower or an elective share. In contrast, Maine permits a family allowance for support of the surviving spouse (and minor children) without time limit if the estate is adequate. Me. Rev. Stat. Ann. tit. 18-A, § 2-403 (1981). (In adopting the Uniform Probate Code, Maine removed the Code's limitation on the family allowance during the period of administration.) Oklahoma's "coverture property", a community property-like concept, applies at death of the first spouse and on the basis of what relative survives the spouse. *See* Lilly, *Oklahoma's Troublesome Coverture Property Concept*, 11 Tulsa L.J. 1, 4-9 (1975). These statutory protections have been based upon vague notions of "support" or "protection." Such a share has more recently been justified on the basis of the contribution of the surviving spouse, especially the widow, to the acquisition of the assets or on a closely related rationale of "fairness."

7. While the four points concern property, contract, and probate changes, certain tax reforms have been proposed which are directly related to the enumerated goals. First, in order to expedite a variety of interspousal transfers during lifetime and at death, an early enunciated tax reform component of marital property reform sought the removal of all federal and state taxation imposed upon interspousal transfers. This has been accomplished at the federal level when Congress enacted in 1981 the Economic Recovery Act, Pub. L. No. 97-34, 95 Stat. 172, (1981). *See* I.R.C. §§ 2056(c) and 2523(a), effective January 1, 1982. In Wisconsin, interspousal gifts during lifetime and at death were excluded from taxation by 1981 legislation. *See* Wis. Stat. Ann. §§ 72.76(8) and 72.15(5). (West Supp. 1984). Second, tax reform proposals also included the option of a state joint income tax return similar to joint federal income tax returns, where such an option is not already available. This latter change flows logically from enactment of a property rule recognizing equal property ownership of spousal income during marriage. In contrast to common law property rules, federal tax law has recognized income and asset sharing by married couples for tax liability calculation purposes since 1948 when Congress authorized the joint income tax return. *See* I.R.C. § 1(a) (1954). For most income tax purposes, married couples in common law property states are treated similarly to their counterparts in community property states. The 1948 legislation also equalized gift and estate tax consequences for married couples in common law property states and community property states. Income Tax Reduction Act, Pub. L. No. 80-471, §§ 351, 361-66, 371-74, 62 Stat. 110 (1948). Since the Supreme Court's decision in Poe v. Seaborn, 282 U.S. 101 (1930), married couples in community property states have had a right to split income from services or capital on their federal income tax returns.

1. Spousal sharing of ownership rights of certain property during marriage;

2. Spousal sharing of management and control rights during marriage including the right of equal access to credit based on the assets of the marriage;

3. Spousal sharing of ownership rights of certain property at death, regardless of the order of death, and increased protections for surviving spouses; and

4. The enforceability of spousal marital property agreements covering a broad range of subjects, including property classification and management and control.

Widespread consensus on these goals has emerged.While certain reformers believed that reform within the common law property framework was possible,[8] other reformers determined that modification of the common law property rules would be inadequate to correct underlying inequalities in marital property rights.[9] Further, as earlier reformers succeeded in legislating and implementing sharing rules at divorce which are fundamentally inconsistent with common law property rules applicable during marriage and at death, a growing number of reformers came to agree that addressing these four areas of concern requires legislation based on other than common law property principles.[10]

A. *Defects in Common Law Property Rules: The On-going Marriage*

In the context of the on-going marriage, reformers emphasize that the failure of the common law to recognize the full range of contributions by both spouses to the marital partnership is reflected in the rules which govern many day-to-day spousal transactions. Common law property rule deficiencies are illustrated by the limited effect of nineteenth century re-

8. *See infra* notes 73-77 and accompanying text.

9. *See infra* notes 66-71 and accompanying text. William F. Buckley, Jr., Phyllis Schlafly, and the Eagle Forum have endorsed a community property model for reform of married persons' property rights. Ms. Schlafly has endorsed community property legislation drafted by Professor Grover Rees, III, of the University of Texas Law School. Schafly, *Community Property Laws—Justice for Wives*, 16 The Phyllis Schlafly Rept. (Nov., 1982). At a public hearing on a draft of the Uniform Marital Property Act held in Washington, D.C., in February 1983, the only opposition expressed was on behalf of the State Bar of Wisconsin.

10. Once divorce laws were reformed to recognize the economic contributions of both spouses to the accumulation of marital assets, extending the same principle to the on-going marriage and to termination of the marriage by death was accepted as "fair" and "good policy". Editorial, Milwaukee Journal, Feb. 22, 1980, at 1, col. 1; Editorial, The Capital Times, Mar. 9, 1984 at H, col. 1, "Marriage as Partnership." Editorial, Milwaukee Sentinel, Oct. 13, 1983, at 16, col. 1, "State reform needed on marital property"; *see His . . . Hers . . . Theirs: Marital Property* (1978) (published by the League of Women Voters Education Fund). For publications of the Wisconsin Governor's Commission on the Status of Women, *see* Toward A True Marriage Partnership (1976); That Old American Dream & the Reality Or Why We Need Marital Property Reform (1977); Real Women, Real Lives: Marriage, Divorce, Widowhood (1978); and The Marriage Partnership (c. 1979).

forms which removed the common law disabilities of married women.[11] Since the passage of the various Married Women's Property Acts, common law property states have had ownership rules for married couples which appear sex neutral.[12] Each spouse owns and controls whatever he or she earns, purchases or receives as a gift. An owning or earning spouse may choose to share property with the other spouse but no sharing between the spouses arises by operation of law. Where an asset normally has a document of title, sharing requires an affirmative, legally appropriate act by the owning spouse on an asset by asset basis. Where an asset does not have a document of title, ownership continues to be determined by economic contribution or gift rules. Thus, in a traditional marriage, where the husband is the wage earner and the wife takes responsibility for the home as well as in many non-traditional marriages where the couple still primarily relies upon the earnings of the husband, the ownership and management rights of the wife are little changed under the reformed common law. Particularly because many third parties transact business with the couple through the primary earner, many documents of title continue to be issued in the husband's name, favoring his ownership and management. Further, the reformed common law does not allocate any economic value to the wife's homemaking contributions to the marriage through property ownership or management rules during theon-going marriage.

Reforms in common law property rules have so far failed to provide a mechanism through which the non-titled, non-earning or lower wage-

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11. For examples of restrictive judicial interpretation of Married Women's Property Act, *see* Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum and Developments Toward Equality*, 47 N.Y.U. L. Rev. 1033, 1066-70 (1972); N. Basch, In the Eyes of the Law: Women, Marriage and Property in Nineteenth Century New York (1982); Chused, *Married Women's Property Law: 1800-1850*, 71 Geo. L.J. 1359 (1983); Salmon, *The Legal Status of Women in Early America: A Reappraisal*, 1 Law & Hist. Rev. 129 (1983); and Younger, *supra* note 5, at 53-64.

12. This is not always the case, however. *See, e.g.*, Wis. Stat. Ann. § 766.05 (West 1981):

> Individual earnings. The individual earnings of every married woman, except those accruing from labor performed for her husband, or in his employ or payable by him, shall be her separate property and shall not be subject to her husband's control or liable for his debts.

and Wis. Stat. Ann. § 766.06 (West 1981):

> May transact business in her own name and for her own benefit. When the husband of any married woman has deserted her or for any cause neglects or refuses to provide for her support or for the support and education of her children, she shall have the right to transact business in her own name and to collect and receive the profits of such business, her own earnings and the earnings of her minor children in her charge or under her control, and apply the same for her own support and the support and education of such children. Such business and earnings shall not be subject to her husband's control or interference or liable for his debts.

Chapter 766 of the Wisconsin Statutes is derived from the Married Women's Property Act originally adopted in 1850.

earning wife may transact business for the couple on an equal basis with her husband. Rather than grant the wife credit access based on her contribution to and ownership of marital assets, common law rules continue to rely on the spousal duty of support, historically assigned to the husband exclusively, as the primary means to recognize the wife's economic contributions and needs.

Under traditional common law, a husband has a duty to support his wife. In turn, the wife owes a duty to provide domestic, child-rearing and sexual services.[13] A wife's right to support is, however, basically unenforceable because the husband retains great discretion to determine the level of spousal and family support and because courts have been exceedingly reluctant to take an active role in an on-going marriage when spouses disagree about what constitutes appropriate support.[14] Thus, the support obligation has been an ineffective concept to provide economic rights for wives.

Supporters of the common law property approach emphasize the common law doctrine of "necessaries" developed to provide some relief to a wife who is in need of "basics" which the husband can afford but chooses not to provide, as a key doctrine providing economic rights for wives.[15] That doctrine, however, essentially functions as a remedy for

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13. Thus, under the common law, there could be no marital rape since, by marrying, women implicitly gave irrevocable consent to their husbands' sexual demands. Recently, statutory and case law have permitted rape charges where the couple was living apart. Most recently, developing statutory and case law in several jurisdictions have eliminated completely the marital exception for rape prosecutions. Oregon is an example of a state's reforming its statutes to permit rape prosecutions when the defendant and victim live together in a relationship of cohabitation as man and wife, regardless of the legal status of their relationship. *Compare* Or. Rev. Stat. §§ 163.355, 163.365, 163.375 (1983) with prior Or. Rev. Stat. § 163.335 (1977). New York is an example of a state's eliminating the marital exception for rape when the couple is living together by case law. *See* People v. Liberta, 64 N.Y.2d 152, ___, 474 N.E.2d 567, 571, 485 N.Y.S.2d 207, 211 (1984). *But see* Weishaupt v. Commonwealth, 227 Va. 389, ___, 315 S.E.2d 847, 855 (1984) holding that a husband could be prosecuted for rape only if the wife had conducted herself "in a manner that establishes a *de facto* end to the marriage."

14. *See, e.g.*, McGuire v. McGuire, 157 Neb. 226, 238, 59 N.W.2d 336, 342 (1953).

15. For three modern Wisconsin cases on necessaries, *see* Sharpe Furniture, Inc., v. Buckstaff, 99 Wis. 2d 114, 299 N.W.2d 219 (1980), Estate of Stromsted, 99 Wis. 2d 136, 299 N.W.2d 226 (1980) and Marshfield Clinic v. Discher, 105 Wis. 2d 506, 314 N.W.2d 326 (1982). Under modern Wisconsin doctrine, husbands are primarily liable and wives are secondarily liable for necessaries. In *Sharpe Furniture*, Justice Shirley S. Abrahamson in a concurring opinion stated constitutional and public policy objections to the gender-based rule. *Sharpe Furniture*, 99 Wis. 2d at 125-26, 299 N.W.2d at 225 (Abrahamson, J., concurring). In a dissenting opinion in *Estate of Stromsted*, Justice Abrahamson noted that courts elsewhere have adopted sex-neutral rules. *Estate of Stromsted*, 99 Wis. 2d at 150-51, 299 N.W.2d at 233 (Abrahamson, J., dissenting). The Mississippi court imposed joint and several liability on both spouses in Cooke v. Adams, 183 So.2d 925 (Miss. 1966). The New Jersey court rejected that approach and instead imposed primary liability on the spouse who incurred the expense and secondary liability on the other spouse. Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum, 84 N.J. 137, 417 A.2d 1003 (1980). The Wisconsin Marital Property Act states that "no spouse may be presumed primarily

creditors. If a creditor voluntarily chooses to supply "necessaries" then the creditor is granted a cause of action against the husband for the cost. The "necessaries" doctrine was not designed as an effective remedy to assist a wife who is in disagreement with her husband about "basics" for herself or the family and who lacks sufficient assets of her own to contract independently with suppliers of goods and services.[16] The doctrine is simply not the equivalent of recognizing a wife's interest in the property of her husband.

B. *Defects in Common Law Property Rule: At Death*

Looking at spousal property rights when a marriage ends at the death of a spouse, reformers observe that in common law property states all intestacy laws and most statutes providing an "elective share" for a surviving spouse apply only to a portion of the decedent's assets, the pro-

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liable for support expenses. . . ." Wis. Stat. Ann. § 765.001(2) (West Supp. 1984) (effective Jan. 1, 1986).

16. Traditionally, the doctrine of "necessaries" derived from the legal obligation of a husband to support his wife; nothing short of wrongful conduct on the wife's part freed the husband from this obligation. Failure of the husband to provide the wife "suitable and proper necessaries" was the basis for an action against the husband by any third party who did so provide. "Necessaries" were articles of food or apparel, medicine, medical attendance and nursing, means of locomotion, habitation and furniture or "such provision for her protection in society, and the like, as the husband, considering his ability and standing, ought to furnish to his wife for her sustenance, and the preservation of her health and comfort." Warner & Ryan v. Heiden, 28.Wis. 517, 519 (1871), citing 1 Bishop on Mar. and Div., §§ 553-54. Accordingly, the doctrine required the creditor to show that he or she had supplied the wife with an item that was a "necessary" and that the defendant-husband had previously failed or refused to provide the item for his wife. Eder v. Grifka, 149 Wis. 606, 610, 136 N.W. 154, 156 (1912). *See also* Brown, *The Duty of the Husband to Support the Wife*, 18 Va. L. Rev. 823, 824-35 (1932) (discussion of the nature of the husband's duty, the evolution from reliance on agency law to reference to a policy-based duty of support and difficulties inherent in defining necessaries). Modern courts hold that the duty of the husband to support his wife does not depend on an agency relationship between the spouses but is imposed as a matter of public policy. *Sharpe Furniture*, 99 Wis. 2d at 118, 299 N.W.2d at 221-22. The resulting liability of the husband to third parties is, therefore, quasi-contractual. *Sharpe Furniture*, 99 Wis. 2d at 119-20; 299 N.W.2d at 222.

See also Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 Vand. L. Rev. 709, 713 (1956) (discussion of problems in defining necessaries with reference to the husband's station-in-life). A typical statement of the entitlement of the wife to a level of maintenance appropriate to her husband's wealth, income, and status is:

> Where parties are man and wife, it is obvious that they normally are expected to live together. That does not mean that she is to sleep in the garage, eat with the cook, and wear cast-offs. It commonly contemplates not only sharing the same residence, but eating at the same table, enjoying the ministrations of the same servants—if they have servants—, and wearing such apparel as befits the husband's station.

DuPont v. DuPont, 103 A.2d 234, 238 (Del. 1954). For a comprehensive criticism of the necessaries doctrine, see Comment, *The Unnecessary Doctrine of Necessaries*, 82 Mich. L. Rev. 1767 (1984).

bate estate.[17] Many significant assets of a spouse are not subject to the laws of intestacy or elective share rules.[18] Further, probate codes provide an inflexible formula to determine the claims of the surviving spouse to probate assets and do not consider factors such as the length of the marriage or the extent of the survivor's need.[19] Even in common law states which have adopted the Uniform Probate Code's "augmented estate"[20] or similar reforms[21] which more realistically define assets for the purpose of calculating the elective share, rules of ownership continue to reflect the non-recognition of spousal contribution to the acquisition of marital property and thus limit the efficacy of the reforms. Because ownership is exclusively title-based, the surviving spouse is given a share of *someone else's* property. If the property was titled in the decedent spouse's name or if non-titled property was purchased from the decedent's earnings, the surviving spouse's own contributions to the acquisition and accumulation of the decedent spouse's property receive no recognition. Finally, no matter how finely tuned common law surviving spousal protections may become, the lack of legal recognition in the common law for each spouse's contribution to the accumulation of family assets ensures that if a spouse dies first without family assets being titled in his or her name, that spouse has

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17. Wisconsin's elective share is fairly typical. Wis. Stat. Ann. § 861.05(1) (West 1971) states:

> If decedent dies testate, the surviving spouse has a right to elect to take the share provided by this section. The elective share consists of one-third of the net probate estate, reduced by any property given outright to the spouse under the decedent's will. As used in this subsection, net probate estate means the net estate as defined in s. 851.17, including any property passing by intestate succession as well as under the will, but without deduction of the estate taxes.

See generally Volkmer, *supra* note 6, at 128-48.

18. Non-probate assets such as life insurance, deferred employment benefits, joint tenancies, and multiple party bank accounts which transfer ownership rights at death, constitute a large portion of most decedents' estates. *See* Effland, *Rights of Creditors in Nonprobate Assets*, 48 Mo. L. Rev. 431 (1983); Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1109-15 (1984).

19. The fractional share is typically one-third or one-half.

20. Uniform Probate Code (U.L.A.) § 2-202 (1969) [hereinafter cited as U.P.C.]. The augmented estate sections of the U.P.C. have been adopted in nine states.

21. *See* Restatement (Second) of Property, Note on Reconsideration of § 13.7, Spousal Rights in Appointive Assets on Death of Donee, at 119-36 (Tent. Draft No. 7, 1984).

Massachusetts is an interesting example of a jurisdiction where a recent decision by the Supreme Judicial Court in Sullivan v. Burkin, 390 Mass. 864, 460 N.E.2d 572 (1984) reversed long established case law and held that a surviving spouse may augment probate assets in the calculation of his or her statutory share. Specifically, according to *Sullivan*, the value of assets held in an inter vivos trust may be included in the value of the decedent's estate if the decedent was the settlor and retained the power, acting alone, to direct the disposition of trust assets for his or her own benefit. *See* Hamel, *Is Dower Back? A Consideration of* Sullivan v. Burkin, 28 Boston B.J. 17, 24 (July/August 1984) for suggestion that legislation along the lines of the Uniform Marital Property Act is urgently needed.

no property to pass on to others under a will or under the laws of intestacy.[22]

C. *Marital Property Agreements*

At present, pre-nuptial contracts between couples about to marry and contracts between spouses during marriage which waive various statutory protections at death are not uncommon and are generally enforced. Premarriage and during the marriage agreements affecting spousal property and support rights at divorce are less uniformly enforced, although the clear trend is away from decisions which hold such agreements void as against public policy for encouraging divorce.[23] Enforceability of agreements affecting rights during the on-going marriage, however, remains highly problematic.

Among reformers there is a consensus that no single property system, no matter how carefully conceived and drafted, will suit the needs of all married couples. Accordingly, many have urged that married persons should have a broad right by contract to tailor the rules of the property system to meet their individual, agreed upon needs.[24] There is general agreement among reformers that an express statutory basis for enforcement of those agreements during the marriage as well as at divorce and at death is highly desirable. Less consensus exists on the appropriate rules for such agreements concerning such issues as formalities, consideration, disclosure, unconscionability, and subject matter constraints for public policy reasons.[25]

D. *General Reasons For Marital Property Reform*

Not all support for marital property reform arises from dissatisfaction with the operation of specific common law property rules. Further impetus for changes in marital property rules comes from recent social changes and closely related reforms as well as a general desire for consistency in broad areas of public policy. Many of these changes and reforms

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22. In Rasmussen v. Oshkosh Savings & Loan Ass'n, 35 Wis. 2d 605, 611, 151 N.W.2d 730, 733 (1967), the Wisconsin Supreme Court held that the earnings of the wage earner are "his property out of which he has the duty to support his family" and any funds left after payment of expenses of support belong to the wage earner and not to the homemaker. In *Rasmussen*, the husband turned his wages over to his wife. She placed part of the excess in two bank accounts in her name in trust for each of their children ("Totten" trusts). After the wife's death, her husband was successful in reaching these funds.

23. *See, e.g.*, Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U.Pa. L. Rev. 1399, 1399-1404 (1984); Oldham & Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts between Cohabitants*, 18 Fam. L.Q. 93, 98-100 (1984).

24. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 Calif. L. Rev. 204, 328-34 (1982); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 Calif. L. Rev. 1169, 1249-58 (1974).

25. *Compare* Sharp, *supra* note 23 with Shultz, *supra* note 24.

have roots in the significant recent increase in wives and mothers in the paid workforce and concomitant role changes within the home and within marriages.[26]

First, although there is little "hard" evidence to support this point, there appears to have emerged in recent years a widespread belief that marriage is properly viewed as a partnership or joint venture and that legal rules should reflect this definition through doctrines which favor automatic spousal property sharing.[27] This marital partnership concept covers a traditional marriage, a marriage where both spouses are employed fulltime, and a marriage where both are employed but the couple relies primarily upon the wages of one spouse.

Second, there is growing awareness of and dissatisfaction with the inconsistency between the principles applicable to the division of spousal property at divorce which recognize the contributions of both spouses to the marriage[28] and the absence of such principles during the on-going marriage and at death. Already enacted divorce reforms highlight property law incongruities. The doctrine of "marital property" has become a firmly rooted and well known common law concept referring to the pool of spousal property which is subject to property division at divorce.[29] Arguably, it is only an incremental development to broaden the existing common law divorce concept of "marital property" to a general marital property system applicable to all phases of a marriage. Such an extension has the effect of providing a consistent doctrine of rights applicable to spousal

26. Between 1950 and 1982 women increased their participation in the civilian labor force from 31.9% to 47.6%; in absolute numbers that is an increase from 17,340,000 in 1950 to 43,256,000 in 1982. U.S. Bureau of the Census, Statistical Abstract of the United States: 1984, 405 (104th ed. 1983). Between 1970 and 1982 the number of women who were married, with spouse present, and who worked rose from 17,572,000 to 24,053,000. *Id.* at 409.

27. *See, e.g.*, recent proposal to change the decades-old formula used to compute social security pensions based upon the view that marriage is "an economic partnership to which husband and wife contribute equally." N.Y. Times, Dec. 30, 1984, at 1, col. 1. *See also* recent amendment to the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, which takes into account "the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home," S. Rep. No. 575, 98th Cong., 2d sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 2547 and P. Blumstein & P. Schwartz, American Couples 96-111 (1983) (married persons generally assume they will pool most or all their money).

Tax laws often have been at the vanguard of legislation incorporating spousal sharing concepts. *See* Revenue Act of 1948, 62 Stat. 111 (1948) (providing parity between married couples in common law property states and community property states as to income, gift and estate tax). Between 1939 and 1948, six common law property states adopted community property prospectively in order to provide married couples 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).

28. *See supra* note 5.

29. *See, e.g.*, Ill. Rev. Stat. ch. 40, § 503 (1980); N.Y. Dom. Rel. Law § 236 (McKinney Supp. 1984).

property at three distinct times: during marriage, when a marriage dissolves at divorce and when it terminates by death. Reformers have stressed the irony of existing public policy in common law property states which recognizes the principle of spousal property sharing and the concept of marriage as an economic partnership *only* when the marriage is no longer viable.

Third, there is a continuing interest in implementation of equal rights principles in state laws. Many common law property states, including Wisconsin, have already revised their statutes, making them facially gender neutral, in the wake of the United States Supreme Court pronouncements on gender discrimination in public law.[30] In addition, current federal and state legislation mandates equal educational and employment opportunities without regard to gender.[31] The decades of intense public debate which produced this myriad of laws designed to equalize the legal status of men and women have significantly heightened interest in legislation which treats married couples as equal economic partners regardless of the state of domicile.

In searching for alternatives to common law property rules that are consistent with the changing view of marriage and legal concepts of gender equality, reform supporters have been attracted to community property principles, particularly those which may be described as the reformed community property model.[32]

II. Alternatives to the Common Law Property Model: Community Property Principles and The Uniform Marital Property Act

A. *Community Property*

While the roots of the common law property system in force in the majority of American states may be traced back to feudal England, the roots of community property, an alternative property system, are even older. They have been traced to the Visigoth Code.[33] Community property

30. *See, e.g.*, R. Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in The Burger Court: The Counter-Revolution That Wasn't 132 (V. Blasi ed. 1983).

31. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 703, 78 Stat. 255; amended by Pub. L. No. 92-261, §§ 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Title IX of the Civil Rights Act of 1964, Pub. L. No. 92-318, § 906(a), June 23, 1972, 86 Stat. 375 (codified as amended as 42 U.S.C. §§ 2000c, 2000c-6, 2000c-9, 2000h-2 (1982)); Equal Pay Act, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206 (1982)).

32. *See infra* notes 44-56 and accompanying text.

33. Differences of opinion on the historical roots of marital community property traditionally have derived from two problems: how to explain the lack of historical continuity between ancient communities in which there were foreshadowings of community concepts and those modern communities in which the concepts predominate and how to explain the presence of community concepts in the laws of countries which were once part of the Roman Empire. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 Baylor L. Rev. 20, 28-31 (1967). Current consensus is that the Visigoths intro-

law first came to the New World as part of the civil law code systems of the Spanish and the French. When territories once held by the Spanish and French became American states, each new state made a choice as to whether to preserve community property law.[34]

Louisiana, Texas, and California continued or retained community property law when they attained statehood. California, during its Constitutional Convention in 1849 adopted community property rules for married persons' property rights after a major debate over the choice of common law or community property rules.[35] The remaining community property states, Nevada, Arizona, Washington, Idaho, and New Mexico, each briefly experimented with common law property rules but soon returned to community property rules. The choice of nearby California heavily influenced the decisions of Washington, Nevada and Idaho.

With few exceptions, the community property system as it was first introduced into the American territories and states recognized that spouses had equal, vested rights in assets of the marital "community."[36] Further, the system recognized a wife's ownership of a "separate" estate as well as a husband's ownership of a "separate" estate. Based upon the civil law, property of the community included all property acquired by either spouse during marriage, excluding only gifts, inheritances or testamentary gifts received by one spouse. At death, equal ownership in community property meant that the wife, if she died first, had the right to dispose of her share of community property by will. If her husband predeceased her, she owned one half of each item of community property.[37] A wife's interest in community property, therefore, was not subject to disposition under her husband's will.[38]

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duced the marital community system into the Roman provinces and that the Spanish developed and codified the form of community property that would later predominate in the United States. W. de Funiak & M. Vaughn, Principles of Community Property 17, 55 (2d ed. 1971); and Younger, *supra* note 5, at 45 n.3.

34. *See generally* W. McClanahan, Community Property Law in the United States, Chapter 3 (1982).

35. Greene, *supra* note 4, at 76 n.21. Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 U.C.L.A. L. Rev. 1, 8-24 (1976). *See also* Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U. L. Rev. 211, 215 (1973).

36. *See* W. McClanahan, *supra* note 34, at § 2.31 and § 7.7. Until 1926, California characterized the wife's interest as a "mere expectancy" while she lived with her husband. *See* United States v. Robbins, 269 U.S. 315 (1926). Legislation enacted that year specified that the interests of both spouses were "present, existing and equal." W. McClanahan, *supra* note 34, at § 7.9. For a detailed discussion of the special California rule, see Prager, *supra* note 35, at 34-39. Until 1973, the rule in New Mexico was that a wife's community property interest expired at her death. W. McClanahan, *supra* note 34, at 240.

37. Arizona apparently permits an aggregate approach. *See* Gaethje v. Gaethje, 8 Ariz. App. 47, 52, 442 P.2d 870, 874 (1968).

38. An estate planning device used in the community property states is called the "widow's (or widower's) election". Under this scheme, the decedent spouse attempts to dispose of all of the community property in his or her will and makes certain testamentary gifts to the surviving spouse. In the typical forced election, the surviving spouse must

In theory, spouses shared equally in community property ownership rights at all times. Because of management and control rules, however, the wife was decidedly the inferior of the owning partners. Traditional community property management and control rules recognized the husband as the sole manager of the community. Thus, in practice traditional community property rules recognized the equal property ownership rights of both spouses in community property only when the community ended. Moreover, under early American community property rules, in contrast to Spanish law, a husband was also given the power to manage his wife's separate estate.[39] This power included management of the increase in a wife's separate estate and the income generated by her property during the marriage.

Thus, during the on-going marriage, rights of wives in traditional community property states differed little from those of wives in common law property states, particularly in the majority of situations where wives performed domestic family services exclusively and did not acquire significant assets through gifts or inheritance.[40] Wives in traditional community property states as in common law property states lived under the state-mandated "bargain": the wife exchanged domestic and sexual services for the support of her husband; the husband managed and controlled most of the assets acquired during marriage in the interest of the marriage as he defined it and provided necessary support for the wife as he defined it.

Beginning in the late nineteenth century, a series of reforms addressed the imbalance in the right to manage and control under traditional community property law. The Married Women's Property Acts, enacted in the community property states somewhat later than in the common law property states, gave wives substantially increased management rights over their "separate" property.[41] Later in some of the community property states, concepts of "special community" property developed, which granted wives management and control rights over their own wages.[42] Some control over community property came to wives in various community property states when joinder requirements were thereafter added for conveyances and encumbrances of community real property generally and homestead property specifically.[43]

The most important reforms in the American community property

choose between asserting his or her community property rights and giving up any rights to testamentary gifts or transfering his or her interest in community property pursuant to the terms of the decedent spouse's will and taking testamentary gifts under the decedent spouse's will. In the alternative, a will may provide for a voluntary election where there is no forfeiture of benefits under the will if the surviving spouse fails to transfer his or her interest in community property as desired by the decedent spouse. *See* J. Price, Contemporary Estate Planning—Text and Problems, ch. 9(E) (1983).

39. *See* W. McClanahan, *supra* note 34, at § 9.3.
40. *See* Younger, *supra* note 35, at 216-22.
41. *See* W. McClanahan, *supra* note 34, at § 9.7.
42. *See* W. McClanahan, *supra* note 34, at § 9.8.
43. *See* W. McClanahan, *supra* note 34, at §§ 9.9 and 9.10.

states, however, have been recent moves away from the Spanish community property rule for management and control which designated the husband as the sole manager of community property. In 1967, Texas expanded on reform legislation of 1913, becoming the first state to adopt a facially neutral form of equal management and control of community property. The Texas approach permits each spouse to manage exclusively that community property which each spouse would own if single.[44] If spouses' community assets are commingled, then joint management is required by statute.[45] Further, to expedite dealings with third parties, community property solely titled in one spouse's name is subject to that spouse's management and control.[46]

In 1972, Washington became the second state to modify its male management and control rules for community property.[47] Unlike the reformed management and control rules of Texas, which have been criticized as permitting male management in many of the same situations as under traditional community property law, Washington rules set the pattern for reform in the remaining community property states by giving equal management and control rights to both spouses. Soon thereafter, the remaining community property states (with the exception of Louisiana) adopted equal management and control legislation.[48] In 1979 Louisiana became the last of the community property states to replace its "head and master" statute with equal management and control legislation.[49]

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44. Tex. Fam. Code Ann., § 5.22(a) (Vernon 1975). The 1967 legislation extended reform legislation which reached back to 1911 and 1913 giving married women management rights over their earnings, income from separate property, and separate property, subject to certain joinder requirements. *See*, McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 Cal. W.L. Rev. 117, 124-26 (1971); Huie, *Divided Management of Community Property in Texas*, 5 Tex. Tech L. Rev. 623, 624-25 (1974). Pressure for the legislation came from women's groups, particularly groups of businesswomen who objected to joinder requirements for disposition of a wife's separate real property and securities, accessibility of the wife's separate property for debts of her husband, and the need to curtail certain management abuses by husbands. *See* Williams, *Section 5.22 of the Texas Family Code: Control and Management of the Marital Estate*, 27 SW. L.J. 837 (1973); McKnight, *Recodification of Matrimonial Property Law*, 29 Tex. B.J. 1000, 1000-01 (1966).

45. Tex. Fam. Code Ann., § 5.22(b) and (c) (Vernon 1975).

46. Tex. Fam. Code Ann., § 5.24 (Vernon 1975).

47. Wash. Rev. Code Ann. § 26.16.030 (Supp. 1985). This legislation resulted from Washington's adoption of a state equal rights amendment to its constitution. New Mexico's adoption of equal management and control legislation also resulted from its adoption of a state equal rights constitutional amendment. *See* Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History*, 5 N.M.L. Rev. 1, 34-40 (1974).

48. Ariz. Rev. Stat. Ann. § 25-214 (1976); Cal. Civ. Code §§ 5125, 5127-28 (West 1983); Idaho Code § 32-912 (1983); Nev. Rev. Stat. § 123.230 (1979); N.M. Stat. Ann. §§ 40-3-13 to 40-3-16 (1983).

49. La. Civ. Code Ann. arts. 2346, 2347, 2349-2352, 2354, 2355 (West Supp. 1985). In Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981), the United States Supreme Court held that Louisiana's traditional male management and control law violated the Equal Protection Clause of the fourteenth amendment because of gender discrimination.

Except for joinder rules for certain transactions[50] and special management rules for certain community property,[51] the recent reforms in the seven community property law states gave each spouse an equal right to manage and control not only his or her share of a community property asset but the entire community property asset.

As this brief summary indicates, there is no single American community property model. There are California community property rules, Texas community property rules, Washington community property rules, and so forth. The community property states differ from one another not only as to management and control rules already noted, but in other significant doctrinal areas such as property classification and debt classification and satisfaction.[52]

The eight states share, however, certain basic property principles. The most fundamental, uniform principle governing property of spouses domiciled in a community property state is that each spouse automatically owns a present, vested, equal right or interest in each community property asset from the instant of acquisition. Further, any property owned by a spouse is presumed to be classified as community property, although the strength of the community classification presumption varies from state to state.[53] The community property presumption presents a dramatic contrast to the basic common law property rule that title determines ownership. Title does not determine property ownership in a community prop-

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50. In the community property states, transfers of community real property typically require joinder by the spouses. In Arizona, Washington and Nevada, joinder is required for acquisition of community real property. The states differ as to what transactions are covered, what constitutes joinder, protections for bona fide purchasers, etc. There are a variety of other joinder rules. California, Louisiana, Nevada and Washington require joinder for transfers of household goods. Arizona and New Mexico require joinder for indemnity contracts and in Washington and Nevada spousal consent is required for transactions outside the ordinary course of the business even when customary transactions are subject to one spouse's sole management. *See* W. McClanahan, *supra* note 34, at §§ 9.10-9.13; W. Reppy & C. Samuel, Community Property in the United States, ch. 15 (2d ed. 1982); MacDonald, *The Impact of Equal Management Upon Community Property Business*, 13 Idaho L. Rev. 191, 195-202 (1977).

51. Sole management of a community property business where only one spouse is actively involved in management is provided for in Washington, Nevada, Louisiana and California (exceptions are noted *supra* note 50). *See* W. McClanahan, *supra* note 34, at §§ 9.13-9.14. Louisiana, New Mexico, California and Washington provide a variety of protections for third parties dealing with one spouse in whose sole name the property is titled. California, Louisiana, New Mexico and Texas have statutory provisions dealing with an absent or incapacitated spouse in situations where joinder is normally required. *Id.* at § 9.14. *See also* W. Reppy & C. Samuel, *supra* note 50, at ch. 14.

52. *See infra* notes 96-98, 104-07, 111-19, 128-32, 143-47, 153-54, 163-64, and 170 and accompanying text for some differences among the community property states relating to property classification rules. For an overview of the differing approaches among the community property states relating to debt classification and satisfaction, *see* W. McClanahan, *supra* note 34, ch. 10; W. Reppy & C. Samuel, *supra* note 50, ch. 17. Two other areas where there are important differences among the community property states are intestacy laws and rules governing property division at divorce.

53. *See infra* notes 89 and 91 and accompanying text.

erty state, rather ownership arises in both spouses from the fact of acquisition during marriage unless acquisition results from a third party gift, an inheritance, or some special circumstance.

Each of the American community property states also recognizes certain classes of property as separate property of a spouse, such as property a spouse brings to the marriage or receives as a gift during marriage. In all the community property states, separate property of a spouse includes a spouse's interest in joint tenancy and tenancy in common, much to the confusion of those accustomed to a common law property approach.[54] Universally in a community property state, the burden of proof is upon the party who wishes to establish that a particular asset is separate property, although the burden is variously defined.[55] Further, in all community property systems the rules require each spouse managing and controlling community property to act in good faith.[56] Because reformed community property principles incorporate the concept that marriage is a partnership to which each spouse makes a different but equally important contribution and in which each spouse has significant management and control rights, the reformed version of community property laws presents an attractive model for reform of laws in common law property states.

B. *The Uniform Marital Property Act*

Given the attractiveness of the reformed community property model and the broad acceptance of the concept of marital property in the divorce law of common law property states, it is not surprising that when the National Conference of Commissioners on Uniform State Laws appointed a drafting committee in 1979 to consider uniform state legislation governing property rights of married persons, the community property model soon became central to the Committee's deliberations.[57] After consideration of other alternatives, the drafters concentrated their efforts upon legis-

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54. *See infra* notes 128 and 129 and accompanying text.
55. *See infra* note 91 and accompanying text.
56. *See infra* notes 176-78 and accompanying text.
57. William C. Hillman (Providence, Rhode Island) chaired the Drafting Committee. Other members of the Committee were George C. Berk (Providence, Rhode Island), Peter J. Dykman (Madison, Wisconsin), Bion M. Gregory (Sacramento, California), Linda Judd (Post Falls, Idaho), Henry D. Stratton (Pikeville, Kentucky), Professor Richard V. Wellman, (Athens, Georgia). Aimee Schwartz (New York, New York) served as consultant. Ex officio Committee members were M. King Hill, Jr. (Baltimore, Maryland), Carlyle C. Ring, Jr. (Alexandria, Virginia), Professor William J. Pierce (Ann Arbor, Michigan), and Thomas E. Cavendish (Columbus, Ohio). The Review Committee included Wisconsin State Senator Susan S. Engeleiter. The following persons served as official advisors to the Committee: Thomas M. Boykoff, American Bar Association, Section of Taxation; Edwin H. Frank, Jr., American Bar Association, Section of Real Property, Probate and Trust Law; John Goode, American Land Title Association; Beverly A. Groner, American Bar Association; Robert Halfyard, American College of Real Estate Lawyers; Ruth-Arlene Howe, American Bar Association, Section of Family Law; and Professor Mary Moers Wenig, American Bar Association.

lative reform which incorporates basic community property principles. The Uniform Marital Property Act adopted by the National Conference in July of 1983 was the end product of numerous drafts based upon those principles.

Attorney William P. Cantwell of Denver, who served and continues as Reporter for the Uniform Marital Property Act Drafting Committee, has identified the following as the root concept of the Uniform Marital Property Act: property acquired during marriage by the effort of spouses is to be shared. Such property is "marital property"[58] or "ours"; it is a vested, present property right of each spouse.

> Such a law translates the emotional and perceived concept of "ours" into a verified legal reality. And while that parallels sharing under community property systems, the Act is more accurately characterized as a *sui generis* approach, and as one which utilizes equally useful ideas developed in common law jurisdictions, such as title based management and control. In addition it is a response to the 20-year long challenge of the President's Commission on the Status of Women issued in 1963 to face the reality that each spouse makes a different but equally important contribution in a marriage. Though drafted with an awareness of various community property statutes and cases, the Uniform Marital Property Act is not an image of any of them. It is a statute speaking to the realities and equities of marriages in America in the Eighties.[59]

For the Uniform Act drafters, community property was an attractive model because it is presently the property system covering almost one quarter of the American population. Numerous existing practices and precedents in the community property states are readily available to guide states contemplating a change to a community property system. Estate planners and general practitioners dealing with migratory clients are becoming increasingly knowledgeable about community property rules in various jurisdictions. Moreover, precedents in common law property states relating to marital property divorce already incorporate many basic community property classification rules and are also readily available and helpful to states considering new ownership rules based upon community property principles. It may no longer be said that community property

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58. The Uniform Act adopts the terminology of "marital property" for spousal property which is to be automatically shared and "individual" property for property that belongs solely to one spouse. "Marital property" is substantially equivalent to community property while "individual property" is substantially equivalent to separate property in a community property state. The Wisconsin "trailer bill," *see infra* note 85, includes a statement that "it is the intent of the legislature that marital property . . . is a form of community property."

59. Uniform Marital Property Act (U.L.A.) (1983) (Prefatory Note) [hereinafter cited as U.M.P.A.]. The House of Delegates of the American Bar Association approved U.M.P.A. 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*, 52 U.S.L.W. 1027 (Aug. 27, 1984).

principles are "exotic" or "foreign" to those familiar with the common law property system.[60]

Not only does the Uniform Act provide married persons in all states with an equitable law governing their property based upon increasingly familiar existing law and practices, it also fulfills a second perceived need.

Another goal for the members of the Drafting Committee was uniformity among the states. They considered uniformity important, particularly in family and property law, because of the great mobility of the American population, the desirability of permitting businesses to deal in a uniform manner with married persons from various states, and the obvious advantages of a single, comprehensive statutory framework.

III. A Brief History of The Wisconsin Marital Property Act

In 1984 Wisconsin became the first state to enact legislation based upon the Uniform Marital Property Act. The passage of the Wisconsin Act so soon after the adoption of the Uniform Act by the National Conference was no doubt possible because the principles and rules of the Uniform Marital Property Act closely resembled those already developed by Wisconsin reformers in their efforts to revise state marital property law and implement the concept of marriage as a partnership.

These reform efforts began in 1974 after the defeat of a referendum on a State Equal Rights Amendment[61] and were part of a broad movement to redefine the legal rights of women.[62] Reformers first supported an

60. *See* Willcox v. Penn Mutual Life Insurance Co., 357 Pa. 581, 593, 55 A.2d 521, 524 (1947) (holding Pennsylvania's 1947 community property law unconstitutional). *See* Note, *Community Property: Constitutionality of Oklahoma-Pennsylvania Community Property Law*, 1 Okla. L. Rev. 57 (1948). In a similar case, Swanda v. Swanda, 207 Okla. 186, 188, 190, 248 P.2d 575, 578, 579 (1952) the Oklahoma Supreme Court reached an opposite result. The Court found Oklahoma, unlike Pennsylvania, to be more closely associated historically, geographically, socially and commercially with community property states, particularly Texas.

61. The equal rights amendment (1973 Enrolled Joint Resolution 5) to the Wisconsin Constitution failed to win approval by the Wisconsin electorate on April 3, 1973. The vote was 447,240 to 520,936. In 1921, an equal rights statute was enacted which granted women equal rights in all respects but permitted the courts to construe some statutes for the protection of women. 1921 Wis. Laws ch. 529. In 1975, the Legislature amended the statute to clarify that men and women had equal rights and removed the language allowing protective constructions. Wis. Stat. Ann. § 766.15 (West 1981).

62. A leadership role in legislation reform in Wisconsin was taken by the Governor's Commission on the Status of Women. The Chairperson was Kathryn Clarenbach and the Executive Secretary was Norma Briggs. The Commission published a number of widely distributed pamphlets, booklets and books. By late 1978 it listed the following groups as on record supporting marriage as an equal partnership in which the contributions of the unpaid homemaker should be recognized: American Association of University Women, Wisconsin Division; Coalition of Minority Women; President's Conference, Women's Division, Milwaukee Jewish Federation; Democratic Party of Wisconsin; Feminists for Life of Wisconsin; Governor's Commission on the Status of Women; Legal Association for Women; National Association for Commissions on Women; National Commission on the

omnibus bill to make Wisconsin statutes sex neutral, which was enacted in 1975.[63] By deliberate design, three substantive areas were excluded from the omnibus bill. For tactical reasons, legislative sponsors supported separate bills to reform the state's rape[64] and divorce laws.[65] Marital property reform was delayed because, although there was some consensus concerning the defects of existing Wisconsin law governing property rights of married persons, no agreement had yet developed on the substantive content of marital property reform legislation. Consensus eventually grew out of the reformers' further study of altenative property models, particularly community property models.

Shortly after passage of the 1975 omnibus legislation, the Governor's Commission on the Status of Women formed an *ad hoc* Committee composed of legislators, practitioners, law professors, University Extension staff, and representatives of citizen groups such as the League of Women Voters to study alternative legal rules governing spousal property rights and make recommendation for reform.[66] Law students from the Univer-

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Observance of International Women's Year; National Organization for Women, Wisconsin State Council; National Women's Conference, Houston, 1977; New Republican Conference; Wisconsin Civil Liberties Union; Wisconsin Farm Bureau Federation; Wisconsin Federation of Business and Professional Women's Clubs, Inc.; Wisconsin Jaycee Auxiliary; Wisconsin Pork Producers Association Porkettes; Wisconsin State AFL-CIO Women's Committee; Wisconsin Women for Agriculture; Wisconsin Women's Political Caucus; Women in Communications, Inc.; and Women's International League for Peace and Freedom. *See supra* note 10 for Commission publications.

63. 1975 Wis. Laws ch. 94.

64. *See* 1975 Wis. Laws ch. 184.

65. *See* 1977 Wis. Laws ch. 105. Separate bills liberalizing the taxation of interspousal transfers were enacted in 1976. 1977 Wis. Laws ch. 248. The tax legislation resulted from recommendations of the Special Legislative Council Committee on Inheritance Taxation which based its recommendations in part upon the concept of marriage as an economic partnership.

66. The two main legislators participating in the *ad hoc* Committee were Representatives Marjorie (Midge) Miller and Mary Lou Munts. The author was a member of the Committee. Together with H. Eunice Gibson, an attorney member of the Governor's Commission on the Status of Women, the author supervised University of Wisconsin law students who received academic credits for participating in a clinical internship program at the Governor's Commission.

In the spring prior to the abolition of the Governor's Commission in 1979, the Wisconsin Women's Network was established. Thereafter, the Network continued the efforts of the Governor's Commission to support Wisconsin marital property reform based upon the reformed community property model. The Network is primarily an umbrella organization composed of established groups such as the League of Women Voters, N.O.W., Wisconsin State Council National Women's Political Caucus Wisconsin Division, Wisconsin Farmers' Union, IMPACT, Wisconsin Education Association Council, Coalition of Labor Union Women, Wisconsin Home Economics Association, and Wisconsin Nurses' Association.

The reformed community property model was also supported by the Governor's Marital Economic Reform Task Force. *See* A Report to Governor Lee Sherman Dreyfus (compiled by the Governor's Office for Women and Family Initiatives, Nov. 1, 1981).

sity of Wisconsin Law School performed the basic research for the *ad hoc* Committee.

The Committee first considered a reform model based upon the Uniform Partnership Act. The Committee rejected this model because, by merely permitting spouses to opt into a partnership system by agreement, reform based upon the Uniform Partnership Act model would not remedy basic defects of the common law property system.[67] Next the Committee scrutinized the reformed community property model of the American community property states as well as a comprehensive legislative proposal developed in British Columbia in the early 1970s.[68]

Once the *ad hoc* Committee determined that the automatic sharing principles of the reformed community property model would remedy most of the defects of the common law property system, it focused upon the selection of specific rules, considering the diverse policy alternatives various community property rules expressed. Among the rules analyzed by the Committee were those relating to property classification, management and control, debt classification and satisfaction, marital property agreements, and coverage. In August 1978, initial drafting instructions for a "marital partnership property" bill were forwarded to the Legislative Reference Bureau, the drafting arm of the Wisconsin Legislature.

In December 1979, identical bills were introduced into both houses of the Wisconsin legislature which proposed a new "marital partnership property" system based upon community property principles.[69] A modified version of the 1979 bill was introduced into the 1981 session of the

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67. Among the arguments that were considered which favored an optional only form of community property were: 1) such legislation would be easier to draft, would evoke less opposition and thus would be easier to enact; 2) such legislation would provide valuable experience for a later comprehensive form of marital property reform; and 3) such legislation would avoid all constitutional issues. Among the arguments that were considered which opposed an optional only form of community property were: 1) it would not provide protection for those who needed it the most; 2) it might remove the major impetus for a later mandatory form of marital property reform and would severely complicate the work needed to educate legislators and the public about marital property reform models; and 3) an opt-in system (in 1976) would present spouses with unexpected adverse gift tax consequences.

Professor Richard W. Bartke, an enthusiast for the reformed community property model for spousal sharing, advocated, as a "fall back" position, a conventional form of community property whereby married couples by agreement would opt into a comprehensive, statutory form of community property. *See* Bartke, *Marital Sharing—Why Not Do It By Contract?*, 67 Geo. L.J. 1131 (1979).

68. Proposal of the Working Group on Matrimonial Property of the British Columbia Family and Children's Law Commission (1974) (on file at the University of Wisconsin Law Library).

69. 1979 A.B. 1090 and 1979 S.B. 474. The primary sponsor in the Assembly was Representative Mary Lou Munts and in the Senate was Senator James Flynn. For some Wisconsin history leading to the "marital partnership property" legislative proposal in 1979, *see* Irish, *A Common Law State Considers a Shift to Community Property*, 5 Community Prop. J. 227 (1978).

legislature[70] and a still further modified version of the 1979 bill was introduced into the 1983 session.[71] After the initial 1979 legislative proposal, the proposed property system was called "marital property" for consistency with the terminology then used by the newly constituted Uniform Marital Property Act Drafting Committee.

Prior to the introduction of the 1979 comprehensive marital property reform proposal, the State Bar of Wisconsin was requested to arrange for its various substantive committees to review the provisions of the proposal.[72] A Special Marital Property Committee established for this purpose began meeting in April 1979.[73] Although the main focus of the Committee was technical review of the proposed community property-based bill, the chairperson also established a subcommittee to explore common law property reforms as an alternative.[74] From the subcommittee's deliberations, a "common law alternatives" bill was developed which was introduced during the 1981 session of the Wisconsin Legislature.[75] In the 1983 session of the Legislature, it was introduced in a modified and expanded version.[76]

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70. 1981 A.B. 370 and 1981 S.B. 272.

71. 1983 A.B. 200 and 1983 S.B. 105. Representative Mary Lou Munts continued as the primary sponsor in the Assembly. Senator Lynn Adelman became the primary sponsor in the Senate, succeeding James Flynn who had been elected Lieutenant Governor.

72. Communication from the author to the Executive Director of the State Bar of Wisconsin in late 1978.

73. David L. Kinnamon (Milwaukee) chaired the Committee. Most of the Committee members were members of the Real Property, Probate and Trust Law Section. There were also single representatives from the Family Law Section, Individual Rights and Responsibilities Section, Taxation Section and two other sections of the State Bar.

74. John B. Haydon (Milwaukee) chaired the subcommittee.

75. 1981 A.B. 284 and 1981 S.B. 666. The 1981 legislative proposal 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 signed, written interspousal property agreements.

76. 1983 A.B. 376 and 1981 S.B. 240. The 1983 legislative proposal included most of the provisions that were in 1981 A.B. 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 to a right to have a property division, using divorce law standards. Finally, a decedent spouse was given a

The Board of Governors of the State Bar of Wisconsin went on record supporting the need for marital property reform but opposing community property legislation.[77]

While both the marital property bill and the "common law alternatives" bill were being considered by the Legislature but before the National Conference of Commissioners on Uniform State Laws adopted the Uniform Marital Property Act, some legislative sponsors of the marital property bill considered in detail the Uniform Act as then drafted to determine which Uniform Act provisions should be substituted for already introduced marital property reform provisions.[78] After the National Conference adopted the Uniform Act in July 1983, the sponsors introduced a comprehensive substitute amendment to conform the marital property bill in most respects with the Uniform Act as adopted.[79]

On October 19, 1983, after vigorous and lengthy debate on both the marital property bill and the competing "common law alternatives" bill, the Wisconsin Assembly passed a compromise version of marital property reform. It contained an "opt-in by agreement" form of marital property as well as a set of common law remedies from the "alternatives" bill for those couples who did not opt into the marital property system.[80]

While the Senate Judiciary Committee considered the Assembly's compromise bill and the mandatory marital property bill, several legislative sponsors who had endorsed a community property approach to marital property reform since 1979 and others interested in sponsoring a bill based upon the Uniform Marital Property Act began a series of informal discussions.[81] These discussions produced a comprehensive substitute

right by will to direct his or her 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, he or she would have a right to will a portion of the marital assets owned by the surviving spouse.

77. December 6, 1980 Resolution and March 4, 1983 reaffirmation of December 6, 1980 Resolution. The Board of Governors supported marital property reform but concluded that it could best be achieved through amendment of Wisconsin's present common law property system since this would be less disruptive than reform through community property legislation. *See supra* notes 75 and 76.

78. In addition to the changes to the Uniform Act incorporated into the Wisconsin Act, the following modifications were also discussed but eventually discarded: additional language amplifying the good faith duty to manage and control marital property; additional formalities for marital property agreements; an adequate consideration requirement for marital property agreements except as they cover interspousal gifts of existing spousal property; restricting satisfaction of voluntary individual obligations incurred during marriage to individual property of the incurring spouse; making deferred marital property rights at death an elective instead of an automatic right of the surviving spouse; and defining each spouse's equal management and control right in regard to access to unsecured credit in terms of his or her interest in marital property (a "50%" rule).

79. Assembly Substitute Amendment 1 to 1983 A.B. 200 was introduced September 27, 1983 by the Committee on Judiciary.

80. Engrossed 1983 A.B. 200.

81. The main participants in these informal discussions were Senators Lynn Adel-

amendment which followed the Uniform Act provisions more closely than its predecessor and was approved by the Senate Judiciary Committee in early 1984.[82]

With several technical changes, the Senate passed the Wisconsin version of the Uniform Marital Property Act by an overwhelming vote of 27 to 5 on March 8, 1984. Subsequent Assembly consideration of the Senate version of the marital property reform bill was heated. Ultimately the Assembly passed the Senate version of the Uniform Act with one amendment and the Senate adopted the bill based upon the final amended version on March 22, 1984.[83] On April 4, 1984, at a ceremony in Wisconsin's Assembly Chambers, Governor Anthony Earl signed Wisconsin's Marital Property Act, 1983 Wisconsin Act 186. William Cantwell, Reporter for the Uniform Act, was among those who witnessed the signing. He also made some remarks noting the historical and substantive interrelationships between the Uniform Marital Property Act and the Wisconsin Act.

In June of 1984, the Legislative Council established a Special Committee on Marital Property Implementation.[84] The Legislative Council directed the Special Committee to review the Marital Property Act to insure smooth transition and implementation. It asked the Committee to make recommendations for clarification of technical issues to the Legislative Council and thereafter to the Legislature for consideration early in the 1985 Legislative Session. A timetable was established so that the Legislature could act on the "trailer bill"[85] well in advance of January 1, 1986, the Act's general effective date. To aid the Special Committee's work, several key members of the Uniform Marital Property Act's Drafting Com-

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man, Susan Engeleiter and Donald Hanaway and Representative Mary Lou Munts.

82. Substitute Amendment 1 to 1983 A.B. 200 was introduced on February 28, 1984.

83. The Assembly vote on March 13, 1984, concurring in the Senate action was 59 to 38. On March 15, 1984, by a vote of 41 to 54, the Assembly refused to reconsider its March 13, 1984, vote. The final votes in the Senate and Assembly were voice votes.

84. Senator Lynn Adelman and Representative Mary Lou Munts were selected to chair the Committee. Other Committee members who are members of the Legislature are: Senators Donald Hanaway and Russell Feingold and Representatives Joanne Huelsman and James Rutkowski. The three public members are John Knight (Madison), Michael W. Wilcox (Madison), and the author (Madison). Wisconsin's Legislative Council is an official body of legislators. Its primary responsibility is to establish study committees to examine major legislative issues and to act on study committees' recommendations for legislation.

In January 1985, Representative Thomas Crawford was selected to replace former Representative Mary Lou Munts as a legislative member of the Committee since Ms. Munts now serves as a member of Wisconsin's Public Service Commission and is no longer a member of the Legislature. She continues to serve on the Committee as co-chair.

85. The term "trailer bill" is used in Wisconsin for technical implementation legislation which often follows enactment of comprehensive reform by the Legislature. Statements in this article about the provisions of the "trailer bill" are based upon the version recommended by the Legislative Council on April 10, 1985. Action by the Legislature is expected in May 1985.

mittee met with the Special Committee's Technical Subcommittee on December 7 and 8, 1984.[86]

IV. Three Guiding Principles and Numerous Policy Choices for Wisconsin's Marital Property Reform Act

In the drafting and consideration of the marital property reform proposals which eventually became 1983 Wisconsin Act 186, the major legislative sponsors and ultimately the members of the Wisconsin Senate and Assembly made many policy choices. Three guiding principles connect many of the Wisconsin Act's resulting provisions. The Act's key unifying principles are identified and discussed in three subsections which cover a number of specific policy choices. Each policy choice is first discussed in conjunction with the relevant rule or rules in community property states and with reference to the relevant provision of the Uniform Marital Property Act. Where the Wisconsin Act contains a rule identical with or substantially similar to the Uniform Act rule, that fact is noted. When the Wisconsin rule differs from the Uniform Act, the Wisconsin Act's differences are noted and discussed separately. Provisions recommended for inclusion in the 1985 Wisconsin Marital Property "trailer bill" by the Special Legislative Council Committee are noted and incorporated into the discussion of the Wisconsin Act.

A. Property Classification Rules: Maximizing Spousal° Property Sharing

The common approach to property classification in the eight community property states favors classification of property as community property in contrast to its classification as separate property of a spouse. If this principle were pushed to its logical conclusion, it would result in a "universal community" in which all property of spouses were shared. Such a system would be exceedingly simple to administer. Nonetheless, all the American community property states have rejected this alternative and instead follow the French and Spanish community property systems which distinguish between community property acquired by "onerous" means and separate property acquired by "lucrative" means.[87]

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86. Attending these meetings were William C. Hillman, Chairman of the Uniform Act's Drafting Committee, William Cantwell, Reporter for the Uniform Act, Richard V. Wellman, a Drafting Committee member and Reporter for the Uniform Probate Code, Peter J. Dykman, Drafting Committee member, and Mary Moers Wenig, an American Bar Association advisor to the Drafting Committee. Also attending were Professors Richard Effland (Arizona State University College of Law), Howard Erlanger (University of Wisconsin Law School), and Daniel Furrh (Marquette University Law School). The Technical Subcommittee is composed of the three public members of the Special Committee with the author serving as chairperson.

87. *See* W. McClanahan, *supra* note 34, § 2.28. "Lucrative" title is by gift, bequest, device or descent. "Onerous" title is acquired for a consideration including services. Unlike the common law system, the primary sources of law in a civil law system are not written

The more complicated community of gains or "acquests"[88] reflects a policy choice which balances a general principle favoring spousal property sharing with a concept that some property is more appropriately owned solely by one spouse. Both the Uniform Act and the Wisconsin Act have adopted the more finely tuned spousal property sharing system of the eight American community property states. Thus, the marital property system under the Uniform Act and the Wisconsin Act rejects a universal community approach and incorporates property classification rules distinguishing between marital (or community) property, on the one hand, and individual (or separate) property, on the other hand.

Many choices face drafters and legislators in the determination of specific property classification rules, some favoring the marital or community property classification and others the individual or separate property classification. The Uniform Act's classification rules generally favor the marital property classification. The Wisconsin Act not only adopted the Uniform Act's general approach favoring marital property, it also modified several key Uniform Act provisions to implement more fully the common policy of both Acts. Thus, the first unifying principle of the Wisconsin Act is to maximize spousal property sharing within a general framework of a community of gains or "acquests."

1. The Basic Presumption: Property of Spouses is Marital

a. *Community property states*

All the community property states presume that property owned by spouses is community property. The community property states vary as to the strength of this presumption and how it may be rebutted. No state is consistent in its formulation of this key presumption and some judicial opinions apply different formulations of the presumption without apparently appreciating their inconsistency.[89] Among the various statutory or judicial formulations of the presumption are: property acquired during marriage by either spouse or both is presumed to be community property; property possessed by either spouse during marriage is presumed to be community property; and all property of spouses is presumed to be community property.[90] Community property states also vary as to whether the

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constitutions, laws, and decided case law opinions. Primary law sources of the civil law are codes and the writings of juriconsults (authoritative legal commentators on the codes). *Id.* at §§ 2.11-2.18. *See* de Funiak, *Why Community Property Is So Misunderstood—Knowing Its Origins Is the Key*, 1 Community Prop. J. 97, 101-03 (1974).

88. *See id.* at § 2.28.

89. *See* W. Reppy & C. Samuel, *supra* note 50, at 53-54. This article does not consider the circumstances when federal preemption rules govern property classification. *Id.* at 396-409. *See* Reppy, *Community Property in the U.S. Supreme Court—Why Such a Hostile Reception?*, 10 Community Prop. J. 93 (1983).

90. *See* W. Reppy & C. Samuel, *supra* note 50, at 53-54.

party asserting that an asset is separate property must do so by the preponderance of evidence or by clear and convincing evidence.[91]

b. The Uniform Act and the Wisconsin Act

The unlimited presumption, which is most favorable to the marital property classification, has been adopted by the Uniform Act[92] and the Wisconsin Act.[93] The Uniform Act in its definition of "presumption" based upon the Uniform Rules of Evidence rejected a clear and convincing evidence standard to rebut the presumption.[94] An earlier version of the Wisconsin Act required clear and convincing evidence, making it difficult to establish a spousal asset as individual property. The Wisconsin Act contains the Uniform Act's definition of presumption. The "trailer bill" will repeal this special definition. Instead, the general statutory construction rule in the Wisconsin statutes will make preponderance of the evidence the applicable standard.[95] While it is difficult to assess whether the choice of preponderance of evidence instead of clear and convincing evidence makes any real difference, the choices of the Uniform Act and the Wisconsin Act to adopt the unlimited presumption but reject the clear and convincing evidence standard required to rebut the presumption implement the decision that individual property should play a legitimate role within the overall framework of a marital or community property system.

2. "Active" Appreciation of Individual Property During Marriage

a. Community property states

In a traditional community property system, the efforts, skills and labor of each spouse during marriage are available for the benefit of the "community" or the partnership of husband and wife. Accordingly, in each of the community property states, if separate property of one spouse appreciates during marriage due to the efforts, skill and labor of one or both spouses, the increase attributable to spousal efforts, the "active" appreciation, is recognized as community property. On the other hand, appreciation due to inflation or other "natural" reasons is regarded as "passive" appreciation and is classified as separate property.

Methods to describe and value the components of appreciation as community or separate property are far from uniform in the community property states. A variety of valuation approaches has been developed,

91. *Id.* at 54-55.

92. U.M.P.A. § 4(b) (1983). "All property of spouses is presumed to be marital property."

93. Wis. Stat. Ann. § 766.31(2) (West Supp. 1984) (effective Jan. 1, 1986).

94. U.M.P.A. § 1(14) (1983). "'Presumption' or a 'presumed' fact means the imposition on the person against whom the presumption or presumed fact is directed of the burden of proving that the nonexistence of the presumed condition or fact is more probable than its existence."

95. Wis. Stat. Ann. § 903.01 (West 1975).

even within the same jurisdiction.[96] Two valuation methods are particularly popular. One is to determine what constitutes reasonable compensation for the kind of spousal labor contributed.[97] "Reasonable compensation" then represents the measure of the community's interest in the separate property. Under this method, the remaining appreciation is classified as separate property. A second very different method is to calculate a reasonable rate of return on the separate property investment and classify this as separate property.[98] All remaining appreciation is then classified as community property. It is noteworthy that both of these rules were developed and apply in a single jurisdiction, California, even though they are based upon distinct and incompatible philosophies of valuation. Under different fact situations, either rule may overvalue the separate property component and may even preclude the community from sharing in the appreciation.

Rules classifying and valuing the active appreciation component of separate property during marriage are particularly important when a spouse brings a separate property business, professional or other interest to the marriage (or acquires one during marriage with separate property) and spends a substantial amount of time during marriage on that interest in lieu of or in addition to other employment. Given the general rule that wages earned during marriage are community property, all community property states recognize that it should not matter whether a spouse's efforts during marriage result in wages which are shared by both spouses or appreciation of separate property which is also shared by the spouses to the extent of its community property classification.

b. The Uniform Act

The Uniform Act's "active appreciation" rule classifies the *substantial* appreciation of individual property of a spouse resulting from *sub-*

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96. *See* W. McClanahan, *supra* note 34, at §§ 6.15, 6.18; W. Reppy & C. Samuel, *supra* note 50, ch. 11(c). *See* Adler, *Arizona's All-or-Nothing Approach to the Classification of Gain From Separate Property: High Time for a Change*, 6 Community Prop. J. 190, 197-99 (1979); Messinger, *Unification of the* Pereira *and* Van Camp *Rules: The Economics Underlying the Division of a Business Between Separate and Community Property in California Divorce Proceedings*, 9 Community Prop. J. 286, 287-90 (1982); Weekley, *Appreciation of a Closely-Held Business Interest Owned Prior to Marriage—Is It Separate or Community Property?*, 7 Community Prop. J. 261, 270-79 (1980); Comment, *Serving Two Masters: Expenditure of Community Labor and Assets on Separate Property in Washington*, 19 Gonz. L. Rev. 519, 530-31, 539-41 (1983/1984]). Valuing "active" appreciation of separate property during marriage may also be an issue in a common law property state at divorce.

97. *See* Van Camp v. Van Camp, 53 Cal. App. 17, 27-28, 199 P. 885, 890 (1921). A variation has recently been adopted by the Texas Supreme Court in Jensen v. Jensen, 665 S.W.2d 107, 109 (1984). The majority adopted a reimbursement approach. It does not give a community property *ownership* interest to the increase in one spouse's separate property (in this case stocks) as a result of the spouse's efforts during marriage.

98. *See* Pereira v. Pereira, 156 Cal. 1, 7, 103 P. 488, 491 (1909).

stantial efforts of a spouse without *reasonable* compensation as marital property.[99] The Act recognizes this marital property component, however, only when the substantial effort was exerted by one spouse upon the *other* spouse's individual property,[100] a limitation unknown in any of the community property states. Thus, the Uniform Act has significantly limited claims of marital property arising from spousal efforts during marriage. Comments to the Act indicate a bias against the creation of marital property in these circumstances, making a clear exception to its policy favoring marital property.

Moreover, the Uniform Act does not provide any statutory direction on how the marital property appreciation component is to be valued. Although an argument may be made that a "reasonable compensation" approach is implied by the Act's formulation of the appreciation classification rule, such an approach appears inconsistent with the Uniform Act's focus upon increased value attributable to spousal labor and may undervalue the marital property interest.

c. *The Wisconsin Act*

The first 1979 Wisconsin marital property reform proposal favored simplicity; it avoided the complex apportionment rules required to distinguish "active" from "passive" appreciation of a spouse's individual property during marriage. Accordingly, *all* appreciation of individual property during marriage was classified as marital property in the initial bill.[101] At the public hearing which followed introduction of the 1979 bill, the approach of this rule was strongly criticized. Objections centered upon the "unreasonableness" of classifying "passive" or "natural" appreciation as marital property. Shortly thereafter, the bill was changed to adopt the customary community property approach, distinguishing between "active" and "passive" appreciation of a spouse's individual property during marriage. A later provision enumerated factors to be considered in making any required apportionment of appreciation.[102]

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99. U.M.P.A. § 14(b) (1983).

100. *Id.* This portion of the rule resulted from floor debate and a vote by the Commissioners.

101. *See supra* note 69. The bill included a statutory formula which presumed an even rate of appreciation to simplify application of the appreciation rule to property acquired prior to marriage. A later version, 1983 A.B. 200 § 766.37(a)(4), contained a presumption that any "passive" change in property value occurred at an even rate during marriage.

102. 1983 A.B. 200 § 766.37(3)(b).

> PROPORTION OF OWNERSHIP: (a) With respect to any item of property which is not entirely marital, separate or quasi-marital, relative ownership interests in that property are established by the proportion in which separate property and either marital property or the personal effort of either spouse or both were used to acquire the property or to change its value.
>
> (b)In determining what proportion of a spouse's interest in mixed property is separate property or marital property when the mixed property consists of

With one major modification, the Wisconsin Act incorporates the Uniform Act's approach.[103] The Wisconsin Act rejected the key Uniform Act limitation that marital property results only from spousal efforts which enhance the value of the *other* spouse's individual property and adopted a classification rule applicable when spousal efforts result in substantial appreciation of *either* spouse's individual property. The Wisconsin Act's modification of the Uniform Act brings its appreciation rule back into line with the basic principle recognized in all the community property states that marital partners should share in property created by spousal efforts during marriage. Like the Uniform Act, the Wisconsin Act avoids application of the appreciation rule when spousal efforts are minimal or when minimal appreciation results. Moreover, the formulation adopted allows couples the opportunity to plan with classification results in mind, in that no marital property appreciation component will be recognized if "reasonable compensation" is received or, as an alternative, couples may change the rule by a marital property agreement.

3. "Fruits" or Income of Individual Property During Marriage

a. *Community property states*

The traditional Spanish rule which predominates in community property states is that "fruits" or income generated from separate property during marriage—whether interest, dividends or rents—is classified

separate property combined with the application of a spouse's personal effort during the marriage, the court shall consider all of the following:

1. The value of the separate property when acquired by one spouse.
2. The reasonable value of spousal personal effort expended on acquiring or improving the property.
3. The appreciation attributable to the separate property.
4. The facts surrounding the property's acquisition and the application of spousal personal effort to acquire or improve the property.
5. Any other factor the court considers relevant.

(c) If proof exists that a change in the value of separate property is at least in part passive, but no proof exists that the change is predominantly either active or passive, 50% of the change is marital and 50% is separate property.

(d) In determining what proportion of a spouse's interest in business property is separate or marital, the court shall consider all of the following:

1. Changes in value exhibited by similar businesses in similar circumstances.
2. The extent to which:

a. The business is capital-intensive or labor-intensive.
b. Either or both spouses received fair compensation for personal efforts.
c. The business is established prior to the date of the marriage or the effective date of this chapter (1983).
d. Separate or marital property is invested in the business.
e. Separate property is commingled with marital property.

103. Wis. Stat. Ann. § 766.63(2) (West Supp. 1984) (effective Jan. 1, 1986). The "trailer bill" clarifies that this rule is applicable to all non-marital property of a spouse.

as community property.[104] The rationale for this longstanding rule is that spouses contribute not only their talent and labor to the marriage partnership but the use of all separate property as well. Idaho and Texas follow this classification rule.[105] Louisiana has a special variation whereby the owning spouse may unilaterally withdraw his or her "fruits" from the community and make them his or her separate property by a recorded declaration.[106] In the remaining community property states, the "American" rule is followed. In Arizona, California, Nevada, New Mexico and Washington, "fruits" of separate property during marriage are classified as separate property. The "American" rule has been attributed to the hostility of judges trained in common law property principles toward community property doctrine.[107]

b. The Uniform Act and the Wisconsin Act

The Uniform Act rejected the "American" rule and adopted instead the traditional Spanish rule.[108] Drafters of the Uniform Act justify their classification rule which covers all income from any source (wages as well as interest, dividends and rents) as a "simple and understandable arrangement", noting that couples may change the rule by a marital property agreement.[109]

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104. *See* W. McClanahan, *supra* note 34, at § 6.12, W. Reppy & C. Samuel, *supra* note 50, at 131. Classifying "fruits" of separate property during marriage may also be an issue in a common law property state at divorce. *See, e.g.*, Arneson v. Arneson, 120 Wis.2d 236, 243-44, 355 N.W.2d 16, 19 (Ct. App. 1984). Particular assets such as oil and gas and mineral rights present special classification problems. *See* W. Reppy & C. Samuel, *supra* note 50, at 152-56.

105. *Id.* Idaho Code § 32-906 (Michie 1983) provides, however, that the conveyance may designate that the income from separate property also is separate property or that spouses by written agreement may so provide.

106. La. Civ. Code Ann. art. 2339 (West Supp. 1985). *See*, Riley, *Analysis of the 1980 Revision of the Matrimonial Regimes Law of Louisiana*, 26 Loy. L. Rev. 453, 480-84 (1980) (criticizing the unilateral right to withdraw "fruits" from the community). Prior to Louisiana's adoption of equal management and control legislation, only a wife had such a right. This privilege had been granted to wives as partial compensation for the rights of management and control over separate property given to her husband. If a wife chose, however, she could take administration of her separate property and, in so doing, retain the fruits of that property as separate property. Since 1944, this was accomplished by execution of an instrument before a notary and two witnesses and recording of the instrument. Fruits from a husband's separate property remained community property. *Id.* at 480-81.

107. *See*, Prager, *supra* note 35, at 28-34, Bruch, *Definition and Division*, *supra* note 3.

108. U.M.P.A. § 4(d) (1983).

109. U.M.P.A. § 4 Comment (1983). William P. Cantwell, Reporter for the Uniform Act, has further stated that commingling of income generated by individual property during marriage would be the probable norm in adopting states. The Uniform Act's "fruits" rule has also been justified as representing "a form of rough justice," given the narrow appreciation rule adopted in U.M.P.A. § 14(b). Cantwell, *Drafting the Uniform Marital Property Act: The Issues and Debate*, 21 Hous. L. Rev. 669, 671, 671 n.10

The earliest Wisconsin marital property reform bill classified "fruits" of individual property during marriage as marital property. Following a public hearing at which this rule was among those most strongly criticized, the Assembly Judiciary Committee amended the bill to include a Louisiana type procedure permitting an owning spouse to withdraw unilaterally his or her "fruits" after notification to the other spouse. Subsequent versions of the marital property reform bill included the Louisiana "fruits" approach until mid-1983. Thereafter, the Wisconsin proposal tracked the Uniform Act as to classification and terminology.[110] While the rule classifying "fruits" as marital property has been controversial, its major policy justifications are that it increases spousal property sharing during marriage and that it treats similarly married couples whose main source of income is wages and married couples whose main source of income is derived from gifted or inherited wealth owned by one spouse or wealth one spouse accumulated prior to marriage.

4. The Key Transitional Provision: "Quasi" or "Deferred" Marital Property

a. *Community property states*

In the community property states, the phrases "quasi-community" property and "deferred community" property are sometimes used interchangeably. Even though the two concepts are similar at divorce, there are significant differences between these concepts as applied at the death of a spouse. Under both deferred and quasi-community property concepts, each spouse during marriage owns and controls property as in the common law property system. Under a deferred community property concept, however, when a spouse dies, equal ownership of community property by both spouses is recognized through an "equalization" payment.[111] Equalization is based on a computation of the amount by which each spouse's net assets at the end of the marriage exceed those assets at the beginning. The spouse with the lesser gains is entitled to one half the difference between the gains of each spouse. This equalization occurs, regardless of whether the spouse with greater or lesser gains dies first. In contrast, quasi-community property concepts apply only as to property previously acquired by the decedent spouse which would have been community property if acquired in the community property state. Quasi-community prop-

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(1984).

110. Wis. Stat. Ann. § 766.31(4) (West Supp. 1984) (effective Jan. 1, 1986).

111. Denmark, Finland, Iceland, Norway, and Sweden have pioneered in "deferred" community property rules which combine separation of assets during marriage and a community property regime at divorce or death of a spouse. At dissolution or termination of the marriage, with certain exceptions, the net property of the spouses are added together and divided into equal shares. International Encyclopedia of Comparative Law 99-104 (A. Chloros ed. 1980). In Sweden, this has been modified to provide a minimum amount for the surviving spouse. [Marital Property—Sweden] Särtryck Ur Sou 1981: 85, Bilaga 6 (Summary) 619-20 (1981).

erty rules, unlike true deferred community property rules, are asymmetric. They apply only to property of the decedent spouse, not the surviving spouse. Also, unlike true deferred community rules, quasi-community property rules have no application if the "non-owning" spouse dies first..

California first developed the concept of quasi-community property to deal with property a California married couple had acquired when domiciled in a common law property state.[112] Upon divorce, such property is treated as community property if the property would have been community property under California property law.[113] When the "owning" spouse dies first, such property is treated as community property in California. New California legislation, effective January 1, 1985, specifies that the quasi-community property rights of a surviving spouse extend not only to property of the decedent which is in the decedent's probate estate but to certain non-probate transfers made by the decedent without consideration "of substantial value" and without the other spouse's consent.[114] These transactions generally include transfers in which the decedent retained a right to revoke, or a right to receive income or transfers in which the decedent held the property with another with the right of survivorship. Life insurance and pension benefits are specifically excluded from coverage of the new legislation.[115]

Idaho is the only other state which recognizes quasi-community property rights at death.[116] Idaho's version of quasi-community property was enacted over a decade ago as part of its adoption of the Uniform

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112. *See*, W. McClanahan, *supra* note 34, at §§ 11.8 and 12.16. In *Estate of Thornton*, 1 Cal. 2d 1, 33 P.2d 1, 2 (1934), a majority of the California Supreme Court invalidated as an unconstitutional "taking" without due process a statute which was construed as converting common law separate property to community property as soon as a married couple established a California domicile. The next year, the legislature responded by enacting Calif. Prob. Code § 201.5, Stats. 1935, ch. 831 § 1:

> Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, shall belong to he [sic] surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this Code.

This statute was held constitutional in In re Miller, 31 Cal. 2d 191, 199, 187 P.2d 722, 726 (1947). Legislation was enacted in 1961 to extend the quasi-community property concept to divorce. Calif. Civ. Code former § 140.5—now § 4803. That legislation was upheld in Addison v. Addison, 62 Cal.2d 558, 566, 399 P.2d 897, 903-04, 43 Cal. Rptr. 97, 102 (1965) based upon the substantial interest of the domiciliary state upon dissolution of marriage as well as at the death of a decedent domiciliary.

113. Arizona and Texas also have adopted quasi-community property concepts at divorce. *See*, Reppy, *"Quasi-Community Property" Comes to Texas*, 9 Community Prop. J. 171, 172 (1982).

114. Cal. Prob. Code §§ 66, 101 and 102 (West Supp. 1985) (effective Jan. 1, 1985).

115. *Id.*

116. Idaho Code §§ 15-2-201 to 15-2-209 (1979).

Probate Code and is a community property adaptation of the Code's "augmented estate" concept.[117] In addition to probate property, Idaho's quasi-community property concept extends to the same non-probate transfers covered by the new California legislation if made by the decedent without adequate consideration and without spousal consent. It also includes gifts made within two years of the decedent's death which are in excess of three thousand dollars per donee per year. There is no exclusion in Idaho for life insurance and pension benefits.[118] In calculating the surviving spouse's "augmented quasi-community property rights," property received by the surviving spouse from the decedent is considered.[119]

b. The Uniform Act and the Wisconsin Act

The Uniform Act adopted California's quasi-community property concept, although it did not adopt California's terminology.[120] The Act also expanded the concept so that its application is not restricted to situations where married couples move into an adopting jurisdiction after acquisition of marital assets in a common law property state. The Act's concept of quasi-marital property also applies to property already owned by married couples in a state adopting the Uniform Act. In this latter application, the concept serves as the key transitional provision by affecting a class of property acquired before the Act's effective date by married couples domiciled in an adopting state.

The 1979 version of Wisconsin marital property reform included the concept of quasi-marital property and applied it, as does the Uniform Act, to two distinct groups of married persons. Under the original Wisconsin version, if a spouse rejected full application of the new property system's rules to the spouses' already acquired Wisconsin property, quasi-marital property rules covered that property at a spouse's death. Also, already acquired property of married couples moving to Wisconsin after the Act's effective date was covered by Wisconsin's original quasi-marital property rules. A redrafted form of quasi-marital property was included in subsequent Wisconsin drafts. Some versions provided that quasi-marital property rights were an automatic right of a surviving spouse while others required that the surviving spouse file an election.

There is special significance to the adoption of the Uniform Act's concept of quasi-marital property at death under the Wisconsin Act.[121] Quasi-marital property rights replace the surviving spouse's right to elect against the decedent spouse's will, the basic protection in lieu of dower

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117. U.P.C. §§ 2-201 to 2-207 (1969).

118. Idaho Code § 15-2-202 (1979). *But see,* U.P.C. § 2-202 (1969), which does not include life insurance and pension benefits.

119. Idaho Code § 15-2-207(a) (1979).

120. U.M.P.A. §§ 17 and 18 (1983). U.M.P.A. Comments refer to the concept as deferred marital property. As noted in the text, this is not accurate.

121. Wis. Stat. Ann. § 766.77 (West Supp. 1984) (effective Jan. 1, 1986). *See also* changes to Wis. Stat. Ann. § 861.17 (West Supp. 1984) (effective Jan. 1, 1986).

that common law property states provide for a surviving spouse. Wisconsin's statutory elective share has been repealed by the Wisconsin Act.[122]

Since the adoption of the Wisconsin Act, questions have been raised about the Act's quasi-marital property provisions. One relates to the application of the concept at divorce, particularly in light of Wisconsin's existing statute on property division at divorce. Since neither the Uniform Act nor the Wisconsin Act were intended to change existing state law on property division at divorce, the Wisconsin "trailer bill" deletes the Act's section relating to quasi-marital property at divorce in order to eliminate the possibility of misinterpretation of legisative intent and to affirm support for the existing statutory authority of a court to divide spousal property equitably.[123]

Even more critical questions have been raised as to the scope of the Uniform Act's language adopted in the Wisconsin Act which applies the quasi-marital concept at the death of a spouse to "all property then owned by the spouse". A traditional reading of that Uniform Act phrase would make the concept applicable only to probate property of the decedent spouse. A broad reading of the phrase would make the concept also applicable to a variety of non-probate property owned by the decedent spouse, including insurance, pensions, and property held by the decedent with a third party with the right of survivorship. These conflicting interpretations strongly suggested the need for statutory clarification as to the scope of the concept of quasi-marital property rights when the first spouse dies. Practical probate administration concerns were also expressed about the Acts' quasi-marital property rights which are set forth as automatic rights of the surviving spouse, subject to disclaimer, rather than as an elective right of the surviving spouse.

The "trailer bill's" provisions on quasi-marital property are modeled upon the California and Idaho provisions, with certain modifications. First, as to the decedent's probate property, the surviving spouse's quasi-marital rights are elective and not automatic.[124] Second, there are two presumption favoring the marital property and quasi-marital property classifications at death.[125] Third, there is an additional election available to the

122. 1983 Wisconsin Act 186 §§ 76 and 77.

123. Wis. Stat. Ann. § 766.75(1) (West Supp. 1984) (effective Jan. 1, 1986). Subsection (4) of the same section will also be repealed in the "trailer bill" because it is inconsistent with existing Wisconsin rules governing property division upon legal separation contained in Chapter 767. Tax reasons for the inclusion of provisions for quasi-marital property at divorce have recently been removed by federal legislation. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1491 (codified as 29 U.S.C. § 1041 (1985)).

124. Prior to the adoption of the Uniform Act, the 1983 Wisconsin marital property reform bills treated quasi-marital property rights as elective. The Uniform Act Drafting Committee is expected to recommend a similar change to the Uniform Act.

125. In Wisconsin decedents' estates when it cannot be established that any property is other than quasi-marital property, the surviving spouse's elective right to one-half of the net probate estate will be the equivalent of an elective share in many common law prop-

surviving spouse covering the same categories of non-probate transfers specified in the California legislation.[126] In the calculation of the surviving spouse's right to make this second election, there is a set-off for certain lifetime and at death transfers from the decedent to the surviving spouse.[127]

5. Joint Tenancy and Survivorship Marital Property

a. Community property states

In the community property states, the community property classification does not cover the two popular common law forms of concurrent property ownership, joint tenancy and tenancy-in-common.[128] At first this seems strange to a lawyer trained in common law property rules, where concurrent titling as joint tenancy or tenancy-in-common property creates shared ownership with some (but not all) of the attributes of community property. In the community property states, however, the separate property classification is used to encompass *all* forms of common law property ownership including solely owned spousal property, a spouse's interest in tenancy-in-common, and a spouse's interest in joint tenancy.[129]

Many married couples in community property states, like couples in common law property states, use joint tenancy and similar forms of property holding to make non-testamentary gifts that avoid probate.[130] Nevada

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erty states.

126. These include transfers by the decedent without spousal consent and without adequate consideration if: 1) the decedent retained, at the time of his death, the possession or enjoyment of or the right to income from the property; 2) the decedent retained, at the time of his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit; and 3) the decedent held the property at the time of his death with another with the right of survivorship. The "trailer bill's" new augmented marital property election includes insurance and pensions, unlike California and U.P.C. § 2-202 (1969).

127. This is based upon Idaho and U.P.C. §§ 2-207(a) and (c) (1969).

128. All the community property states, except Louisiana as to spousal tenancies, recognize the common law joint tenancy and tenancy-in-common. *See* W. Reppy & C. Samuel, *supra* note 50, at 37. For the popularity of spousal joint tenancy in at least one community property state, *see* Sterling, *Joint Tenancy and Community Property in California*, 10 Community Prop. J. 157, 158-59 (1983).

129. *See* W. Reppy & W. de Funiak, Community Property in the United States 103 (1975); J. Price, *supra* note 38, at 122-23. Because of its restrictive rules governing court jurisdiction and authority at divorce, California has adopted a special rule that at divorce, a single family residence acquired in joint tenancy during marriage is presumed to be community property. Calif. Civ. Code § 5110 (West Supp. 1985). *See* Sterling, *supra* note 128, at 200-01.

130. Apparently there are some instances when an argument is made that spousal joint tenancy property should be treated as joint tenancy property for purposes of its non-probate, nontestamentary right of survivorship and that it should be treated as community property for purposes of a new basis for the entire asset at death.*See* J. Dukeminier & S. Johnson, Family Wealth Transactions: Wills, Trusts, and Estates 563 n.42 (1978). There are income tax advantages in determining gains on appreciated community property assets following the death of either spouse. *Both* halves receive a new basis. *See* Arnold &

has recently authorized by statute a non-probate survivorship feature that may be added to community property documents of title.[131] In Nevada, couples may now designate certain marital property as "community property with the right of survivorship". Nevada property designated in that manner is community property during marriage.[132] When the first spouse dies, the surviving spouse owns the entire asset by operation of law without probate.

b. The Uniform Act and the Wisconsin Act

The Uniform Act does not classify a spouse's interest in joint tenancy and tenancy-in-common in the same way as the community property states do. Instead, under the Uniform Act such tenancies are classified as marital property, individual property or a combination of the two, depending upon the classification of property used to acquire the tenancy or reclassification of the property by spousal agreement or gift.[133] The Uniform Act views a joint tenancy and a tenancy-in-common as solely a form of property holding and not a form of property ownership.

Earlier Wisconsin marital property reform bills followed the classification rule of the community property states and included statutory methods by which spouses who desired exclusively spousal joint tenancies and tenancies-in-common could implement their intent. In mid-1983, the Uniform Act's approach was adopted. Because of the unique approach of the Uniform Act and the Wisconsin Act,[134] pointed questions were raised during the 1984 legislative floor debates about whether probate would be required if a portion of a joint tenancy consisted of marital property. Legislative sponsors responded that the non-probate survivorship feature of a joint tenancy controlled for all of its components even though the joint tenancy consisted of marital property in whole or in part. A memo written on behalf of the Uniform Marital Property Act Drafting Committee confirmed this interpretation.[135] The "trailer bill" codifies this rule and will

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Cremer, *The Unlimited Marital Deduction and the Differences Remaining in Treatment of Residents of Community Property and Common Law States at Death*, 19 Real Prop., Probate and Trust J. 736, 740-41 (1984).

131. Nev. Rev. Stat. § 111.064 (1981). *See* Parks, *Critique of Nevada's New Community Property With Right of Survivorship*, 10 Community Prop. J. 5 (1983).

132. The statute specifically provides for a unilateral right of severance during marriage by one spouse extinguishing the right of survivorship, an attribute of a common law joint tenancy. *Id.*

133. U.M.P.A. § 11(d) (1983). "Spouses may hold property in any other form permitted by law, including a concurrent form or a form that provides for survivorship ownership." *See* U.M.P.A. § 11 Comment (1983).

134. Wis. Stat. Ann. § 766.60(4) (West Supp. 1984) (effective Jan. 1, 1986).

135. A memo dated March 15, 1984, by Peter J. Dykman, as a member of the Uniform Act Drafting Committee, stated that under the Uniform and Wisconsin Acts, regardless of the classification of property added to a joint tenancy, the surviving tenant would own the property without probate. It was distributed to members of the Assembly before their vote on reconsideration. *See supra* note 83.

specifically state that, regardless of the classification of property constituting a joint tenancy, the survivorship feature will prevail for all property held in joint tenancy.[136]

As an alternative to common law joint tenancy between spouses, the Uniform Act explicitly authorizes "survivorship marital property" as a form of property ownership and holding.[137] Married couples wishing the survivorship feature heretofore associated with joint tenancy will be able to use this new form of marital property. The Wisconsin Act follows the Uniform Act in this regard.[138] Because of support for "survivorship marital property" as a desirable substitute for spousal joint tenancies, a "trailer bill" provision classifies all exclusively spousal joint tenancies created after the Act's effective date as survivorship marital property.[139] (A similar provision also classifies all exclusively spousal tenancies-in-common created after the Act's effective date as marital property.)

A unique provision in the Wisconsin Act relating to classification of

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136. The "trailer bill" will clarify § 766.60(4) by expressly stating that to the extent that the incidents of a joint tenancy or tenancy in common conflict or differ from the incidents of property which constitute the tenancy, the incidents of joint tenancy or tenancy-in-common control. Thus, regardless of the classification of property held in joint tenancy, the non-probate survivorship aspect of joint tenancy remains unaltered.

137. U.M.P.A. § 11(e) (1983).

> If the words "survivorship marital property" are used instead of the words "marital property" in the form described in subsection (a) or (b), marital property so held is survivorship marital property. On the death of a spouse, the ownership rights of that spouse in survivorship marital property vest solely in the surviving spouse by nontestamentary disposition at death. The first deceased spouse does not have a right of disposition at death of any interest in survivorship marital property. Holding marital property in a form described in subsection (a) or (b) does not alone establish survivorship ownership between the spouses with respect to the property held in that form.

138. Wis. Stat. Ann. § 766.60(5) (West Supp. 1984) (effective Jan. 1, 1986). Note that survivorship marital property applies to property on an asset by asset basis only where there is a document of title. Also, the property must be titled in both spouses' names. There can be no survivorship marital property if the property is titled solely in one spouse's name, unless a marital property agreement adds a right of survivorship to spousal property. *See infra* note 258.

139. For simplicity, the "trailer bill" states two new rules. First, if after the Act's determination date, spouses attempt to create an exclusively spousal joint tenancy, the property will be classified as survivorship marital property. Second, if after the Act's determination date, spouses attempt to create an exclusively spousal tenancy in common, the property will be classified as marital property. Other provisions of the "trailer bill" treat survivorship marital property identically to joint tenancy property with respect to satisfaction of obligations at the death of a spouse. One difference between survivorship marital property and joint tenancy property will be that a joint tenant may unilaterally remove the right of survivorship from the entire tenancy and convert it into a tenancy-in-common (except for a homestead in Wisconsin) while survivorship marital property when held in the form "husband *and* wife" requires joinder for management and control. Also, when survivorship marital property held in the form "husband *or* wife" is only partly disposed of by the managing spouse (by sale or gift), the remaining portion is still survivorship marital property unless the managing spouse takes affirmative steps to change the survivorship marital property form.

homestead property should be noted.[140] Under prior Wisconsin law, if a document of title described the owners as husband and wife (or they were, in fact, married to each other), the statutory rule was that they were joint tenants with the right of survivorship unless the instrument of transfer showed an intent to create a tenancy-in-common document.[141] The Wisconsin Act repealed this rule because it was inconsistent with the statutory presumption favoring marital property. The Act recognized, however, that homestead deeds which name husband and wife as owners without explicitly indicating the intended survivorship feature may continue to be drafted. Since under prior law a survivorship feature would arise by operation of law, the Wisconsin Act provides a special classification rule stating that, whenever a homestead is acquired in the names of both spouses, the homestead will be classified as survivorship marital property unless an intent to the contrary is expressed on the instrument of transfer. In this way, spouses who wish their newly acquired homesteads to be marital property with all the normal attributes of that property classification need only indicate "as marital property" on the deed. A survivorship feature will automatic attach to a homestead deed where a husband and wife are named as grantees and there is *no* indication of the property classification or form of holding of the property. This unique Wisconsin classification rule was drafted to implement the intentions of most spouses in the sole case of homestead property and only where the transfer document is silent.

6. Special Assets: Life Insurance and Deferred Employment Benefits

Life insurance and deferred employment benefits are playing an increasingly important role among assets which are transferred at an owner's death.[142] They have merited special attention in the property classification rules of the community property states, the Uniform Act and the Wisconsin Act.

a. Life insurance: Community property states

The usual rule in community property states is that when the insured-owner spouse dies, the surviving spouse has an interest in one-half of the insurance proceeds attributable to community property or labor, regardless of the beneficiary designation by the decedent spouse, unless the surviving spouse has consented to the beneficiary designation.[143] A gift has been made by a consenting spouse either at the time of premium payment of when the insured spouse designating the beneficiary dies, depending upon the time and form of consent: When the non-insured spouses dies first, without giving consent to the beneficiary designation, the usual rule

140. Wis. Stat. Ann. § 766.605 (West Supp. 1984) (effective Jan. 1, 1986).
141. Wis. Stat. Ann. § 700.19(2) (West Supp. 1984) (effective Jan. 1, 1986).
142. *See supra* note 18 and accompanying text.
143. *See* W. McClanahan, *supra* note 34, at § 6.20.

in the community property states is that half of the community's share of the cash surrender value or half of the interpolated terminal reserve will be owned by the decedent spouse's successors.[144]

When both community property or labor and separate funds or labor are used to pay life insurance premiums, some community property states pro-rate the community property and separate property ownership interests.[145] Other community property states determine classification by an inception of title doctrine which looks to the classification of the property used to pay the first premium.[146] There is some authority for treating term life insurance differently, with the classification of the last premium controlling the classification of all the proceeds.[147]

b. Life Insurance: the Uniform Act and the Wisconsin Act

The Uniform Act has adopted life insurance classification rules which strongly favor the marital property classification.[148] For example, if a policy is issued after the Act's effective date and the insured spouse is the owner, it is classified as a marital property policy regardless of the source of premiums.[149] Also, if only one policy premium is paid with marital property, all premiums thereafter are considered to have been paid with marital property for purposes of calculating the marital property component.[150] There is no special classification rule for term insurance in the Uniform Act. Unless there is written consent by the other spouse, the designation of a beneficiary by the insured spouse is only effective as to half of the proceeds attributable to the marital property component. Absent written consent, the other spouse has an absolute right to claim one-half of the proceeds attributable to the marital property component. The Uniform Act contains an express presumption that designation of a parent or child of either spouse as beneficiary was made with the required consent.[151]

Earlier Wisconsin marital property reform bills contained an apportionment approach for life insurance proceeds acquired in part with marital property and also required written consent for an effective designation of a beneficiary to receive the entire marital property interest. With one exception, the Wisconsin Act adopted the Uniform Act's special life insurance provisions in view of the importance of uniformity in this area.[152] The Wisconsin Act deleted the Uniform Act's presumption of spousal con-

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144. *Id.*

145. *Id.*

146. *Id.*

147. *See* W. McClanahan, *supra* note 34, at 364 n.12.

148. U.M.P.A. § 12 (1983). Floor instructions from Commissioners altered the Drafting Committee's more traditional apportionment approach.

149. U.M.P.A. § 12(c)(1) (1983).

150. U.M.P.A. § 12(c)(2) and (4) (1983).

151. U.M.P.A. § 12(c)(5) (1983).

152. Wis. Stat. Ann. § 766.61 (West Supp. 1984) (effective Jan. 1, 1986).

sent for beneficiary designations of a parent or child of either spouse because it diluted the normal property classification rules and appeared unduly broad, particularly in second marriage situations.

c. Deferred employment benefits: Community property states

In the community property states, pensions and other deferred employment benefits are classified according to the marital status of the employee or the source of funds. There appears to be no difference in classifying "defined benefit" plans and "defined contribution" plans. Apportionment is usually made on the basis of time.[153]

In at least one community property state, there is a unique rule terminating the community property interest of the non-employee spouse in the employee spouse's pension plan when the first spouse dies. Most community property states treat the non-employee spouse's interest in the employee spouse's pension plan under usual community property rules regardless of which spouse dies first. Under case law, however, California has developed a "terminable interest" rule which has been 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.[154] This appears to reflect a common law property approach, instead of a community property analysis.

d. Deferred employment benefits: The Uniform Act

The Uniform Act's classification of deferred employment benefits is more conventional than the Act's novel insurance classification rules.[155] The Act follows a time based apportionment formula familiar in community property states. The only question which has been raised about the Uniform Act's rules on deferred employment benefits is whether its definition of deferred employment benefit plans is sufficiently broad to include individual retirement accounts and other plans which are commonly used for retirement income purposes but which are not literally deferred

153. *See* W. McClanahan, *supra* note 34, at § 6.21. There is little significant difference at divorce between treatment of pensions in common law property states and community property states. It is now widely accepted in divorce proceedings that vested and unvested pension rights, if any, are property rights to be considered. Valuation problems, however, abound.

154. *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. 2d 614, 166 Cal. Rptr. 653 (1980); Chirmside v. PERS, 143 Cal. App. 3d 205, 191 Cal. Rptr. 605 (Ct. App. 1983). *See also* Lack v. Lack, 584 S.W.2d 896 (Tex. Civ. App. 1979) (interpreting firefighters death benefits statute). *But see* Farver v. Dep't of Retirement Systems, 97 Wash. 2d 344, 644 P.2d 1149 (1982) (Washington rejects the California (and Texas) rule). The rule has been criticized. *See* Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After* Marriage of Brown *and ERISA*, 25 U.C.L.A. L. Rev. 417, 443-82 (1978); Luther, Luther & Urie, *Equal Treatment for the Community Property Pension Rights of Nonemployee Spouses*, 8 Community Prop. J. 91, 94 (1981).

155. U.M.P.A. § 13 (1983).

benefits resulting from employment.[156] The Uniform Act's drafters have indicated that they did not intend to define deferred employment benefit plans narrowly.[157]

e. Deferred employment benefits: the Wisconsin Act

The Wisconsin Act[158] includes two features which are significant departures from the Uniform Act and which resulted from special, articulated Wisconsin concerns. At the public hearing which followed the 1979 introduction of the first marital property reform bill, a number of speakers called attention to problems which they emphasized would face a surviving employee spouse if the other spouse were permitted to will away a portion of the survivor's pension or deferred employment benefit rights. To accommodate this expressed concern, the Assembly Judiciary Committee approved a modification which classified employment pension rights as the quasi-marital property of the employee spouse. This 1980 change was coupled with a requirement for spousal consent for management and control decisions relating to this category of assets. Concern was next expressed that federal preemption rules would prohibit state legislation requiring spousal consent.[159] The spousal consent requirement was then deleted and a unique "terminable interest" rule replaced the special quasi-marital property classification rule.

The Wisconsin Act contains a "terminable interest" rule applicable to deferred employment benefits when the non-employee spouse predeceases the employee spouse.[160] This is an important modification of the Uniform Act, reflecting the unique history of public debate in Wisconsin on this issue. Because of Wisconsin's "terminable interest" rule, the Special Legislative Council Committee considering the "trailer bill" has declined to recommend that the Wisconsin Act's definition of "deferred employment benefit plan" be broadened to include individual retirement accounts and other similar plans not presently within the definition.

The second departure in the Wisconsin Act from the Uniform Act in the pension area concerns the right of plan administrators to make payments in accordance with the plan and an administrator's records even if an administrator has actual knowledge of an inconsistent court order, marital property agreement, or adverse claim.[161] The Uniform Act makes a plan administrator liable for payments in accordance with contractual arrangements and records if the administrator had actual knowledge of

156. U.M.P.A. § 1(4) (1983).

157. *See supra* note 86 and accompanying text.

158. Wis. Stat. Ann. § 766.62 (West Supp. 1984) (effective Jan. 1, 1986).

159. In particular there was concern that the Employee Retirement Income and Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1381 (1976)), occupied the entire field of regulation of pensions.

160. Wis. Stat. Ann. §§ 766.31(3) and 766.62(5) (West Supp. 1984) (effective Jan. 1, 1986).

161. Wis. Stat. Ann. § 766.62(4) (West Supp. 1984) (effective Jan. 1, 1986).

inconsistent provisions of a court order, marital property agreement or adverse claim at the time of payment.[162] Wisconsin pension plan administrators, particularly administrators of public employee pension plans, have taken the position that they are bound only by the terms of the plan. They presently refuse to follow court orders issued in a divorce proceeding which require the plan administrator to divide pension plan payments whenever such payments are inconsistent with contractual arrangements. Although clarification of this situation is desirable, the issue is not a special problem resulting from marital property reform and, therefore, it was not addressed in the Wisconsin Act. Separate legislation is expected to address this issue in the near future.

7. Tort Recoveries

a. *Community property states*

Damages awarded to a spouse for lost wages during marriage, loss of earning capacity during marriage and medical and hospital expenses incurred by the community are usually classified as community property in the community property states, while recoveries for physical injuries and pain and suffering are classified as the separate property of the injured spouse.[163] At divorce, any future earnings portion remaining is usually reclassified as the separate property of the injured spouse.[164]

b. *The Uniform Act*

Under the Uniform Act, only the amount of a personal injury recovery attributable to expenses paid or satisfied from marital property is classified as marital property.[165] At divorce and at the death of the injured spouse, however, if there is property which can be traced to loss of earning capacity during marriage, that property "must be treated as if it were marital property."[166] The Uniform Act's unusual initial classification of the lost income component of a personal injury award of a spouse as individual property has been justified because it "avoids the necessity of an allocation and makes personal injury actions simpler."[167] Apparently the classification rule was also formulated on the assumption that plaintiffs are favored by lump sum awards and the Uniform Act Drafting Committee did not wish to interfere with common litigation patterns.

162. U.M.P.A. § 13(d) (1983).

163. *See* W. McClanahan, *supra* note 34, at § 6.27; Akers, *Separate or Community Character of Personal Injury Recovery*, 5 Community Prop. J. 107 (1978); In re Marriage of Brown, 100 Wash. 2d 729, 675 P.2d 1207 (Sup. Ct. 1984). In *Brown*, the Washington Supreme Court conformed its law to majority doctrine.

164. *Id.*

165. U.M.P.A. § 4(g)(6) (1983).

166. U.M.P.A. §§ 17(2) and 18(b) (1983).

167. U.M.P.A. § 17 Comment (1983).

c. *The Wisconsin Act*

The Wisconsin Act follows the usual community property rule.[168] Because the income substitute component of a tort recovery may be the sole or principal marital asset of a couple during marriage, a rule which does not classify this component as marital property would cause a significant loss of property rights for the non-injured spouse. If the injured spouse is the surviving spouse, however, the Wisconsin Act provides that he or she is entitled to receive as individual property "that portion of the award that represents an income substitute after the death of the other spouse."[169] In this situation, the surviving spouse will benefit under the special property classification rule when remaining marital property includes personal injury damages for loss of future income based upon a claim of the surviving spouse.

8. Mixed Property and Commingling

a. *Community property states*

There are numerous situations where separate property and community property of a married couple are "mixed" or commingled in a single bank account, real estate asset or brokerage account. In all the community property states, when the person claiming a separate property component of "mixed" property cannot clearly trace the separate property contribution, the mixture is covered by the general community property classification presumption. As long as the respective separate property and community property components are identifiable, however, there is no reclassification because of the act of mixing or commingling. Where the community property contribution is *de minimis*, mixing or commingling does not operate to make the entire asset community property in the community property states.[170]

b. *The Uniform Act and the Wisconsin Act*

As already noted, the Uniform Act provides special rules for unscrambling "mixed" life insurance and deferred employment benefits.[171] The Uniform Act also contains a general rule for "mixed" property which follows the community property states' rule reclassifying mixed property to community property unless the separate property component is traced.[172] According to a Uniform Act Comment, tracing in this context

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168. Wis. Stat. Ann. § 766.31(7)(f) (West Supp. 1984) (effective Jan. 1, 1986).

169. *Id.* In Wisconsin, special verdicts which identify loss of earnings and earning capacity are the rule. Milwaukee & Suburban Transport Corp. v. Milwaukee County, 82 Wis. 2d 420, 450, 263 N.W.2d 503, 519 (1978). *See* Decker & Decker, *Special Verdict Formulation in Wisconsin*, 60 Marq. L. Rev. 201, 207 (1977).

170. *See* W. McClanahan, *supra* note 34, at § 6.8.

171. *See supra* notes 148 and 155 and accompanying text.

172. U.M.P.A. § 14(a) (1983). Except as provided otherwise in Sections 12 and 13,

generally means following the appropriate tracing rules of an adopting state. The *de minimis* situation is also addressed in the Comment which notes that the ability to prove mixing where it is only *de minimis* is itself a form of tracing.[173]

The Wisconsin Act follows the Uniform Act on these tracing and commingling doctrines.[174] Unless there is an unscrambling of mixed property, mixed property is classified as marital property.[175] Neither the Uniform Act nor the Wisconsin Act specifically deals with the issue of how natural or "passive" appreciation of mixed property consisting of identifiable individual property and marital property is to be classified. Presumably the usual classification rules apply and apportion "passive" appreciation between the marital property component and the individual property component.

B. *Management and Control of Marital Property: Implementing Spousal Equality While Protecting Third Parties*

Turning from property classification rules in the community property states, the Uniform Marital Property Act, and the Wisconsin Act which are generally designed to maximize spousal sharing to rules relating to management and control of spousal shared property, it is immediately apparent that there are greater complexities in making policy choices. On the one hand, ownership rules which recognize equal spousal property rights will be seriously diluted unless there are also equal management and control rights to accompany the reformed ownership rules. On the other hand, there are legitimate practical considerations relating to third parties who engage in a multiplicity of transactions with a married person and obstacles which may complicate their transactions. Confrontation points come readily to mind. Even though wages during marriage are clearly marital property and thus owned equally by both spouses, how should third parties be affected when the wage earning spouse places his or her paycheck in a bank account which is solely in his or her name? What type of inquiries, if any, should a third party make to establish whether a donor, seller, or debtor is married and, if so, what is the classification of the property being given away, sold, or used to obtain credit? Further, since spouses may enter into valid marital property agreements which change various classifications of property and/or management and control rules, questions immediately arise as the effects of these agreements on third parties. How do spousal contracting rights affect third parties who may or may not be aware of an existing marital property agree-

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mixing marital property with property having any other classification reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced.

173. U.M.P.A. § 14 Comments (1983).

174. Wis. Stat. Ann. § 766.63(1) (West Supp. 1984) (effective Jan. 1, 1986).

175. *Id.*

ment? These are merely some examples of a myriad of situations in which tension exists between implementation of equal spousal ownership and management rules, on the one hand, and the desirability of expediting normal transactions between a married person and third parties, on the other hand. Obviously resolving these conflicting policies requires a delicate balancing of important interests.

1. The Good Faith Duty

a. Community property states

Under traditional rules, although there was equal ownership of community property by husband and wife, the husband had sole rights of management and control. These management rights were limited, however, by a good faith duty imposed upon the husband to act for the common benefit of husband and wife.[176] Litigation did little to help define the limits and content of the good faith doctrine except to clarify that the husband was not a fiduciary with customary fiduciary responsibilities, despite some judicial language to the contrary. When the American community property states revised their legislation to provide for equal management and control of community property by husband and wife, there was no attempt to clarify the meaning of the good faith duty.[177] Prior case law dealing with the good faith requirement in the context of exclusive male management will no doubt be applied to cases arising in the era of equal management and control.[178]

b. The Uniform Act and the Wisconsin Act

The Uniform Act has followed the tradition of most community property states by including only a general statement that "each spouse shall act in good faith with respect to the other spouse in matters involving marital property. . . ."[179] The Uniform Act also makes the good faith duty explicitly applicable to a spouse's management of the non-marital property of the other spouse. (This later reference appears to be merely a statement of the rules of agency which would normally apply.) The provision clarifies that a spouse is not under a good faith duty to manage his or her non-marital property to maximize income from that property (which under the classification rules would be marital).[180] Significantly, the Comment to the Good Faith section refers to the good faith requirement contained in the Uniform Commercial Code. The good faith requirement is

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176. *See* W. McClanahan, *supra* note 34, at § 9.5, W. Reppy & C. Samuel, *supra* note 50, ch. 16.

177. *See* Cal. Civ. Code § 5125(e) (West 1983). "Each spouse shall act in good faith with respect to the other spouse in the management and control of community property."

178. *See*, W. Reppy & C. Samuel, *supra* note 50, at 245-247.

179. U.M.P.A. § 2(a) (1983).

180. U.M.P.A. § 2(b) (1983).

also one of only four Uniform Act substantive provisions which may not be varied by a spousal marital property agreement.[181]

While earlier versions of Wisconsin's marital property reform bills spelled out in somewhat more detail the contents of the good faith duty,[182] the Wisconsin Act follows the language in the Uniform Act without modification.[183]

2. Title Management of Marital Property

a. *Community property states*

Reformed community property statutes dealing with spousal rights to manage and control community property present two distinct models. In lieu of traditional, exclusive male management and control of community property, seven states have adopted an "equal" management and control model. Their statutes deal specifically with certain management and control transactions involving community property. First, some transactions involving community property require joinder of husband and wife. In all seven states, there is a joinder requirement for the disposition of community real property and in several states there is also a joinder requirement for acquisition of community real property.[184] There may be some additional transactions, such as sale of household goods, which also require joinder by husband and wife.[185] In most other non-donative transactions, each spouse has a right to manage and control not only his or her interest in community property but the entire community property interest, subject to the good faith duty.

When a non-titled spouse attempts to deal with a third party and there are customary documents which do not reflect community property ownership, obvious difficulties arise. Accordingly, some of the equal management and control states have developed special legislation to deal with this situation.[186] Also several states have exclusive management and control provisions for certain business enterprises.[187]

Texas, as the first state to depart from traditional male management, follows a very different community property management and control

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181. U.M.P.A. § 3 (1983).

182. *See, e.g.*, proposed Wis. Stat. § 766.13, Assembly Substitute Amendment 2, to 1979 A.B. 1090. "Each spouse owes to the other a duty to act in good faith in the conduct of any transaction involving marital . . . property, including the duty to make full and timely disclosure of marital . . . property assets and liabilities, and to act in a manner the spouse reasonably believes to be in and not opposed to the interests of the other spouse. The management and control of marital . . . property by one spouse shall not result in an advantage for that spouse to the disadvantage of the nonmanaging spouse."

183. Wis. Stat. Ann. § 766.15(1) (West Supp. 1984) (effective Jan. 1, 1986).

184. *See* W. McClanahan, *supra* note 34, at § 9.10.

185. *See supra* note 50.

186. *See, e.g.*, N.M. Stat. Ann. § 40-3-14 (1983); Cal. Fin. Code § 851 (West Supp. 1985).

187. *See supra* note 51.

model. Under its 1967 Act, each spouse is given a right to manage solely that community property which each spouse would own if he or she were single, so long as there has been no commingling.[188] Accordingly, each spouse may exclusively manage his or her earnings, personal injury recoveries, and the income and active appreciation of his or her separate property. If community property of one spouse is commingled with the community property of the other spouse, there is joint management requiring joinder of both spouses.[189] In addition, Texas law explicitly protects third parties dealing with a spouse where the third party has no actual or constructive notice of a spouse's lack of authority, is not a party to fraud upon the other spouse, and relies upon the presumption that the property is subject to sole management by that spouse because of a document of title or possession by the spouse.[190] Thus, Texas reformed management and control rules deny management and control rights to a non-titled or nonwage earning spouse. Further, even where there has been commingling, the dual or joint management rule may be ineffective because a spouse may act unilaterally if title to such property is in his or her name or if he or she has possession of non-titled community property.

b. The Uniform Act and the Wisconsin Act

Although earlier drafts of the Uniform Act contained alternatives for "equal management and control" and "title based management and control," the Uniform Act as adopted includes only a title based management system for marital property,[191] together with certain new titling options for spouses[192] and a new remedy for a non-titled spouse.[193] The Uniform Act's management and control section begins with the statement that a spouse acting alone may manage and control marital property "held"[194] in that spouse's name alone, non-titled marital property, a life insurance policy owned by that spouse, deferred employment benefits from that spouse's employment, claims for relief vested in that spouse by other laws and marital property held in the names of the spouses in the alternative ("or") form. Spouses must act together in managing and controlling marital property if the property is held in the names of both spouses in the conjunctive ("and") form. To underscore the bifurcation between marital property *ownership* rights and marital property *management and control* rules, the Uniform Act's management and control section explicitly states that "the right to manage and control marital property does not determine the classification of property of the spouses and does not rebut the (gen-

188. *See supra* note 44.
189. *See supra* note 45.
190. *See supra* note 46.
191. U.M.P.A. § 5 (1983).
192. U.M.P.A. § 11.
193. U.M.P.A. § 15(c) (1983).
194. U.M.P.A. § 1(9) (1983).

eral) presumption (favoring the marital property classification) . . ."[195] The same section also clarifies that when marital property is transferred to a trust, management and control rights are determined by the terms of the trust.[196]

The Uniform Act also contains a separate section relating to bona fide purchasers dealing with a spouse having management and control rights under the Act's title management system.[197] If a third party comes under the definition of the protected class, the transaction is free from any claim of the other spouse or a successor in interest to that spouse.[198] (A transaction by the managing spouse which breaches the good faith duty is subject, however, to interspousal remedies.[199]) The Uniform Act's statutory protections for bona fide purchasers may not be varied by a marital property agreement.[200] These protections for bona fide purchasers are an integral part of the Act's title based management system designed to expedite numerous third party transactions.

In view of the Uniform Act's heavy reliance upon title based management and the protections offered to bona fide purchasers dealing with a titled spouse, there is a particularly important provision in the Act's Remedies section for adding the name of a non-titled spouse to a document of title covering marital property.[201] The availability of this remedy is subject to certain limitations. The "add-a-name" remedy cannot be granted for a general partnership interest, professional entity, unincorporated business operated by the other spouse, or other property where the addition "would adversely affect third party rights."[202]

Until the adoption of the Uniform Act, all drafts of Wisconsin's marital property reform bill incorporated an equal management and control model. Earlier versions required joinder for disposition and acquisition of marital real property. To expedite normal transactions, these bills also contained language protecting third parties dealing with a titled spouse and provided for sole management and control for marital property businesses when only one spouse operated or managed the business.

Once the Uniform Act was adopted, Wisconsin legislative sponsors gave serious consideration to the Act's titled based approach to management and control in order to promote uniformity and ease of transition. There was particular concern, however, as to whether, under the Uniform Act's approach, a non-wage earning spouse would have restricted access to credit despite the marital property wages of the other spouse. Accordingly, when Wisconsin adopted the Uniform Act's titled based management and

195. U.M.P.A. § 5(d) (1983).
196. U.M.P.A. § 5(c) (1983).
197. U.M.P.A. § 9 (1983).
198. U.M.P.A. § 9(c) (1983).
199. U.M.P.A. § 15(a) (1983).
200. U.M.P.A. § 3 (1983).
201. U.M.P.A. § 15(c) (1983).
202. U.M.P.A. § 15(c)(1)-(4) (1983).

control rules,[203] the Wisconsin Act contained certain important additions or clarifications relating to access to credit.[204] With those additions or clarifications, the Wisconsin legislative sponsors concluded that there was little functional difference between the Uniform Act's management and control rules and alternative equal management and control rules when those latter rules included protections for third parties in dealings with a titled spouse.

3. Equal Access to Credit Based Upon Marital Property

a. *Community property states*

Regulation B was adopted by the Board of Governors of the Federal Reserve System to implement the Equal Credit Opportunity Act (ECOA) of 1974.[205] It addresses the issue of credit practices in community property states as well as common law property states and has been interpreted by the Federal Reserve Board staff and at least one court to prohibit creditors from requiring the signature of the non-applicant spouse if the applicant spouse is empowered by state law to manage and commit community property assets.[206] Although the issue has not been finally resolved, more and more creditors in community property states appear to be complying with the Board staff's position. Thus, non-wage earners in the seven community property states with equal management and control rules, unlike nonwage earners in common law property states, are generally considered creditworthy based upon their rights of equal ownership and equal management and control of community property without the signature of the non-applicant, wage earning spouse.

b. *The Uniform Act*

Access to unsecured credit by homemakers and/or lesser wage earning spouses on the same terms and under the same conditions that credit is made available to the primary wage-earnings spouse has been an important goal of marital property reform. The Uniform Act's approach to the implementation of this goal differs significantly from that of the community property states which have enacted equal management and control statutes. Uniform Act drafters believe that unsecured credit will become

203. Wis. Stat. Ann. § 766.51 (West Supp. 1984) (effective Jan. 1, 1986). Wisconsin's existing joinder requirement governing disposition of a married couple's homestead, regardless of ownership, is not changed by the Act's management and control provisions.

204. Wis. Stat. Ann. §§ 766.51(1m) and 766.56 (West Supp. 1984) (effective Jan. 1, 1986).

205. 12 C.F.R. § 202 (1983). (Pub. L. No. 93-494, tit. V, § 503, 88 Stat. 521 (1974) (codified as amended at 15 U.S.C. §§ 1691-1691(f) (1982)).

206. Fed. Reserve Bd. Interpretive Letter No. 73 (May 28, 1982). Clark v. AVCO Financial Services, No. CIV 80-272 (D. Ariz. Oct. 29, 1981). *See* Taylor, *The Equal Credit Opportunity Act's Spousal Cosignature Rules and Community Property States: Regulatory Haywire*, 37 Sw. L.J. 1039 (1984).

available to non-wage earning and lower wage earning spouses under the Uniform Act as the result of its obligations (debt) classification and satisfaction rules.

In the Uniform Act's section on Obligations, there is a presumption that obligations arising during marriage are incurred "in the interest of the marriage or the family."[207] That section further provides that a marital obligation may be satisfied from all marital property and the non-marital property of the incurring spouse.[208] There is an additional category of debts relating to support of the other spouse or a child of the marriage. Support obligations may be satisfied from all marital property and the non-marital property of the obligated spouse.[209] Because marital property, particularly spousal wages, is available for satisfaction of support and marital obligations, drafters of the Uniform Act believe that creditors will grant credit to homemakers under the Act's marital property system.

c. *The Wisconsin Act*

Equal access to credit, whether the applicant spouse is the primary wage earner or not, has been a high priority Wisconsin marital property reform goal for almost a decade. In reviewing the Uniform Act's provisions, sponsors were concerned that equal access to credit by nonwage earning or lesser wage earning spouses depended exclusively upon the enlightened self interest of creditors realizing that all marital property was available for marital and support obligation satisfaction. The Act does not directly establish an equal right to credit. The Wisconsin Act, therefore, amplifies the Uniform Act's management and control section by adding an explicit provision specifying each spouse's equal management and control right for the purpose of obtaining credit.[210] Under that provision, a spouse's right to manage and control marital property is subject to certain business exceptions.[211] In addition, the Wisconsin Act contains a new section covering Credit Transactions also designed to implement equal spousal access to credit as an integral part of the new marital property system.[212]

The "trailer bill" clarifies two aspects of the special Wisconsin Act language added to the Management and Control section relating to equal access to credit. The revised language clearly states that the subsection covers only obtaining unsecured credit for obligations classified as marital obligations. The "trailer bill" also contains certain clarifications of the

207. U.M.P.A. § 8(1) (1983).
208. U.M.P.A. § 8(b)(ii) (1983).
209. U.M.P.A. § 8(b)(i) (1983).
210. Wis. Stat. Ann. § 766.51(1m) (West Supp. 1984) (effective Jan. 1, 1986).
211. Wis. Stat. Ann. § 766.70(3)(a)-(d) (West Supp. 1984) (effective Jan. 1, 1986) is expressly cross-referenced in § 776.51(1m).
212. Wis. Stat. Ann. § 766.56 (West Supp. 1984) (effective Jan. 1, 1986).

separate Credit Transactions section.[213] Three provisions are particularly note-worthy. The first states that, in evaluating creditworthiness for a marital obligation, a creditor is required to consider all marital property available to satisfy that obligation of a married applicant in the same manner that the creditor considers property of an unmarried applicant available to satisfy such an applicant's obligation. The second clarifies that a creditor is bound by the terms of a spousal marital property agreement or a court ordered interspousal remedy if the applicant spouse provides the creditor with a copy of the agreement or court decree prior to the time credit is extended. The third applies only to transactions covered by the Wisconsin Consumer Act and requires creditors who extend credit or increase a line of credit for marital obligations to provide written notice to the non-applicant spouses.

This last provision relating to written notice from a creditor was part of earlier versions of Wisconsin marital property reform. It was subsequently deleted only to be added back immediately prior to final passage of the Wisconsin Act. The stated rationale behind the notice requirement is to increase the amount of relevant and accurate information available to the non-applicant spouse to assist realistic family financial planning. While some creditors have labeled the required notice a "tattletale" provision, other creditors believe that such notice will lessen collection problems.

4. Gifts of Marital Property

a. *Community property states*

The conditions under which a spouse may make gifts of community personal property to third parties is another aspect of management and control rules. They merit separate attention because, unlike purchases and sales, gifts deplete the community of assets. Under a traditional community property system with exclusive male management and control, there is a rule of reasonableness governing the husband's right to gift community personal property. Gifts disproportionately large in relation to community assets or large gifts to unrelated individuals are presumptively invalid. Even before recent equal management and control legislation, some states required that a wife consent to any transfer made by her husband without valuable consideration. The majority of community property

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213. The "trailer bill" repeals a provision that required a creditor to inquire whether any document (marital property agreement or court order under the Remedies section) exists affecting or altering the ownership or management and control rights to marital property. It substitutes a notice requirement to be printed on all written credit applications governed by the Wisconsin Consumer Act that no marital property agreement or court decree under the Remedies section may adversely affect a creditor unless the creditor is furnished a copy or has knowledge of the adverse provisions when credit is extended. It also integrates the Act with numerous consumer protections contained in the Wisconsin Consumer Act.

states now require spousal consent for gifts of community property while a minority retain the traditional Spanish rule, requiring reasonableness in the size of the gift for valid unilateral gifts of community property.[214]

b. The Uniform Act and the Wisconsin Act

The Uniform Act has incorporated a simplified version of the traditional Spanish gift rule. It authorizes a spouse with management and control rights to make unilateral gifts of marital property which are reasonable "considering the economic position of the spouses."[215] A new "safe harbor" concept has also been included in the Uniform Act to provide an absolute shelter for gifts totaling a specified dollar amount per year to an individual or entity.[216] The amount suggested in the Uniform Act is five hundred dollars but the amount has been bracketed to indicate that adopting states may wish to set the amount at a different level.

The earliest version of Wisconsin marital property reform adopted a different approach to gifts. It required spousal consent for all gifts of marital property and written consent when the amount exceeded three thousand dollars per donee per year. This amount reflected the annual federal gift tax exemption then available. A spouse's signature on a federal gift tax form satisfied the required written consent. In 1980, the Assembly Judiciary Committee changed the proposed gift rules so that gifts of marital property required consent only if the gifts were "unreasonable" or "immoderate." The Wisconsin Act adopts the Uniform Act's gift provisions without modification, including the five hundred dollars "safe-harbor" amount.[217] Sponsors concluded that the Uniform Act's gift provision represented a reasonable balancing between a universal joinder requirement and a broad right to make unilateral gifts of marital property.

5. Remedies

a. Community property states

Traditionally, interspousal remedies have not been available to spouses during the on-going marriage in a community property state. Even the new equal management and control statutes leave unclear the extent to which legal remedies are available during marriage to enforce the good faith management standard as well as the nature of possible remedies.[218] At termination of a marriage by divorce or death, however, it is not uncommon in the community property states that adjustments are

214. *See* W. McClanahan, *supra* note 34, at §§ 9.11-9.12.
215. U.M.P.A. § 6(a) (1983).
216. *Id.*
217. Wis. Stat. Ann. § 766.53(1) (West Supp. 1984) (effective Jan. 1, 1986).
218. *See* McClanahan, *supra* note 34, at § 9.12, Bruch, *supra* note 5, 34 Hastings L.J. at 236-38.

made to reflect various post marriage remedies, particularly for impermissible gifts.

b. The Uniform Act

Interspousal and other remedies are available under the Uniform Act when there has been a breach of a spouse's good faith duty to manage[219] or a violation of the joinder requirements for gifts.[220] Other remedies are also available during an on-going marriage. They include an accounting, a declaration of spousal ownership rights, "access," and what has been informally described as the "add-a-name" remedy, an important part of the Uniform Act's title based management and control system.[221] This remedy permits a court to add the non-titled spouse's name to certain documents of title covering a marital property asset. Such a remedy thus provides management and control rights for a spouse who secures an order.

There are limitations, however, on the availability of certain Uniform Act remedies. The "add-a-name" remedy, for example, is not available for a general partnership interest, professional entity, and unincorporated business assets "if the other spouse is the only spouse involved in operating or managing the business", or "any other property if the addition would adversely affect the rights of a third person." Both the Interspousal Remedies section and the section providing remedies for gifts contain a relatively brief statute of limitations.[222]

c. The Wisconsin Act

Provision for a variety of interspousal and other remedies available during marriage and at the death of one spouse has been a salient feature of Wisconsin marital property reform legislation since its initial introduction in 1979. The Wisconsin Act contains all of the Uniform Act's remedies but also incorporates some additional ones "if the marital property has been or is likely to be substantially injured by the other spouse's gross mismanagement, waste or absence."[223] These additional remedies include limitation or termination of management and control rights in marital property, naming one spouse the sole manager of the marital property, division of existing obligations, assignment of future obligations to the incurring spouse, and classification of property as the individual property of the acquiring spouse.[224] There is an important limitation to these additional remedies: they cannot adversely affect bona fide purchasers. An-

219. U.M.P.A. § 15(a) (1983).

220. U.M.P.A. § 6(b) (1983). Strictly speaking, there is no joinder requirement. The spouses are required to "act together." U.M.P.A. § 6(a) (1983).

221. U.M.P.A. §§ 15(b) and (c) (1983).

222. U.M.P.A. §§ 6(b) and 15(d) (1983).

223. Wis. Stat. Ann. § 766.70(4) (West Supp. 1984) (effective Jan. 1, 1986).

224. *Id.*

other remedy permits set-offs, when, for example, marital property has been used for satisfaction of a non-marital obligation.[225] Finally, there are recovery or reimbursement actions for marital property gifts made by one spouse without the required consent of the other spouse.[226] The "trailer bill" reorganizes and clarifies the Remedies section.[227]

The Wisconsin Act contemplates that a divorce court may consider whether a spouse who forebears bringing meritorious interspousal litigation during the marriage in order to "save the marriage" may have that factor considered when spousal property is divided at divorce.[228]

C. *Marital Property Agreements: Expanding Contractual Freedom While Providing Appropriate Spousal Protections*

Much has been written about policies relating to enforcement of spousal agreements at divorce and the general desirability of contractual property arrangements between spouses.[229] Competing policies in this area of the law are numerous and complex. On the one hand, there are advocates who foresee these agreements as the wave of the future, an important mechanism whereby two adults married or about to marry agree upon key rules to govern many aspects, including economic issues, of their marriage and, perhaps, marital termination. Many of these advocates prefer that these agreements be governed by normal contract rules which they believe are adequate to handle most issues that may arise.[230] Other observers believe that marital agreements are unlike regular businèss contracts and rarely involve negotiations that can be described as "arm's length." These observers are concerned about issues such as substantive

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225. Wis. Stat. Ann. § 766.70(5) (West Supp. 1984) (effective Jan. 1, 1986).

226. Wis. Stat. Ann. §§ 766.53(2) and 766.70(7), (8), and (9) (West Supp. 1984) (effective Jan. 1, 1986).

227. The "trailer bill" relocates and amplifies the remedy authorizing a right of recovery when a unilateral gift of marital property exceeds the permissible limit from the Gifts section to the Remedies section. New provisions deal with gifts which become complete upon death of a spouse such as payable on death accounts, revocable trusts, and certain bonds. Additional provisions clarify distinct remedies which are available when a spouse makes a gift of marital property to a third person in the form of a joint tenancy between the donor spouse and third person. The "trailer bill" also revises the statute of limitations for the gift remedy. The three year period has been replaced with a one-year "discovery" period during marriage and an absolute one year period following dissolution or death. Under the "discovery" rule, an action must be commenced either one year after notice or when the objector should have had notice.

228. Wis. Stat. Ann. § 767.255(5e) (West Supp. 1984) (effective Jan. 1, 1986). This provision is repealed by the "trailer bill" because it was viewed as unnecessary. Recent Wisconsin case law, specifically Anstutz v. Anstutz, 112 Wis. 2d 10, 13, 331 N.W.2d 844, 846 (1983) acknowledges that economic mismanagement is a factor that a court may consider in determining an appropriate property division. Wisconsin is listed among the states where economic misconduct is a factor to be considered in property division at divorce in Freed & Foster, *supra* note 5 at 324.

229. *See e.g.*, Weitzman, *supra* note 24.

230. *See* Shultz, *supra* note 24.

fairness or consideration, broadened definitions of coercion and undue influence, disclosure requirements and the problem of changed circumstances when the agreement is enforced.[231] At times, these policy disagreements are stated in terms of certainty and predictability, on the one hand, versus judicial discretion, equity, and a case-by-case approach, on the other hand.

1. Community Property States

At a very early period, the French and Spanish community property systems recognized pre-marital agreements, although the Spanish rules permitted a broader array of such agreements than did the French rules. In all community property states except Washington, some legislation has been enacted permitting spouses to enter into pre-marital agreements relating to their property. All such laws require signed writings plus some additional formalities, typically requiring acknowledgements for property deeds. Most statutes require recording for an agreement to be effective against third parties and do not restrict the contents or the ability of a married couple to make alterations during marriage.[232]

As to spousal agreements during marriage relating to property rights, the laws of the individual community property states are diverse. Texas was most restrictive. In 1980, the Texas constitution was amended to broaden the scope of agreements between spouses, both pre-marital and during the marriage.[233] California, on the other hand, permits many types of marital agreements and has enforced oral spousal agreements relating to community real property from an early date.[234]

One important feature of a marital property agreement is unique to Washington and Idaho. As enacted by Washington in 1881, "Washington Community Property Agreement" legislation permits spouses to agree to the disposition of community property then owned or thereafter acquired "to take effect upon the death of either."[235] The Washington legislation

231. *See* Sharp, *supra* note 23.

232. *See* W. McClanahan, *supra* note 34, at §§ 8.2-8.18.

233. Tex. Const. art. XVI, § 15. *See* Vaughn, *Texas Amends Its Constitution and Its Community Property System*, 8 Community Prop. J. 59, 62 (1981).

234. *See* McClanahan, *supra* note 34, at 427.

235. Wash. Rev. Code Ann. § 26.16.120 (1961).

> *Agreements as to status.* Nothing contained in any of the provisions of this chapter or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: *Provided, however,* That such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior

permits the right of survivorship to be added to community property as a non-probate transfer without the formalities required for a valid will. Upon death of a spouse, the agreement itself directly transfers the decedent spouse's interest in community property. A typical Washington community property agreement has three prongs. The first converts all present property of the spouses to community property. The second is an agreement that all future acquisitions of either or both spouses will be community property. The third provides that at the death of the first spouse, all property covered by the agreement will automatically vest in the surviving spouse.[236] A subsequent will is ineffective to dispose of property covered by the agreement and there can be no unilateral revocation of such an agreement.[237]

Idaho's version of the Washington provision is of recent origin.[238] It

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court to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party.

236. *See* Cross, *The Community Property Law in Washington*, 49 Wash. L. Rev. 729, 798, 805 (1974); Oltman & Reutlinger, *The Statutory Community Property Agreement as a Will Substitute on the Death of the Second Spouse*, 19 Gonz. L. Rev. 511, 512 (1983/1984]); Comment, *The Community Property Agreement: A Probate Cure with Side Effects*, 18 Gonz. L. Rev. 121 (1982/1983]). When a spousal agreement disposes of property not only at the death of the first spouse but also at the death of the second spouse, certain unintended problems may arise, particularly when the interests are legal and not equitable. The Wisconsin Act's "trailer bill" provides that in such a situation, the surviving spouse shall have a right to amend the agreement unless the agreement expressly provides otherwise and except to the extent the property is held in trust.

237. *Id.* In Lyon v. Lyon, 100 Wash. 2d 409, 412-13, 670 P.2d 272, 275 (1983), a Washington Community Property Agreement between husband and wife was held to transform a joint tenancy gift subsequently given to the husband and his brother by his father when the husband died first. The court concluded that the surviving spouse and her brother-in-law held the former joint tenancy as tenants in common.

238. Idaho Code (c) and (d) § 15-6-201 (1979).

> (c) In the case of agreements to pass property at death to the surviving spouse, such agreements shall be executed in writing, acknowledged or proved in the same manner as deeds to real property, contain a description of all real property, be altered or amended in the same way, and shall be revoked in the event husband and wife are subsequently divorced. The existence of such an agreement shall not affect the rights of creditors and any debt, cause of action or any obligation which could have been presented as a claim against the property of the decedent's estate shall survive against the other parties to the agreement; statutes of limitations on any such debts, causes of action, choses in action, or other legal obligations shall continue to run as though the deceased person had survived and any action brought against the persons succeeding to such property shall be brought within the period listed for the commencement of such action, provided that recovery against the person succeeding to such property shall be limited to the fair market value of the property at the time of the death of the decedent.
>
> (d) No such agreement shall be effective to pass title to property until it has been recorded, prior to the death of any party thereto, in the recorders' office of the county of the domicile of the decedent and of each county in which real property described therein is located; nor shall any amendment to any such agreement be effective for any purpose until such amendment has been recorded in like manner prior to the death of any party thereto.

differs from its Washington counterpart because it is derived from the Uniform Probate Code's provision authorizing non-testamentary contractual beneficary designations.[239] Both Washington's and Idaho's provisions have proven to be popular with lay persons as non-probate estate planning documents despite lawyers' concerns about their inflexibility.[240]

2. Common Law Property States

Pre-marital agreements and agreements made by spouses which vary spousal property rights historically have not received favorable treatment in common law property states. Before the passage of Married Women's Property Acts, spousal agreements were not legally possible because of the legal incapacity of a married woman to contract and pre-marital agreements were automatically extinguished upon marriage based upon the legal doctrine that marriage merged the legal identities of man and woman. In addition, there were judicial holdings that pre-marital and spousal agreements which contemplated that marriage might end in divorce were void as against public policy.

Even where agreements are recognized, there are other substantial limitations on pre-marital and during the marriage agreements that are primarily imposed by case law. These include requirements that such agreements be in writing and be supported by consideration or be substantively "fair". Full disclosure or notice of all relevant facts is often required. Some courts note whether each spouse retained independent counsel or had the opportunity to do so as a factor to be considered before determining whether an agreement is enforceable.[241]

Wisconsin is not unusual in its prior statutory and case law treatment of pre-marital or spousal agreements. Under the Wisconsin Probate Code, spouses were able to waive surviving spousal protections, particularly the right to elect a statutory share against the decedent spouse's will,

239. U.P.C. § 6-201. Professor Richard Effland has suggested that Arizona's adoption of U.P.C. § 6-201 will permit transactions similar to those in Washington (and Idaho) not restricted, however, to community property. Effland, *Estate Planning Under the New Arizona Probate Code*, 1974 Ariz. St. L.J. 1, 19.

240. *See supra* note 236.

241. Minn. Stat. Ann. § 519.11(1)(b) (West Supp. 1985) requires that, in order for an antenuptial agreement is to be valid, that "the parties have had an opportunity to consult with legal counsel of their own choice." At one time, Washington case law held that a marital agreement where each spouse does not have independent representation was invalid. Friedlander v. Friedlander, 80 Wash. 2d 293, 494 P.2d 208, 214 (1972). *But see* In re Marriage of Hadley, 88 Wash. 2d 649, 655, 565 P.2d 790, 793 (1977). *See* Comment, *Antenuptial and Postnuptial Contracts in Washington*, 54 Wash. L. Rev. 135, 151-58 (1978). *See also* Note, *The Antenuptial Contract in Ohio*, 28 Case W. Res. L. Rev. 1040, 1064-66 (1978) (proposing a rebuttable presumption that parties bargained at arms' length if both were represented by independent counsel).

by means of a signed, written agreement.[242] Wisconsin case law imposed consideration and disclosure requirements.[243]

Under Wisconsin's reformed divorce law, among the statutory factors to be considered in a property division is the existence of a written agreement which is binding upon the court unless the terms are inequitable to either party.[244] The statute contains a presumption that the agreement is equitable. Further, under Wisconsin's statute dealing with support following divorce, among the factors to be considered by the court in granting maintenance payments is "any agreement made by the parties under which one spouse has made financial or service contributions to the other with the expectation of future reciprocity or compensation and no such repayment has been made or any other agreement concerning any arrangement for the financial support of the parties."[245] Outside of these Probate Code and divorce law statutory provisions and the case law interpreting them, Wisconsin law is silent as to the enforceability of other types of marital property agreements.

3. Uniform Act

The Uniform Act has a comprehensive section on marital property agreements because the Act's drafters early recognized that permitting spouses and couples about to marry to enter into enforceable agreements varying their property rights was an essential component of any reformed property system. They anticipated that in a jurisdiction adopting the Uniform Act, marital property agreements will be very popular, not only in a second marriage situation, but with married couples generally. These agreements would permit couples to change the property classification rules generally (a "maxi" agreement) or to finely tune the property system's ownership or management and control rules as to one or several assets only (a "mini" agreement).

The required formalities in the Uniform Act are minimal, a signed writing. The Marital Property Agreement section is explicit that no consideration is required.[246] Two standards for enforceability are set forth. The first relates to pre-marriage agreements and incorporates without modification provisions from the Uniform Premarital Agreements Act. A pre-marital agreement is not enforceable under either Uniform Act if it was not voluntarily executed *or* it was unconscionable when made. For the purposes of this section, unconscionability means that a spouse did not

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242. Wis. Stat. Ann. § 861.07(1) (West 1971).

243. *See, e.g.*, Estate of Beat, 25 Wis. 2d 315, 321, 130 N.W.2d 739, 742 (1964); Estate of Knippel, 7 Wis. 2d 335, 345, 96 N.W.2d 519, 519-20 (1959). For a comprehensive discussion of Wisconsin law, *see* K. Christiansen, F. Haberman, J. Haydon, D. Kinnamon, M. McGarity, & M. Wilcox, Marital Property Law in Wisconsin ch. 7 (1984).

244. Wis. Stat. Ann. § 767.255(11) (West 1981).

245. Wis. Stat. Ann. § 767.26(8) (West 1981).

246. U.M.P.A. § 10(a) (1983). "A marital property agreement must be a document signed by both spouses. It is enforceable without consideration."

receive "fair and reasonable" disclosure of property and obligations of the other spouse, a spouse did not have notice of property and obligations of the other spouse, *and* there was no signed written agreement expressly waiving the right to receive disclosure beyond that provided.[247] The minimal procedural and substantive requirements of the Uniform Acts make it fairly easy to assure enforceability of a pre-marriage marital property agreement.

Different standards apply to enforcing property agreements made during marriage under the Uniform Marital Property Act.[248] A close reading is required to discern the important differences between the Act's rules governing enforceability of pre-marital agreements and its rules governing the enforceability of agreements entered into by spouses during marriage. A spousal agreement made during marriage is not enforceable under the Act if it was unconscionable when made *or* it was not voluntarily executed *or* a spouse did not receive fair and reasonable disclosure of property and obligations of the other spouse, a spouse did not have notice of property and obligations of the other spouse, *and* there was no signed writing expressly waiving the right to receive disclosure beyond that provided.

The difference between the two enforcement standards turns upon whether unconscionability is an independent factor. For agreements made during the marriage, unconscionability *when made* is an independent factor. Disclosure or waiver of disclosure is also an independent factor. For pre-marital agreements, however, unconscionability is defined only in terms of disclosure or waiver of disclosure. In each instance, the ultimate determination of whether an agreement is unconscionable is a matter of law for the court.[249]

The Uniform Act's limitations upon the subject matter of marital property agreements are few but significant. An agreement may not affect the right of a child to support, the good faith duty to manage and control marital property, the requirement that a creditor must have had prior actual knowledge of a provision of a marital property agreement in order to be adversely affected, and the rule that bona fide purchasers (as defined by the Uniform Act) take marital property purchased from a spouse with a right to manage and control the property free from any claim of the other spouse (or that spouse's successors in interest).[250] A fifth limitation relates to a marital property agreement which modifies or eliminates spousal support if, at the time of divorce, that provision leaves a spouse eligible for public assistance.[251] In that situation, the Uniform Act permits

247. U.M.P.A. § 10(g) (1983).
248. U.M.P.A. § 10(f) (1983).
249. U.M.P.A. § 10(h) (1983).
250. U.M.P.A. §§ 10(b) and (c) (1983).
251. U.M.P.A. § 10(i) (1983).

a court to require support payments by the other (now former) spouse "to the extent necessary to avoid that eligibility."[252]

Comments to the Uniform Act's Marital Property Agreement section note that defenses ordinarily available in contract actions such as fraud, coercion, undue influence, and lack of capacity continue to be available in an enforcement proceeding.[253] The Act also "red circles" or "grandfathers" existing marital property agreements.[254] Their enforceability is to be determined by the applicable law in effect at the time of execution.[255] Finally, the Act specifically provides that a marital property agreement may be amended or revoked only by a later marital property agreement.[256]

The approach of the Uniform Act is to give "almost unlimited contractual freedom for persons who want to amend, avoid or adopt its provisions" unless the agreement violates public policy or a statute imposing a criminal penalty.[257] Included in the list of subjects for marital agreements, in addition to variations of property classification and management and control rules, is a provision based upon the "Washington Community Property Agreement" legislation which permits spouses to add the right of survivorship not only to the decedent's interest in marital property but also to the decedent's individual or non-marital property and to property of the surviving spouse.[258]

4. The Wisconsin Act

All Wisconsin marital property reform proposals contained key sections authorizing marital property agreements. In contrast to the Uniform Act, many of these earlier provisions required additional formalities,[259] consideration,[260] and full and fair disclosure; they determined unconscionability at the time of enforcement of agreements; and they codified certain common law defenses to an enforcement action such as undue influence, fraud, coercion, or mistake. Filing of an agreement in a public

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252. *Id.*

253. U.M.P.A. § 10 Comments (1983).

254. U.M.P.A. § 10(j) (1983).

255. *Id.*

256. U.M.P.A. § 10(d) (1983).

257. U.M.P.A. § 10 Comments (1983).

258. U.M.P.A. § 10(c)(6) (1983). Spouses may agree to "a provision that upon the death of either of them, any of their property, including after acquired property will pass without probate to a designated person, trust, or other entity by nontestamentary disposition."

259. These included two witnesses but did not include "direction" and "presence" requirements typically found in statutes governing will execution formalities. *See, e.g.*, Wis. Stat. Ann. § 853.03 (West 1971). An alternative was signing in the presence of a notary public.

260. Earlier versions of the Wisconsin Act not based upon the Uniform Act required "adequate" consideration for enforceable agreements covering interspousal gifts of future income or assets. No consideration was required, however, for gifts of existing property.

registry was specifically authorized, although not required. The earlier bills listed the following subjects as appropriate for a marital property agreement: choice of law when spouses resided in two different jurisdictions; agreements to resolve disputes arising under marital property agreements or under the new property system generally through arbitration; and a version of the "Washington Community Property Agreement" legislation.

The Wisconsin Act contains several policy modifications of the Uniform Act. First, the Act contains a single standard for enforceability of agreements.[261] With one important exception, it adopts the Uniform Act standards applicable to enforcement of marital property agreements made during the marriage. That adoption reflects both the preference for a single standard and concern that the Uniform Act's standard applicable to enforcement of pre-marital agreements lacks sufficient protections. The Wisconsin Act modified, however, the Uniform Act's right to waive disclosure provision and substituted a minimum general disclosure requirement.[262] The "trailer bill" deletes the awkwardly-worded disclosure requirement and clarifies that the extent of disclosure required will depend upon the circumstances.[263] For example, disclosure for a marital property agreement affecting most of the spouses' property will require more comprehensive disclosure than will a marital property agreement which affects a proportionately small amount of spousal property

As to the Uniform Act's provisions relating to marital agreements which modify or eliminate spousal support, the Wisconsin Act contains certain changes.[264] In particular the Act does not permit an agreement to reduce spousal suport below a necessary and adequate level. The "trailer bill" specifies that a provision of a marital property agreement may not affect the new permanent support allowance authorized in the Wisconsin Act for needy surviving spouses.[265]

The Wisconsin Act also added a provision to the Marital Property Agreement section to deal with the situation where one attorney represents both spouses in drafting a marital property agreement.[266] The added provision states that such representation "by itself" does not make the agreement unconscionable if independent representation has been waived by both spouses in writing. Further, the Act gives specific authorization for spousal agreements to arbitrate disputes arising under a marital property agreement or under the Act, enforceable under Wisconsin's general

261. Wis. Stat. Ann. § 766.58 (6) (West Supp. 1984) (effective Jan. 1, 1986).
262. Wis. Stat. Ann. § 766.58 (6)(c)(2) (West Supp. 1984) (effective Jan. 1, 1986).
263. Subsection (6)(c)(2) is repealed entirely by the "trailer bill." Subsection (6)(c)(1) is amended by adding "under the circumstances."
264. Wis. Stat. Ann. §§ 766.58 (9)(a) and (b) (West Supp. 1984) (effective Jan. 1, 1986).
265. Wis. Stat. Ann. § 861.35 (West Supp. 1984) (effective Jan. 1, 1986).
266. Wis. Stat. Ann. § 766.58(8) (West Supp. 1984) (effective Jan. 1, 1986).

arbitration chapter.[267] The Act also gives authorization for the recording of marital property agreements in the county register of deeds office is included, although filing is not required.[268]

Finally, a new transitional provision contained in the "trailer bill" is particularly noteworthy. It authorizes marital property agreements under the Act to be executed before the determination date to take effect on the determination date. It is anticipated that a number of such agreements will be executed in Wisconsin prior to January 1, 1986.

CONCLUSION

The adoption of the Uniform Marital Property Act in 1983 and the Wisconsin Marital Property Act in 1984 will, no doubt, accelerate the movement toward marital property reform in common law property states. These events will also encourage review of existing law within the community property states. The above review of some of the key aspects of the Wisconsin legislation was intended to explain the Wisconsin experience and its major guiding principles. It was also designed to identify and provide a checklist of policy choices relating to the three central areas of property classification,[269] management and control,[270] and marital property agreements,[271] which must be confronted by those advocating a reformed community property model. Each state adopting a form of reformed community property must reflect and decide upon its own appropriate emphasis and balancing. In making these important and difficult legislative policy decisions, the Wisconsin experience in enacting marital property reform legislation based upon the Uniform Marital Property Act should provide significant guidance.

267. Wis. Stat. Ann. § 766.58(10) (West Supp. 1984) (effective Jan. 1, 1986).
268. Wis. Stat. Ann. § 766.58(11) (West Supp. 1984) (effective Jan. 1, 1986).
269. *See supra* notes 87-175 and accompanying text.
270. *See supra* notes 176-228 and accompanying text.
271. *See supra* notes 229-268 and accompanying text.