WISCONSIN’S MARITAL PROPERTY LAW: AN OVERVIEW

INTRODUCTION

This Information Memorandum provides an overview of Wisconsin’s marital property law, which became effective January 1, 1986. Because this memorandum is an overview, it does not represent an exhaustive treatment of the current statutory framework for the marital property law and court interpretation of that framework. Furthermore, because of the scope of the marital property law, answers to marital property-related questions often involve additional laws, such as tax law and probate law. Therefore, when specific questions relating to the marital property law arise, the applicable law itself should be consulted and, if the situation warrants, the advice of legal counsel should be sought.

The basic provisions of the marital property law were contained in 1983 Wisconsin Act 186, relating to establishing a system of marital property shared by husband and wife. The provisions of Act 186 have been refined, clarified, amended and supplemented by 1985 Wisconsin Act 37, 1987 Wisconsin Act 393 and 1991 Wisconsin Acts 224 and 301. 1993 Wisconsin Act 160 affected the marital property interest in individual retirement accounts. 1997 Wisconsin Act 188 revised a surviving spouse’s elective rights to deferred marital property. Within the statutes, the basic features of the marital property law are found in ch. 766; other provisions are contained in the tax laws, probate laws and other areas of the statutes.

The marital property law comprehensively revised Wisconsin’s previous common law, or separate property, system defining the property rights of married persons. The principal feature of the marital property system currently in place is that, by operation of law, both spouses have an equal ownership interest in certain property; generally, property acquired by either or both spouses during marriage, including income, except property acquired by gift or inheritance. Under the previous common law system, property acquired during the marriage generally belonged to the spouse who acquired the property.

The Wisconsin marital property law is substantially based on the Uniform Marital Property Act (UMPA), approved by the National Conference of Commissioners on Uniform State Laws on July 28, 1983. Both the Wisconsin law and the UMPA follow many of the principles of the laws of the eight other “community property” states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington).
The principle underlying **UMPAP**, as articulated by the Commissioners, follows:

...The fundamental principle that ownership of all of the economic rewards from the personal effort of each spouse during marriage is shared by the spouses in vested, present, and equal interests is the heart of the community property system. It is also the heart of the Uniform Marital Property Act. Common law states have been moving closer and closer to the sharing concept in both divorce and probate legislation, and the Uniform Marital Property Act builds on the direction of that movement. Sharing is seen as a system of elemental fairness and justice so that those who share in the many and diverse forms of work involved in establishing and maintaining a marriage will have a protected share in the material acquisitions of that marriage. The Act creates and protects that share without forcing a spouse to await the completion of a gift from the other spouse or the garnering of proof of dollar-for-dollar contributions to the purchase price of assets acquired over the years of marriage. Under the Act, the sharing of property is recognized by creation of a present interest simultaneously with acquisition of property by effort during marriage. The interest is legally defined and enforceable. It permeates assets as they are acquired and continues to permeate them as they are invested and reinvested, as they are exchanged and transferred and as they grow or diminish... [Prefatory Note, UMPA].

**RELATIONSHIP OF MARITAL PROPERTY LAW TO DIVORCE LAW**

Since the marital property law became effective, there has been a continuing misunderstanding regarding the relationship of the marital property law to Wisconsin divorce law. The marital property law was **not** intended to directly affect divorce law. The basic features of current divorce law were already in place when the marital property law was enacted.

The marital property law generally governs the property of spouses during the marriage and upon the death of a spouse. The divorce law generally governs what happens to spouses’ property at divorce. The divorce law has its own distinct rules for property division and support obligations at divorce. Therefore, for example, the classification of property of spouses under the marital property law does not control whether the property is divisible under divorce law.

APPLICATION

Both spouses must be domiciled in Wisconsin before the marital property law generally applies to the spouses. Conversely, the marital property law generally does not apply when one or both spouses are not domiciled in the state.

GOOD FAITH DUTY

Under the marital property law, each spouse is required to act in good faith, with respect to the other spouse, in matters involving marital property or the other spouse’s nonmarital property. This obligation may not be altered by a marital property agreement. [It is not a violation of the good faith duty when a spouse’s management and control of that spouse’s nonmarital property limits, diminishes or fails to produce income from that property.]

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I. CLASSIFICATION OF PROPERTY OWNED BY SPOUSES

The classification of property owned by spouses is fundamental to the operation of the marital property law. The classification of property is essential, or at a minimum relevant, to determining the ownership of property, who may manage and control property, what property is available for satisfaction of debts, what property a spouse may dispose of by will and what property rights a surviving spouse has at the death of the other spouse. Title to property is not the controlling factor in determining the classification of property; rather, when and how the property is acquired generally determines the classification of property.

A. MARITAL PROPERTY

The marital property law presumes that all property owned by spouses is marital property. In general terms, this means that the party who contends that property is something other than marital property has the burden of showing that the classification is something else. Under the law, each spouse has a present, undivided 1/2 interest in each item of marital property.

Generally, marital property consists of property acquired by spouses during the marriage, except property received individually as a gift or inheritance. Marital property includes:

1. Income earned or accrued by a spouse or attributable to property of a spouse during marriage, subject to certain exceptions. [See Section B, 7, for the exceptions.]
2. Property acquired in exchange for, or with the proceeds of, marital property.
3. Substantial appreciation of nonmarital property to the extent the appreciation is attributable to the uncompensated, substantial effort of either spouse.
4. The amount recovered for personal injury attributable to expenses paid or otherwise satisfied from marital property or attributable to loss of income during marriage.
5. Any property that is not classified as something other than marital property.

B. INDIVIDUAL PROPERTY

Individual property is the property of the owning spouse (generally, the spouse who acquired the property). Individual property consists generally of property acquired before marriage and by gift or inheritance during marriage. Under the marital property law, individual property includes:

1. Property brought to a marriage if the marriage occurs after 12:01 a.m. on January 1, 1986 and both spouses are domiciled in Wisconsin.
2. Property acquired by gift or inheritance during marriage.
3. Property acquired in exchange for, or with the proceeds of, individual property.

4. Property acquired from appreciation of individual property, except to the extent that the appreciation is classified as marital property (see Section A, 3, above).

5. Property designated as individual property by a marital property agreement.

6. Property acquired as recovery for personal injury, except to the extent the amount is classified as marital property (see Section A, 4, above).

7. The following income: (a) income to one spouse from a trust created by a third person, unless the trust provides otherwise; and (b) income attributable to property of a spouse, other than marital property, with respect to which the spouse has executed a statement designating that income as his or her individual property (see Section H, below).

C. PROPERTY WHICH IS NOT CLASSIFIED AS MARITAL PROPERTY OR INDIVIDUAL PROPERTY

The marital property law refers to property of spouses that is neither marital nor individual property (e.g., property “having any other classification”). This “classification” includes property acquired by married persons before the marital property law’s effective date or property acquired by spouses in another state who subsequently move to Wisconsin. Under the law, such property is treated during the marriage as if it were individual property.

D. DEFERRED MARITAL PROPERTY

Strictly speaking, deferred marital property is not a distinct property “classification” under the marital property law. However, a surviving spouse does have optional rights in “deferred marital property”--property that was acquired during marriage and which would have been marital property had the marital property law applied at the time of acquisition (see Part VII, B, below).

E. “MIXED” PROPERTY

Property of spouses may become “mixed” (i.e., a combination of classifications). Because all property of spouses is presumed to be marital property, if marital property is mixed with property having any other classification, the latter property is reclassified as marital property unless the component that is not marital property can be traced (generally, identified on the basis of its source, method and time of acquisition).
F. SPECIAL CLASSIFICATION RULES

1. Homestead Property

A homestead acquired by spouses after January 1, 1986, which when acquired is held exclusively between spouses with no third party, is classified under the marital property law as “survivorship marital property” (see Section I, below) if no intent to the contrary is expressed on the instrument of transfer or in a marital property agreement.

2. Deferred Employment Benefit Plans and Certain Individual Retirement Accounts

Special provisions in the marital property law govern the determination of the marital property component of a deferred employment benefit plan (e.g., pension plan or deferred compensation plan). Generally, the marital property component of a deferred employment benefit plan is determined by the ratio of the employment years during marriage while the marital property law applies to the total employment years under the retirement plan.

The marital property law also contains a special provision regarding the marital property interest of a nonemployed spouse in: (a) a deferred employment benefit plan that accrues from the employment of the other spouse; and (b) assets in an individual retirement account (IRA) that are traceable to the rollover of a deferred employment benefit plan that accrues from the employment of the other spouse. Specifically, the interest of the nonemployed spouse terminates at the nonemployed spouse’s death if he or she predeceases the employe spouse. As a result, the interest of the nonemployed spouse in the marital property component of a deferred employment benefit plan or in IRA marital property assets traceable to the rollover of a plan cannot be disposed of by that spouse by will or, if there is no will, by intestacy law, if he or she predeceases the employe’s spouse. The surviving employe spouse then has the entire interest in the deferred employment benefit plan or IRA assets.

3. Life Insurance Policies

The marital property law contains special provisions classifying the ownership interest and proceeds of life insurance policies insuring the life of a spouse or owned by a spouse, as follows:

a. If the policy designates the insured as the owner and the policy is issued after the date of marriage, after January 1, 1986, or after establishment of a Wisconsin domicile by both spouses, whichever is later, the ownership interest and proceeds in the policy are marital property, regardless of the classification of property used to pay premiums. If, after the issuance of such a policy, the insured or his or her spouse are at any time not domiciled in Wisconsin, the marital property component is determined by a time-apportionment formula, based on the ratio of the period during which the marital property law applied to the entire period the policy was in effect.
b. The ownership interest and proceeds of a policy which designates the spouse of the insured as the owner are individual property of the spouse of the insured, regardless of the classification of property used to pay premiums on the policy. If, after the issuance of such a policy, the insured or his or her spouse are at any time not domiciled in Wisconsin, the individual property component is determined by a formula based on the ratio of the period during which the marital property law applied to the entire period that the policy was in effect (the other component is property that is neither marital or individual).

c. For other situations, in which at least one premium is paid with marital property, the marital property component of the ownership interest and proceeds of the policy is that portion of the ownership interest and proceeds generally representing a ratio of the period during marriage after which a premium was paid with marital property to the entire period the policy is in effect. However, the interest of the owner or beneficiary of a life insurance policy acquired under a court judgment or property settlement agreement incident to a prior marriage or to parenthood is not marital property, regardless of what property is used to pay the policy’s premiums.

The marital property law allows a spouse to consent, in writing, to:

a. The designation of another person as the beneficiary of a life insurance policy;

b. The use of his or her property to pay premiums on a life insurance policy; and

c. The relinquishment or reclassification of his or her interest in property used to pay premiums on a life insurance policy or in the ownership interest or proceeds of the policy.

G. RECLASSIFYING PROPERTY

The marital property law allows spouses to reclassify their property by several means:

1. By gift.

2. By conveyance, signed by both spouses, if the property is real property (i.e., real estate).

3. By an instrument, signed by both spouses, which conveys an interest in the security if the property is a security.

4. By marital property agreement.

5. By written consent, if the property consists of certain life insurance interests (see Section F, 3, above).

6. By unilateral statement, if the property is income attributable to the property of a spouse other than marital property (see Section H, immediately below).
**H. UNILATERALLY CLASSIFYING CERTAIN INCOME AS INDIVIDUAL PROPERTY**

The marital property law permits a spouse, by executing a written statement ("unilateral statement"), to unilaterally classify as individual property the income attributable to all or certain of that spouse’s property other than marital property. Otherwise, income attributable to nonmarital property is generally classified as marital property. Income “attributable to property” includes net rents, interest and dividends from stock (such income is distinguishable from other kinds of income, such as wages or other income resulting from spousal labor). The classification of such income by a unilateral statement is prospective only.

The executing spouse, within five days after the statement is signed, must notify the other spouse of the statement’s contents. Failure to give notice is a breach of the good faith duty that spouses have to each other. With respect to its effect on third parties, a statement is treated as if it were a marital property agreement; thus, for example, creditors generally need to be provided a copy before they are bound by the statement.

A person intending to marry may also execute a unilateral statement before the marriage. The statement is effective upon the marriage or at a later time, if so provided in the statement. Within five days after the statement is executed, the person executing the statement must provide a copy to the person whom he or she intends to marry or has married. Failure to provide the copy is a breach of the duty of good faith.

**I. OPTIONAL WAYS OF HOLDING PROPERTY**

The marital property law permits spouses to hold marital property in forms specifically designated under the law. Spouses may hold marital property in a form that designates the holders of it in the alternative, as marital property (e.g., “John or Mary as marital property”). Spouses may also hold marital property in any form that designates them the holder of it in the conjunctive (e.g., “John and Mary as marital property”). Individual property may be held in a form that designates the owning spouse (e.g., “Mary as individual property”).

Another form of holding property specifically provided in the marital property law is “survivorship marital property.” On the death of a spouse, that spouse’s ownership rights in the survivorship marital property vest solely in the surviving spouse (without probate). The first deceased spouse may not dispose at death any interest in survivorship marital property.

The marital property law also permits spouses to hold property in any form permitted by other laws, including a concurrent form and a form that provides the incident of survivorship ownership. These forms of holding property are generally independent of the classification of the property; the form in which property is held does not necessarily determine its classification. Examples of these forms of property ownership are tenancy in common and joint tenancy, respectively. Reflecting the widespread use of joint tenancy in Wisconsin, the law expressly provides that the operation of the following existing and future joint tenancies, including the survivorship feature, is generally unaffected by the marital property law, regardless of the classification of any property in the joint tenancy:
1. Joint tenancies created before January 1, 1986, exclusively between spouses.

2. Joint tenancies created before January 1, 1986, in which at least one spouse is a tenant.

3. Joint tenancies created after January 1, 1986, in which at least one spouse and a third party are tenants.

Any attempt to establish a joint tenancy exclusively between spouses after January 1, 1986 is treated under the marital property law as establishing survivorship marital property (an exception is when a joint tenancy is created by a gift of property to the spouses from a third person in the form of a joint tenancy; in addition, spouses may give property the incidents of a joint tenancy by marital property agreement). For most purposes, survivorship marital property achieves the same ends for spouses as joint tenancy property. Survivorship marital property may have tax advantages over joint tenancy property (see Part VIII, D, below).

The marital property law provides rules for tenancies in common exclusively between spouses which are similar to those described above for joint tenancies. For example, any attempt to establish a tenancy in common exclusively between spouses after January 1, 1986 establishes marital property (unless the tenancy in common is given to the spouses by a third person in the form of a tenancy in common).
II. MANAGEMENT AND CONTROL OF PROPERTY OWNED BY SPOUSES

A. GENERAL RULES

“Management and control” of property is defined under the marital property law as follows:

“Management and control” means the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, institute or defend a civil action regarding or otherwise deal with property as if it were property of an unmarried person.

To determine which spouse has authority to manage and control a particular item of property under the marital property law, the classification of the property, as might be expected, is relevant. However, also relevant is who “holds” the property. “Holding” property generally means having title to property; however, not all property is titled. Thus, while title to property generally does not by itself determine the classification of ownership interests in property under the marital property law, it is relevant to management and control.

Under the marital property law, spouses may manage and control marital property held in the names of both spouses in the conjunctive (e.g., “John and Mary”) only by acting together.

A spouse acting alone may manage and control:

1. The spouse’s individual property.

2. Unless the marital property has been transferred to a trust, marital property held in the spouse’s name alone or not held in the name of either spouse.

3. Marital property held in the names of both spouses in the alternative (e.g., “John or Mary”).

4. Subject to exceptions, all marital property for the purpose of obtaining an extension of certain kinds of credit for an obligation in the interest of the marriage or family (see Part III, A, below).

5. A policy of insurance if the spouse is designated the owner on the records of the issuer of the policy.

6. Any right of an employee under a deferred employment benefit plan (e.g., pension plan or deferred compensation plan) that accrues as a result of the spouse’s employment.

7. Any legal claim for relief that the spouse has.
The right to manage and control marital property transferred to a trust is determined by the terms of the trust.

**B. GIFTS OF MARITAL PROPERTY**

A special rule applies to gifts of marital property. A spouse acting alone may make a gift of marital property to a third person if:

1. That spouse has the right acting alone to manage and control the marital property.

2. The value of the marital property given to the third person does not total more than either: (a) $1,000 in a calendar year; or (b) a larger amount if, when made, the gift is reasonable in amount considering the economic position of the spouses.

If a gift of marital property by a spouse does not comply with the above limitations, the other spouse has a remedy against the donor spouse, the gift recipient, or both.

**C. MANAGEMENT AND CONTROL OF CERTAIN BUSINESS PROPERTY BY HOLDING SPOUSE**

The marital property law provides a management and control option for a spouse who holds the following business property (which is not also held by the other spouse):

1. An interest in a partnership held as a general partner or an interest in a joint venture held as a participant.

2. An interest in a professional corporation, professional association or similar entity held as a stockholder or member.

3. An interest in a corporation, the stock of which is not publicly traded.

A spouse who holds such business property may direct in a will or other signed writing that the nonholding spouse’s marital property interest in the business property be satisfied from other property of equal value.

If any of the above property is made subject to a written directive of the holding spouse, the marital property interest of the nonholding spouse in the business property must be satisfied within one year of the death of a spouse from other property which is of equal clear market value at the time of satisfaction.

If the interests of the nonholding spouse are not satisfied within one year of the decedent spouse’s death, the nonholding spouse’s marital property interest in the business property continues as if the holding spouse had not executed the directive to satisfy the interests from other property. If the interest of the nonholding spouse is not satisfied within one year because the clear market value of the business property has not been determined, the court is required to
order that the nonholding spouse’s interest be satisfied at a date specified by the court, subject to any necessary adjustment upon final determination of fair market value.
III. CREDIT AND SATISFACTION OF OBLIGATIONS

A. CREDIT

A general goal of the marital property law is to ensure that each spouse has access to credit when marital property is being relied on for the extension of credit. In furtherance of the policy, the marital property law provides a specific management and control right where: (1) credit is extended for an obligation in the interest of the marriage or family; and (2) the credit extended is unsecured credit (e.g., signature loan) or credit secured by a “purchase money security interest” (generally, a credit transaction where the collateral is the property purchased). For the purpose of obtaining such extensions of credit, a spouse acting alone may manage and control all the marital property, with the exception of certain business-related property held by the other spouse.

The marital property law requires a creditor, when a spouse applies for credit that will result in an obligation in the interest of the marriage or family, to consider, in evaluating the spouse’s creditworthiness, all marital property available to satisfy the obligation in the same manner that the creditor, in evaluating the creditworthiness of an unmarried credit applicant, considers the property of the unmarried credit applicant available to satisfy the obligation.

A creditor is required to give the nonapplicant spouse written notice of the extension of credit to the other spouse before any payment is due if: (1) the credit is extended in a transaction governed by the Wisconsin Consumer Act (generally, most consumer transactions involving instalment credit); and (2) the extension of credit may result in an obligation in the interest of the marriage or family (discussed under Section B, below).

The marital property law also includes provisions which specify how the law relates to the Wisconsin Consumer Act, including:

1. The spouse of a person who incurs an obligation under the Consumer Act in the interest of the marriage or family has the same rights and remedies under the Consumer Act as the spouse who incurred the debt.

2. The spouse of a person who establishes an open-end credit plan under the Consumer Act that may result in an obligation in the interest of the marriage or family may terminate the plan by giving written notice of termination to the creditor.

B. SATISFACTION OF OBLIGATIONS

The marital property law specifies what property is available to satisfy unsecured obligations (generally, those obligations where collateral is not pledged as security). Under the law, the type of spousal obligation determines the property which a creditor (“creditor” is used here in a broad sense) may reach to satisfy the obligation during marriage:
1. **Support Obligations.** A spouse’s obligation to satisfy a duty of support owed to the other spouse or to a child of the current marriage may be satisfied from all marital property and all other property of the obligated spouse.

2. **Family Purpose Obligations.** An obligation incurred by a spouse in the interest of the marriage or family may be satisfied from all marital property and all other property of the incurring spouse.

   An obligation incurred by a spouse during marriage is presumed to be incurred in the interest of the marriage or family. In addition, if a spouse seeking credit signs a statement at or before the time the obligation is incurred stating that the obligation is, or will be, incurred in the interest of the marriage or family, the obligation then is by law in the interest of the marriage or family.

3. **Premarriage Obligations.** An obligation incurred by a spouse before or during marriage that is attributable to an obligation arising before the marriage or to an act or omission occurring before marriage may be satisfied from property of the incurring spouse that is not marital property and from that part of the marital property which, but for the marriage, would have been property of that spouse.

   A child support obligation or spousal support obligation arising from a previous marriage has been interpreted as being a premarriage obligation. Thus, the new (nonobligated) spouse’s individual property and that part of the marital property which, but for the marriage, would have been the property of the new spouse are not available to satisfy the other spouse’s child support or spousal support obligation.

4. **Pre-Act Obligations.** An obligation incurred by a spouse before, on or after January 1, 1986 that is attributable to an obligation arising before January 1, 1986, or to an act or omission occurring before January 1, 1986, may be satisfied only from property of that spouse that is not marital property and from that part of marital property which would have been the property of that spouse but for enactment of the marital property law.

5. **Tort Obligations.** An obligation incurred by a spouse during marriage resulting from a tort (e.g., a negligent act) committed by the spouse during marriage may be satisfied from the property of that spouse that is not marital property and from that spouse’s interest in marital property.

6. **Certain Open-End Credit Obligations.** Special provisions are contained in the marital property law for satisfaction of obligations incurred under pre-act and pre-marriage open-end credit plans.

7. **Other Obligations.** Any other obligation incurred by a spouse during marriage may be satisfied from any property of the incurring spouse which is not marital property and from the incurring spouse’s interest in marital property, in that order.
The satisfaction provisions summarized above do not affect the satisfaction of secured obligations (generally, loans secured by collateral).

Following a divorce (or legal separation or annulment), no income of the nonincurring spouse is available for satisfaction of a nontax obligation which was incurred during marriage by the other spouse in the interest of the marriage or family, unless the divorce judgment so provides (see Part VIII for rules related to tax debts). Marital property assigned to each spouse under a divorce judgment is available for satisfaction of such an obligation but only to the extent of the value of the marital property at the date of judgment.

At the death of a spouse, property that would have been available during marriage for satisfaction of an obligation continues to be available for satisfaction except, generally, survivorship marital property and property not available for claims against a decedent’s estate under pre-marital property law. Also, for obligations other than those obligations that were incurred by the decedent spouse from a person who regularly extends credit, the income of the surviving spouse is not available for satisfaction and the surviving spouse's marital property assets are available only to the extent of their value at the date of death of the decedent spouse.
IV. MARITAL PROPERTY AGREEMENTS

A. GENERALLY

The marital property law expressly permits spouses and persons intending to marry to enter into marital property agreements affecting the spouses’ property. In addition to their use in relation to most economic aspects of marriage, the agreements may be used to dispose of property at the death of either spouse by nontestamentary disposition (without probate). Subject to exceptions discussed below, spouses, by marital property agreement, may agree with respect to any of the following:

1. Rights in and obligations with respect to any of either or both spouses’ property whenever and wherever acquired or located. Note that, unless the marital property agreement provides otherwise, classification of a deferred employment benefit as marital property does not affect the rule which provides that, if the nonemploye spouse dies first, his or her interest in the benefit terminates.

2. Management and control of any of either or both spouse’s property.

3. Disposition of any of either or both spouses’ property upon termination of the marriage or death or upon the occurrence or nonoccurrence of any other event.

4. Modification or elimination of spousal support, except when the modification or elimination results in less than necessary and adequate support during marriage or makes one spouse eligible for public assistance at the time of termination of the marriage or the death of the other spouse.

5. Making a will, trust or other arrangement to carry out the marital property agreement.

6. Providing that, upon the death of either spouse, any of either or both spouses’ property, including after-acquired property, passes without probate to a designated person, trust or other entity by nontestamentary disposition.

7. Choice of law governing construction of the marital property agreement.

8. Any other matter affecting either or both spouses’ property which is not in violation of public policy or a statute imposing a criminal penalty.

A marital property agreement may not:

1. Adversely affect the right of a child to support.

2. Vary the good faith duty of spouses in connection with property owned by spouses.
3. Vary the statutory protection for bona fide purchasers of marital property.

4. Vary the provisions of the marital property law relating to when creditors are bound by marital property agreements.

5. By providing for the disposition of either or both spouses’ property upon the death of a spouse, affect the property available for satisfaction of obligations at the death of a spouse unless that property was not available for satisfaction under the marital property agreement while both spouses were alive and the agreement is binding on the creditor.

A marital property agreement must be in writing and signed by both spouses; no other formalities for executing the agreement are necessary (for example, witnesses are not required and the agreement need not be notarized). “Consideration” is not a necessary part of a marital property agreement (“consideration” is a legal concept, not easily defined, that, in very general terms, means something intended by the parties to a contract to be given in exchange for a promise). An agreement may be amended or revoked only by a subsequent marital property agreement. If persons intending to marry each other enter into a marital property agreement, the marital property agreement becomes effective only upon their marriage.

A marital property agreement is not enforceable if the spouse against whom enforcement is sought proves any of the following:

1. The marital property agreement was unconscionable when made.

2. The spouse did not execute the marital property agreement voluntarily.

3. Before execution of the marital property agreement, the spouse:
   a. Did not receive fair and reasonable disclosure, under the circumstances, of the other spouse’s property or financial obligations; and

   b. Did not have notice of the other spouse’s property or financial obligations.

In general, a marital property agreement is not binding on a creditor unless the creditor is furnished a copy of the agreement before credit is extended. Similarly, a third party other than a creditor might not be bound by an agreement unless the third party has actual knowledge of the terms of the agreement. Further, in order for a marital property agreement to affect an interest in real property, additional legal procedures and formalities may be necessary.

**B. STATUTORY TERMINABLE MARITAL PROPERTY CLASSIFICATION AGREEMENT**

The marital property law includes a “statutory terminable marital property classification agreement.” By entering into the agreement, spouses classify all their property as marital
property. The agreement classifies as marital property that property owned when the agreement becomes effective and property later acquired, reclassified or created during the term of the agreement. The substantive aspects of the agreement and the form of the agreement are included in the statutes. The agreement is intended for use by those spouses who wish to reclassify all of their individual and unclassified property as marital property.

The statutory agreement must be signed by both spouses and each signature must be authenticated or acknowledged. An agreement may be executed by persons intending to marry but the agreement does not become effective until the parties marry. An agreement may be executed by spouses not domiciled in Wisconsin but the agreement does not become effective until both spouses have a Wisconsin domicile. If an agreement is executed by parties not yet married, at least one of whom is not domiciled in Wisconsin, the agreement becomes effective on the later of the parties’ marriage or the date they are both domiciled in Wisconsin.

If the spouses do not complete the asset and liability disclosure form which is provided as an attachment to the agreement form, the agreement terminates three years after the date both spouses have signed the agreement. Spouses may enter into only one agreement for which disclosure of assets and liabilities is not provided.

If the spouses complete the asset and liability disclosure form, the agreement is effective until dissolution of the marriage or death. However, if the spouses complete the disclosure form and in a legal action to enforce the agreement it is shown that the information on the disclosure form did not provide fair and reasonable disclosure under the circumstances, the duration of the agreement is three years after both spouses have signed the agreement.

The statutory agreement is unenforceable if the spouse against whom enforcement is sought proves that the agreement was unconscionable when made or that he or she did not execute the agreement voluntarily. In addition, ordinary contract defenses not ruled out under the marital property law are available.

In general, the statutory agreement is not binding on a creditor unless the creditor is furnished a copy of the agreement before credit is extended. Similarly, a third party other than a creditor might not be bound by the agreement unless the third party has actual knowledge of the terms of the agreement. Further, in order for the agreement to affect an interest in real property, additional legal procedures and formalities may be necessary.

The statutory agreement does not provide that, upon the death of one of the spouses party to the agreement, his or her marital property passes to the surviving spouse. That result can be accomplished, but by means other than the statutory agreement (e.g., by will or separate marital property agreement).

The statutory agreement does not affect the duty of support that spouses otherwise have to each other or their children and does not affect property division and maintenance payments in connection with a divorce.
The statutory agreement is subject to termination by one spouse at any time. A termination form is provided as part of the statutory agreement form. Termination is prospective: termination does not affect the classification of property acquired before termination. Also, the agreement may be amended, supplemented or revoked by a later marital property agreement.

**C. STATUTORY TERMINABLE INDIVIDUAL PROPERTY CLASSIFICATION AGREEMENT**

The marital property law also includes a “statutory terminable individual property classification agreement.” By entering into the agreement, spouses classify their marital property as the individual property of the owning spouse. The agreement classifies as individual property that marital property owned when the agreement becomes effective and property later acquired, reclassified or created during the term of the agreement which would otherwise be marital property. The substantive aspects of the agreement and the form of the agreement are included in the statutes.

The statutory agreement must be signed by both spouses and each signature must be authenticated or acknowledged. An agreement may be executed by persons intending to marry but the agreement does not become effective until the parties marry. An agreement may be executed by spouses not domiciled in Wisconsin but the agreement does not become effective until both spouses have a Wisconsin domicile. If an agreement is executed by parties not yet married, at least one of whom is not domiciled in Wisconsin, the agreement becomes effective on the later of the parties’ marriage or the date they are both domiciled in Wisconsin.

If the spouses do not complete the asset and liability disclosure form which is provided as an attachment to the agreement form, the agreement terminates three years after the date both spouses have signed the agreement. Spouses may enter into only one agreement for which disclosure of assets and liabilities is not provided.

If the spouses complete the asset and liability disclosure form, the agreement is effective until dissolution of the marriage or death. However, if the spouses complete the disclosure form and in a legal action to enforce the agreement it is shown that the information on the disclosure form did not provide fair and reasonable disclosure under the circumstances, the maximum duration of the agreement is three years after both spouses have signed the agreement.

The statutory agreement is unenforceable if the spouse against whom enforcement is sought proves that the agreement was unconscionable when made or that he or she did not execute the agreement voluntarily. In addition, ordinary contract defenses not ruled out under the marital property law are available.

In general, the statutory agreement is not binding on a creditor unless the creditor is furnished a copy of the agreement before credit is extended. Similarly, a third party other than a creditor might not be bound by the agreement unless the third party has actual knowledge of the terms of the agreement. Further, in order for the agreement to affect an interest in real property, additional legal procedures and formalities may be necessary.
Notwithstanding execution of a statutory agreement, a surviving spouse may have an elective right in property in the decedent spouse’s estate, in certain nonprobate property and in property that would have been marital property but for the agreement.

The statutory agreement does not affect the duty of support that spouses otherwise have to each other or their children and does not affect property division and maintenance payments in connection with a divorce.

The statutory agreement is subject to termination by one spouse at any time. A termination form is provided as part of the statutory agreement form. Termination is prospective: termination does not affect the classification of property acquired before termination. Also, the agreement may be amended, supplemented or revoked by a later marital property agreement.
V. PROTECTION OF THIRD PARTIES WHO DEAL WITH SPOUSES

A. GENERALLY

The marital property law expressly provides that marital property purchased by a “bona fide purchaser” from a spouse having the right to manage and control the property is acquired free from claims of the other spouse. A marital property agreement may not vary this provision. The term “bona fide purchaser” is broadly defined in the law to mean, in general terms, a person who acquires an interest in marital property by means other than a gift and who acts in good faith with regard to the transaction. Mere notice of the existence of a marital property agreement does not affect the status of a purchaser as a “bona fide purchaser.”

B. CREDITORS

The marital property law provides that if a spouse applying for credit discloses the existence of a currently effective marital property agreement and provides a copy of it to the creditor before the credit is granted, the creditor is bound by the agreement. Otherwise, a creditor is not bound by a provision of a marital property agreement which adversely affects the creditor unless the creditor had actual knowledge, by some other means, of that provision when the obligation to the creditor was incurred.

C. INSURERS, TRUSTEES AND DEFERRED EMPLOYMENT BENEFIT PLAN ADMINISTRATORS

The marital property law contains: (1) provisions protecting insurers and trustees in dealing with spouses and their property; and (2) provisions specifying how to deal with claims made against proceeds, payments or an interest in an insurance policy or a claim asserting entitlement to property in a trustee’s possession or control. In addition, if a deferred employment benefit plan administrator makes payments or takes actions in accordance with the plan and the administrator’s records, the administrator is not liable because of those payments or actions.
VI. REMEDIES

Legal remedies which may be sought by a spouse in relation to his or her property interests are set forth in the marital property law and include:

a. A claim against the other spouse for breach of the good faith duty that results in damage to the claimant spouse’s property.

b. An accounting of the spouses’ property and obligations and a determination of ownership in and access to marital property and the classification of the spouses’ property.

c. The addition of the spouse’s name to marital property or to a document evidencing ownership of marital property held in the name of the other spouse alone, except with respect to specified business-related property or any other property if the addition of the name would adversely affect the rights of a third person.

d. A claim for specified relief if marital property has been or is likely to be substantially injured by the other spouse’s gross mismanagement, waste or absence, except with respect to specified business-related property or any other property if the rights of a third person would be adversely affected.

e. A reimbursement, as individual property, of marital property equal in value to marital property used to satisfy an obligation of the other spouse that is not a support or family purpose obligation. This remedy is subject to equitable considerations and to the rights of third parties who relied on the availability of the marital property to satisfy support or family purpose obligations.

f. Recovery of, or compensation for, improper gifts of marital property during marriage and certain gifts of marital property that become effective on the death of a spouse. This category of remedies includes specific remedies for improper gifts of marital property to third persons in the form of a joint tenancy.
VII. DISPOSAL OF AND RIGHTS TO PROPERTY UPON DEATH OF A SPOUSE

A. DISPOSAL AND RETENTION OF MARITAL PROPERTY AT DEATH OF A SPOUSE

Each spouse may, by will, dispose of his or her share of marital property and his or her nonmarital property, subject to rights the surviving spouse may have in the latter property (described in Section B, below). Upon the death of a spouse, the surviving spouse retains his or her undivided 1/2 interest in each item of marital property. The surviving spouse’s share in each item of marital property is not subject to probate.

B. RIGHTS OF SURVIVING SPOUSE IN DEFERRED MARITAL PROPERTY

Because the surviving spouse retains his or her 1/2 interest in each item of marital property, the marital property law does not provide a traditional election by the surviving spouse against the decedent’s probate estate. Traditional election provisions are intended as a protection in situations where a decedent spouse wills substantially all of his or her probate property to someone other than his or her spouse.

The marital property law does recognize, however, that in the early years following the enactment of the marital property law and for spouses who have recently moved to this state from other jurisdictions, comparatively little marital property will have been accumulated. Therefore, the law provides the surviving spouse with rights against the decedent spouse’s “deferred marital property.” “Deferred marital property” is property acquired during marriage that would have been marital property had the marital property law applied when the property was acquired.

1. Rights if Decedent Spouse Dies Before January 1, 1999

If a spouse dies before January 1, 1999, the surviving spouse has the elective rights to deferred marital property described immediately below. If a spouse dies after December 31, 1998, revised elective rights apply, and are summarized in Section 2., below.

With respect to decedent’s deferred marital property in the probate estate, the surviving spouse may choose (elect) to receive up to 50% of any or all items of the deferred marital property. This election is barred if the surviving spouse has been provided for by means of substantial nonprobate transfers which the decedent spouse could have given to third parties. The election is against each item of deferred marital property in the probate estate (not against an aggregate value) unless the deferred marital property is certain business property subject to a written directive by the holding spouse [see Part II, C, above].

The marital property law also allows an election against the value of certain nonprobate transfers to third parties. This election reflects concern that some spouses might, either intentionally or unintentionally, deplete their probate estates of potential deferred marital property,
thereby undermining the purpose of the election against deferred marital property in the probate estate. The marital property law, therefore, permits a surviving spouse to choose to receive not more than 50% of the value of certain nonprobate transfers of deferred marital property to third parties that occur after April 4, 1984 (the date the marital property law was signed by the Governor). The value of these nonprobate transfers of deferred marital property is referred to in the marital property law as the “augmented marital property estate.” The amount chosen by the surviving spouse under this election is subject to a reduction to account for transfers of the decedent’s property to the surviving spouse. The amount remaining after reduction is the amount to which the surviving spouse is eligible. That amount is paid to the surviving spouse on a pro rata basis, by persons who received the decedent’s deferred marital property or its proceeds. In general, the election against the augmented marital property estate is intended to operate only in narrow circumstances, usually where one spouse attempts to disinherit the other spouse by means of nonprobate transfers of deferred marital property.

2. Rights if Decedent Spouse Dies After December 31, 1998

In order to simplify and make more equitable a surviving spouse’s elective rights in deferred marital property, a committee of the Real Property, Probate and Trusts section of the State Bar of Wisconsin recommended revisions to those elective rights. The recommendations, enacted into law as 1997 Wisconsin Act 188, first apply to deaths that occur on January 1, 1999.

The major revisions to a surviving spouse’s elective rights in deferred marital property are:

a. The elective rights are generally against both the decedent’s and the surviving spouse’s deferred marital property, not just the former.

b. The separate elections for probate and nonprobate deferred marital property are eliminated and replaced by a single election.

c. All nonprobate deferred marital property is subject to the election, not just transfers made on or after April 4, 1984.

d. The election is for a pecuniary amount, rather than for an interest in each item of deferred marital property.

e. The absolute bar to the surviving spouse’s election is eliminated; a reduction, or “cutback,” of the surviving spouse’s share remains and includes deferred marital property already held by the surviving spouse.

C. INTESTACY RULES

The law controlling the disposition of property which is not disposed of by will gives the surviving spouse:
1. The entire estate of the decedent spouse if there are no children of the decedent or if all of his or her children are also children of the surviving spouse.

2. One-half of the decedent’s nonmarital property estate if any of the children of the decedent are not also the children of the surviving spouse.
VIII. TAXATION OF MARITAL PROPERTY

Wisconsin tax laws govern the state taxation of marital and nonmarital property income received by married persons during marriage and may affect such property after divorce, annulment or legal separation (subsequently referred to as divorce) or after the death of one or both of the spouses. The tax laws are effective for tax years 1986 and thereafter, except as otherwise indicated.

[Federal tax laws apply community property taxation principles to the federal taxation of such property in Wisconsin and in the other eight community property law states. As a result, federal tax laws are similar to but not identical with Wisconsin tax laws.]

Persons are considered married for the entire year for income tax purposes if they are married on December 31 of the tax year, including persons who have separated but have not obtained a final decree of divorce by December 31. Marital property law determines what property is classified as marital property and what property is classified as nonmarital property. Tax law determines what property is subject to taxation or eligible for a credit or deduction for one or both spouses and what property is available for the payment of taxes, interest, penalties and fees. Tax rates and income brackets for married persons filing joint returns differ from those filing separate returns and both sets of rates and brackets differ from those for unmarried persons.

A. FILING STATUS

Persons who are married at the end of the tax year may file joint or separate returns under Wisconsin tax law. On joint returns, all income, deductions and credits for both spouses are combined on the same return. Even if the spouses are divorced after the tax year, both spouses are responsible for any tax, interest, penalties or fees (hereafter, referred to as “tax debt”) due on the joint return, except as provided under the “innocent spouse” rules (see Section B, below). Spouses may not file separate returns for a year in which they filed a joint return after the due date for the joint return expires.

If separate returns are filed, each spouse or ex-spouse must report 1/2 of their total marital property income (even if one spouse never received any of the income), deductions and credits, except as provided by a marital property agreement or unilateral statement or by the innocent spouse rules. Each filer is responsible for the tax debt on his or her separate return. However, even if the spouses subsequently divorce, all of the marital property of both spouses and all of the nonmarital property of the separate filer may be used to pay the amount due (unless “innocent spouse” rules apply), because all tax debts incurred during a marriage after the determination date are classified as being in the interest of the marriage or the family (see Part III, B, 2, above). Spouses may file a joint return for a tax year in which separate returns were filed at any time within four years of the due date of the separate returns or, with the consent of the Department of Revenue (DOR), after a notice of adjustment in income tax liability has been sent to either spouse by DOR.
B. INNOCENT SPOUSE PROVISIONS

If a joint return is filed, one spouse or former spouse may be eligible for treatment as an innocent spouse and, therefore, not liable for any additional tax debt, provided: (1) he or she did not know and had no reason to know that the other spouse omitted an income item or claimed a credit or deduction without basis in fact or in law; and (2) it is inequitable to impose liability on the innocent spouse, taking into consideration the facts and circumstances of the additional tax debt. The additional liability may be satisfied, first, from the other spouse’s nonmarital property and, then, from the other spouse’s interest in marital property.

A similar rule applies to the filing of a separate return, if one spouse or former spouse was not notified of unreported marital property income that resulted from the other spouse’s services or property.

C. MARRIED PERSON’S CREDIT

For spouses filing a joint return, a nonrefundable income tax credit of 2% to 3%, depending on the taxable year, of the earned income of the spouse with the lower earned income (computed without regard to the sharing concepts of marital property law) is available up to a maximum of $300 to $420, depending on the taxable year. The credit is not available to spouses who file separate returns. Also, the credit is not affected by a marital property agreement or a unilateral statement.

D. BASIS OF INHERITED MARITAL PROPERTY

Basis is the adjusted cost of property which is used to determine the amount of gain or loss on the sale or other disposition of property for income tax purposes. Usually, the cost of acquisition of the property is its basis, as modified by certain other factors stipulated in tax law, such as improvements and depreciation.

If at least 50% of all the marital property of both spouses is includable for federal estate tax purposes upon the death of the first spouse to die, each spouse’s share of all the marital property receives a new basis, adjusted to the date-of-death value of the marital property. The basis treatment of marital property differs from that accorded to property held in joint tenancy or as a tenancy in common property because only the part of the latter tenancies includable in the decedent’s estate receives a new basis.

Because any marital property interest of a nonemploye spouse in a deferred employment benefit plan, or on or after April 1, 1994 in IRA assets traceable to the rollover of a deferred employment benefit plan, terminates at the death of the nonemploye spouse, no part of the deferred employment benefit plan or rollover IRA assets is eligible for a date-of-death basis adjustment otherwise applicable to marital property.
E. **MARITAL PROPERTY AGREEMENTS**

Wisconsin tax law, in general, recognizes prospective reclassification of income or property by a marital property agreement or a unilateral statement executed by spouses. The agreement or statement must be filed with the DOR before an assessment or billing is issued. The reclassification is effective for tax purposes only for the periods of time while both spouses are domiciled in Wisconsin. Agreements and statements do not affect the determination of homestead tax credit, the married person’s credit or the division of refunds on a joint return.

F. **COLLECTION PROCEDURES**

Wisconsin tax law sets forth provisions regarding the liability for and the DOR collection of tax and certain other debts, such as debts to other state agencies and child support arrearages, which are incurred by one or both spouses. The tax law also provides presumptions and offset procedures for the application of tax overpayments, credits and refunds of one or both spouses or former spouses to those debts as well as an opportunity for a spouse to appeal a misapplication of the overpayments, credits and refunds.

G. **TAX-FREE EXCHANGE OF MARITAL PROPERTY AT DEATH OF A SPOUSE**

At the death of a spouse, the surviving spouse and a beneficiary of the decedent’s estate may exchange their interests in two or more items of marital property as a nontaxable event. For the purpose of determining the basis of the assets, the exchange is treated as if each asset were acquired as a gift; the recognition of capital gain or loss is deferred until the subsequent disposition of the items. Otherwise, the exchange would require recognition of a capital gain or loss at the time of the exchange.

H. **CONFIDENTIALITY OF TAX DOCUMENTS**

In general, only the filer of a tax document may have access to or may obtain a copy of the document except for certain public officials, public employes and other persons stipulated in the statutes for specified purposes only. However, the possibility of spouses filing separate returns combined with the requirement that each spouse report 1/2 of the entire marital property income produced during a marriage, increases the likelihood of disputes between the DOR, spouses and former spouses. This is particularly true for tax years in which the spouses are separated prior to a divorce.

To facilitate the settlement of such disputes in a timely and efficient manner, Wisconsin tax law permits:

1. The spouse or former spouse of a person who filed a tax return or claim to examine, and the DOR to furnish a copy of, the return or claim if the DOR issued an assessment or denial of a claim to the spouse or former spouse or if the spouse or former spouse may be subject to collection for a delinquency.
2. The DOR to disclose to the spouse or former spouse of a person who has filed a tax return or claim whether an extension for filing was obtained, the extended due date for filing and the date the return or claim was filed.