

1986

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Timothy A. Bascom, *Irreconcilable Differences: Income From Separate Property Under Divorce Law and Under Wisconsin's Marital Property Act*, 70 Marq. L. Rev. 41 (1986).

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IRRECONCILABLE DIFFERENCES: INCOME FROM SEPARATE PROPERTY UNDER DIVORCE LAW AND UNDER WISCONSIN'S MARITAL PROPERTY ACT*

TIMOTHY A. BASCOM**

On January 1, 1986, the Wisconsin Marital Property Act (the "Act") became effective.¹ The interpretive notes which accompanied the Act indicate that the legislature did not intend the Act to conflict with current Wisconsin divorce law.² However, a review of certain provisions of the Act reveals that such is not the case. The following potential areas of conflict have been identified and provide the subject matter for this article:

1. Under the Act, either spouse may unilaterally execute a written statement whereby that spouse declares that any income from property other than marital property³ (e.g., property which was received by gift or inheritance) shall retain its

* The author would like to thank Carrie A. Raymond for her valuable assistance in the preparation of the article.

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1. Wisconsin Marital Property Act, 1985 Wis. Laws 37, § 190 (codified at Wis. STAT. ANN. §§ 766.001-.97 (West Supp. 1986).

2. Wisconsin Marital Property Act, 1985 Wis. Laws 37, § 149 explanatory note (the legislative council staff prepared notes for the original 1985 Senate Bill 150 which were retained in the enrolled bill as revised).

3. See Wis. STAT. ANN. § 766.31 (West Supp. 1986) for the standards for classification of property. With respect to income from nonmarital property § 766.31 provides:

* * *

(4) Except as provided under subs. (7)(a), (7p) and (10), income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property.

* * *

(7p) Income attributable to all or specified property other than marital property, with respect to which a spouse has executed under s. 766.59 a statement unilaterally designating that income in his or her individual property, is individual property.

individual character.⁴ These unilateral statements are euphemistically called Louisiana Fruits Statements.⁵ The legislature's statement of intent notwithstanding, current Wisconsin divorce law provides that the income from individual property is part of the marital estate and thus subject to division upon divorce.⁶ There is, therefore, a conflict between the Act and current divorce law which gives rise to the question of whether the Louisiana Fruits Statement will prohibit the division of the income from separate property at the time of divorce or whether the Louisiana Fruits Statement simply excludes the income from separate property from the marital estate during the term of the marriage.

2. A second issue concerning the enforceability of Louisiana Fruits Statements relates to the classification of such documents at the time of a divorce. If, for example, the trial court determines that a Louisiana Fruits declaration is a "Marital Property Agreement," the court may invalidate the declaration if it has an adverse impact on the children of the marriage.⁷ Additionally, a question exists as to whether the Louisiana Fruits declaration will prevent the trial court from dividing separate assets under section 767.255 of the Wisconsin Statutes upon a finding that the failure to do so will work a hardship on the other spouse or the children of the marriage.⁸ Perhaps an even more interesting and complex issue is whether the court will measure the "unconscionability" or

4. WIS. STAT. ANN. § 766.59(1) (West Supp. 1986) provides: "[a] spouse may unilaterally execute a written statement which classifies the income attributable to all or certain of that spouse's property other than marital property as individual property."

5. The phrase "Louisiana Fruits" comes from the idea that the fruits of the "tree" of separate property are a product of the tree, and therefore should be separate property. See generally Furrh, *A Survey of the 1985 Amendments to the Wisconsin Marital Property Act, The Trailer Bill*, 58 Wis. Bar Bull. 11, 14 (Dec. 1985).

6. WIS. STAT. § 767.255 (1983-84); see also *Arneson v. Arneson*, 120 Wis. 2d 236, 355 N.W.2d 16 (Ct. App. 1984).

7. WIS. STAT. ANN. § 766.58(2) (West Supp. 1986) (eff. Jan. 1, 1986).

8. WIS. STAT. § 767.255 (1983-84). Section 767.255 provides in relevant part: Any property shown to have been acquired by either party prior to or during the course of the marriage as a gift, bequest, devise or inheritance or to have been paid for by either party with funds so acquired shall remain the property of such party and may not be subjected to a property division under this section except upon a finding that refusal to divide such property will create a hardship on the other party or on the children of the marriage, and in that event the court may divest the party of such property in a fair and equitable manner.

"inequitability" of the Louisiana Fruits declaration at the date of execution or at the date of enforcement.⁹

The focus of this article is on the unresolved issues relating to the enforceability of a Louisiana Fruits Statement under Chapter 767 of the Wisconsin Statutes. In addition, this article will study the issue of whether a court should apply the standards set forth in Chapter 766 for marital property agreements in the event of a divorce, or whether the standards set forth in Chapter 767 should control.¹⁰

LOUISIANA FRUITS STATEMENTS

A. *Property Protected by Unilateral Statements*

Under section 766.59 of the Wisconsin Statutes, either spouse may unilaterally execute a written statement which classifies the income attributable to all or certain of that spouse's nonmarital property as individual property.¹¹ To be effective, the statement must be signed and notarized and delivered to the other spouse within five days after signing.¹² The failure to give the other spouse notice is a breach of duty of good faith imposed by the Act.¹³ Any income from the property designated in the unilateral statement which accrues on or after the date the statement becomes effective is individual property. From the effective date of the statement until revocation, the unilateral statement excludes income attributable to separate property including net rents, interest in dividends from stock, trusts or other separate assets.¹⁴

9. See *infra* notes 53-57 and accompanying text.

10. A number of other issues have been identified as unique to the Marital Property Act. For a discussion of these related issues, see Podell, *Impact of Wisconsin's Marital Property Act on Family Law*, 68 MARQ. L. REV. 449 (1985); Schwartz, *Agreements Between Spouses Under the Wisconsin Marital Property Act*, 68 MARQ. L. REV. 404 (1985).

11. WIS. STAT. ANN. § 766.59(1) (West Supp. 1986).

12. WIS. STAT. ANN. § 766.59(2)(a)-(b) (West Supp. 1986).

13. Under the Marital Property Act, each spouse has a duty of good faith with respect to matters involving marital property or other property of the other spouse, and this duty may not be altered by a marital property agreement. WIS. STAT. ANN. § 766.15(1) (West Supp. 1986).

14. The Legislative Council's Special Committee Supplemental Notes relating to 1985 Wis. Laws 37 provide: "income 'attributable to property' includes net rents, interest and dividends from stock. Income 'attributable to property' should be distinguished from other income, such as wages resulting from spousal labor." WISCONSIN STATUTES AND OTHER MATERIALS RELATING TO MARITAL PROPERTY REFORM, app. VI,

When analyzing the effect of a Louisiana Fruits unilateral statement on the assets of the marital estate, one must remember that a distinction exists between the income from individual assets and the appreciation of individual assets during the marriage. The appreciation of individual assets may become marital property if the appreciation meets certain tests set forth in section 766.63 of the Wisconsin Statutes.¹⁵ Where one spouse applies substantial labor, effort, creativity or managerial activity to *either* spouse's nonmarital property,¹⁶ the appreciation of the nonmarital property which is attributed to that spouse's activities becomes marital property if (1) the spouse does not receive reasonable compensation for his or her activity and (2) substantial appreciation of the property results from that spouse's efforts. In the absence of a formal marital property agreement, a unilateral Louisiana Fruits Statement will not protect the substantially appreciated nonmarital property which has appreciated due to the efforts and activity of either spouse.

The Act's provision with respect to the appreciation of nonmarital property is consistent with current divorce law in Wisconsin.¹⁷ In *Plachta v. Plachta*,¹⁸ the Wisconsin Court of

26 (ATS-CLE Division, The State Bar of Wisconsin ed. Supp. 1985) [hereinafter SUPPLEMENTAL NOTES]. Since the Supplemental Committee Notes were prepared after the passage of the Act, they were not a part of the enacted legislation, and as such do not have the same official status. However, because they were drafted by the same committee that drafted the original Bill and Notes, they do express the intent of the committee. *Id.* at 1.

15. Under WIS. STAT. ANN. § 766.63 (West Supp. 1986), property is classified as mixed if the nonmarital property is mixed with marital property. The appreciation attributable to nonmarital assets becomes a marital asset if the factors of § 766.63(2) are satisfied. *Id.*

16. WIS. STAT. ANN. § 766.63(2) (West Supp. 1986) provides:

Application by one spouse of substantial labor, effort, inventiveness, physical or intellectual creativity or managerial activity to either spouses' property other than marital property creates marital property attributable to that application if both of the following apply:

(a) Reasonable compensation is not received for the application.

(b) Substantial appreciation of the property results from the application.

The comments to WIS. STAT. ANN. § 766.63 (West Supp. 1986) note that the pool of property to which the appreciation rule applies encompasses *all* property other than marital property, and not just individual property.

17. It is interesting to note that under the Marital Property Act, the appreciation of nonmarital property becomes marital property if such appreciation is due to the efforts of *either* spouse. In a recent case, the Wisconsin Supreme Court noted that although appreciation due to the efforts of the nonowning spouse becomes marital property, the

Appeals held that the appreciation of nonmarital property is regarded as nonmarital property where the separate property retains its character throughout the marriage and the appreciation of the nonmarital property was due to general economic conditions rather than to one spouse's efforts.¹⁹ Since the appreciation was not the result of one spouse's efforts, the court found that the failure to divide the separate property would not work a "hardship" on the nonowning spouse pursuant to section 767.255.²⁰ Therefore, the court concluded that the appreciated separate property retained its separate identity.²¹ Since the appreciation of separate property which is due to the efforts of a spouse is marital property and cannot be divided except by a marital settlement agreement on order of the court, a Louisiana Fruits Statement will be ineffectual to shield these assets from division upon divorce.

The Act is clear, however, that a Louisiana Fruits Statement is treated as if it were a marital property agreement with respect to third parties.²² As such, a spouse seeking to protect the income from his or her separate property must treat the Louisiana Fruits Statement as if it were a marital property agreement and notify creditors and other third parties of the existence of the unilateral statement as required by the Act. Unless a third-party creditor has knowledge of the unilateral statement, the creditor will be able to reach the income from the separate property as if it were marital property.²³

courts have yet to pass on whether the appreciation of separate property due to the efforts of the owning spouse become part of the marital estate. See *Wierman v. Wierman*, 130 Wis. 2d 425, 440, 387 N.W.2d 744, 750 (1986). The rationale behind § 766.63, as well as the current divorce law, is simple: where the appreciation of the property is due to the efforts of one spouse, the appreciation is more akin to income resulting from labor for which the spouse applying the labor should be compensated. Since the "income" attributable to a spouse's efforts becomes part of the marital estate, the appreciation of separate property which is due to the efforts of either spouse should also become property of the marital estate. As such, it is probable that courts will find that the appreciation of separate property which is due to the efforts of either spouse is part of the marital estate at the time of the divorce.

18. 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984).

19. *Id.* at 333, 348 N.W.2d at 195.

20. *Id.* at 334, 348 N.W.2d at 195-96.

21. *Id.*

22. WIS. STAT. ANN. § 766.59(5) (West Supp. 1986).

23. The requirement that parties deliver the Louisiana Fruit Statement to creditors is different than the requirements under Louisiana law. In Louisiana, all the party must do is file the unilateral statement with the Register of Deeds in the parish in which the

B. *Enforceability*

Having determined the scope of a unilateral Louisiana Fruits Statement, we must next address whether Chapter 766 and/or Chapter 767 of the Wisconsin Statutes will govern a division of the income from separate property upon the dissolution of the marriage. On the one hand, Chapter 767 provides that the "fruits" of separate property are considered part of the marital estate and, thus, subject to division upon divorce.²⁴ Since these fruits are considered part of the marital estate, the parties can only divide them by entering into an agreement signed by both parties.²⁵ On the other hand, under Chapter 766 a spouse may unilaterally elect to exclude the fruits of separate property from the marital estate during the term of the parties' marriage.²⁶ Thus, the issue is whether a unilateral Louisiana Fruits Statement will bind both parties, as well as a trial court, upon the dissolution of the marriage.

The answer to this question may turn upon decisions of the Louisiana state courts. This is because the committee notes to section 766.59 specifically state that section 766.59

couple resides. Upon such a filing, all third parties are deemed to be put on notice that the income attributable to that spouse's property is no longer subject to a creditor's rights. *See* LA. CIV. CODE ANN. art. 2339 (West Supp. 1986); *see infra* note 28 for text of art. 2339. Although the Wisconsin provision requiring actual delivery is somewhat more onerous, it is in keeping with the legislative determination that a creditor is entitled to reach all assets that could be classified as marital assets unless that creditor is put on actual notice that certain property has been excluded from the marital estate by the parties. *See* WIS. STAT. ANN. § 766.55(4m) (West Supp. 1986).

24. The rationale for including the income in the marital estate is that the "income generated from the asset [is] separate and distinct from the asset itself." *Arneson v. Arneson*, 120 Wis. 2d 236, 244, 355 N.W.2d 16, 20 (1984). *But see also* *Wierman v. Wierman*, 130 Wis. 2d 425, 440, 387 N.W.2d 744, 750 (1986) (court distinguished income generated through the efforts of the marital partnership from income attributable to a source independent of the marriage).

25. Wisconsin Marital Property Act, 1985 Wis. Laws 29, § 2353 (codified at WIS. STAT. ANN. § 767.10 (West Supp. 1986)).

26. The unilateral nature of the Louisiana Fruits Statement raises yet another apparent conflict with current divorce practice. While it is true that parties to the marriage can bilaterally agree to the division of the entire marital estate, prior to such agreement in a divorce action, both parties must disclose all assets, held either separately or jointly. *See* WIS. STAT. ANN. § 767.27(1) (1983-84). This disclosure requirement is true whether the parties enter into a marital agreement at divorce or during the term of their marriage. *See* *Schumacher v. Schumacher*, 131 Wis. 2d 332, 388 N.W.2d 912 (1986). However, absolutely no disclosure must be made prior to the execution of a unilateral Louisiana Fruits Statement.

was based upon a comparable provision of Louisiana law.²⁷ This section, in a somewhat different form than section 766.59, states that the fruits derived from either spouses' separate property is community property unless expressly reserved by that spouse in a written declaration which is notarized and filed in the parish in which the parties reside.²⁸ Prior to January, 1980, the effective date of Louisiana's current community property laws, Louisiana law contained a similar provision which allowed only the wife to preserve the separate character of the income of her assets by executing a similar document.²⁹

Under Louisiana case law, it is fairly apparent that Louisiana courts would honor the wife's unilateral statement upon divorce. For example, in both *Mathews v. Hansberry*³⁰ and *Reynolds v. Reynolds*,³¹ a husband or former husband sought to obtain a portion of the income his wife had realized from certain separate property. In each case, the court noted that all property which comes into the marital community is presumed to be marital property, unless shown to the contrary. In both cases the wife failed to file the unilateral statement under Louisiana law. Each court stated that had she done so, she could have shielded the income derived from her separate assets from division. Having failed to do so, the husband was entitled to one-half of the income from the wife's separate property.³²

27. See SUPPLEMENTAL NOTES, *supra* note 14, at 26.

28. Compare WIS. STAT. ANN. § 766.59 (West Supp. 1986) with LA. REV. STAT. ANN. § 2339 (West. 1985) (eff. Jan. 1, 1980), which similarly provides:

The natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases are community property. Nevertheless, a spouse may reserve them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged.

As to the fruits and revenues of immovables, the declaration is effective when filed for registry in the conveyance records of the parish in which the immovable property is located. As to fruits of movables, the declaration is effective when filed for registry in the conveyance records of the parish in which the declarant is domiciled.

29. See LA. CIV. CODE ANN. art. 2386 (West 1944) (repealed 1979). Interestingly enough, the wife was also able to unilaterally exclude the fruits of her labor (i.e., her wages) from the marital estate. *Id.*

30. 71 So. 2d 232 (La. Ct. App. 1954).

31. 365 So. 2d 530 (La. Ct. App. 1979).

32. *Id.* at 537; *Mathews*, 71 So. 2d at 235.

Should Wisconsin courts follow Louisiana law, they would have to conclude that the income from separate property is no longer subject to division once a spouse has executed a Louisiana Fruits Statement. The rationale for such a finding is rather simple. Prior to the enactment of the Marital Property Act, Wisconsin law provided that gifted or inherited property was considered individual property³³ while the income from that property was treated no differently than income from any other source.³⁴ Since all income generated by an asset was viewed as separate and distinct from the asset itself, income from individual assets was found to be part of the marital estate.³⁵ With the advent of Chapter 766, the legislature has provided married couples with an option concerning the income from individual property. Either spouse may elect to treat the income from such property as individual property. In the event such an election is made, the individual property never becomes part of the marital estate. Since the individual property and its income were never part of the marital estate, a trial court may have no authority to divide it as it would a marital asset.³⁶

However, it is not likely that Wisconsin's courts will follow Louisiana precedent. As will be more fully discussed below, agreements which exclude certain assets from the marital estate are examined quite critically by Wisconsin's courts and are subject to attack on a number of grounds.³⁷ Additionally, since the legislature expressly stated that it did not intend the Marital Property Act to affect Wisconsin divorce law, courts could easily conclude that the Louisiana Fruits Statement only excludes income from separate property from the marital estate during the term of marriage. Thus, while such a statement may keep creditors from the income during a marriage,

33. See WIS. STAT. § 767.255 (1983-84).

34. *Arneson*, 120 Wis. 2d 236, 355 N.W.2d 16.

35. *Id.* at 244, 355 N.W.2d at 20.

36. It is interesting to note that other states have also treated the income from separate property as marital property. For example, IDAHO CODE § 32-906 (1983) provides that all property which is not individual property is treated as marital property. In fact, all income from separate property is treated as marital property unless both parties agree in writing that the property is to be excluded from the marital community. *Id.* This section seems to be much more in keeping with current Wisconsin divorce law than is WIS. STAT. ANN. § 766.59 (West Supp. 1986).

37. WIS. STAT. § 766.58(6) (1983-84) (eff. Jan. 1, 1986).

the income (or what has been purchased with the income) may nonetheless be divided upon divorce.

C. *Marital Property Agreements*

One possible alternative approach a court may choose to take when faced with the issue of the enforceability of a Louisiana Fruits Statement upon divorce is to classify the statement as a Marital Property Agreement. If a court classifies the unilateral statement as a Marital Property Agreement, it is then subject to attack on the grounds that it has an adverse impact on the children of the marriage³⁸ or that it was unconscionable when made and therefore, not binding.³⁹

Although Chapter 766 of the Wisconsin Statutes does not expressly address this issue, it is unlikely that the drafters intended a unilateral statement to be classified as a marital property agreement. The drafters set forth highly detailed requirements for marital property agreements in the Marital Property Act. For example, a marital property agreement is not enforceable if a spouse proves the absence of fair and reasonable disclosure of the other's assets⁴⁰ or that the spouse did not execute the agreement voluntarily.⁴¹ Since a unilateral statement contains almost none of the requirements set forth in section 766.58, the drafters most likely did not intend such statements to be classified as marital property agreements.

Moreover, the drafters expressly stated that a unilateral statement was to be treated as if it were a marital property agreement with respect to third-party creditors,⁴² thus, highlighting the distinction between a marital property agreement and a unilateral statement which is defined only as a "written statement."⁴³ As such, it is unlikely that the legislature intended the unilateral written statement to function as a marital property agreement for all purposes.

38. WIS. STAT. § 766.58(2) (1983-84) (eff. Jan. 1, 1986).

39. WIS. STAT. § 766.58(6)(a) (1983-84) (eff. Jan. 1, 1986).

40. WIS. STAT. ANN. § 766.58(6)(c) (West Supp. 1986) (eff. Jan. 1, 1986).

41. WIS. STAT. § 766.58(6)(b) (1983-84) (eff. Jan. 1, 1986).

42. WIS. STAT. ANN. § 766.59(5) (West Supp. 1986) (eff. Jan. 1, 1986).

43. Compare WIS. STAT. ANN. § 766.59(1) (West Supp. 1986) ("[a] spouse may unilaterally execute a written statement") with § 766.59(5) ("[w]ith respect to its effect on third parties, a statement or a revocation shall be treated as if it were a marital property agreement").

That is not to say that a court will never look behind a Louisiana Fruits Statement and reach the separate assets of the spouse through another means. When analyzing the extent to which separate property should be included or excluded from a marital estate upon divorce, Wisconsin courts are guided by section 767.255 which states that individual property is not subject to property division under this section "except upon a finding that refusal to divide such property will create a hardship on the other party."⁴⁴ Thus, the court could apply section 767.255 and find that depriving the non-titled spouse from the income of the other spouse's separate property works a hardship on the nontitled spouse.⁴⁵ Especially in light of the unilateral nature of the Louisiana Fruits Statement, as opposed to a bilateral marital property agreement, the finding of hardship may be an easy way of applying Wisconsin divorce law rather than the provisions of the Marital Property Act.

Several recent Wisconsin Supreme Court cases relating to the enforceability of prenuptial agreements may have an impact on a court's analysis of a Louisiana Fruits Statement as well. In *Levy v. Levy*,⁴⁶ the parties entered into a premarital agreement whereby the parties set forth their respective rights to each other's property "both during the term of such marriage and upon the termination thereof by the death of one or both of the parties."⁴⁷ After the wife filed for divorce, the husband sought to restrict his wife's right to marital assets by arguing that the prenuptial agreement was effective to limit her rights not only upon her husband's death, but also upon termination of the marriage by divorce. The trial court agreed, finding that the prenuptial agreement was equitable, enforceable and applicable to termination of the marriage by divorce as well as death.⁴⁸

44. WIS. STAT. § 767.255 (1983-84).

45. By applying the "hardship" standard, Wisconsin courts have concluded that the appreciation of separate property which is due to the efforts of the nonowning spouse is subject to division upon divorce. The failure to so divide such property would work a "hardship" on the nonowning, contributing spouse. *Plachta v. Plachta*, 118 Wis. 2d 329, 334, 348 N.W.2d 193, 195-96 (Ct. App. 1984).

46. 130 Wis. 2d 523, 388 N.W.2d 170 (1986).

47. *Id.* at 527 n.2, 388 N.W.2d at 172 n.2.

48. The trial court reasoned that the agreement was entered into with valid family considerations in mind and that the parties did not refer to divorce because of public

On appeal, the Wisconsin Supreme Court reversed. Applying basic rules of contract construction the court noted that the parties' premarital agreement never mentioned the words "divorce" or "separation."⁴⁹ Additionally, both parties testified at trial that neither contemplated divorce when executing the premarital agreement.⁵⁰ Since the testimony of the parties and the language of the agreement itself left no question that the premarital agreement was intended to apply only upon death, and not at divorce, the supreme court remanded the case for recomputation of property division under section 767.255 of the Wisconsin Statutes.⁵¹

The *Levy* decision impacts the enforceability of the Louisiana Fruits Statement in a number of ways. Initially, one cannot help but note that the courts strictly construed the Levys' premarital agreement to apply only upon the death of either or both of the parties. This narrow construction reveals that the court continues to view agreements which dispose of marital assets in an unequal fashion as suspect under the law.⁵² Since a Louisiana Fruits Statement is unilateral in nature, and disposes of property which the courts previously considered marital assets, it is likely that these unilateral statements will also be strictly construed.

policy considerations at the time they entered into the agreement. *Id.* at 531, 388 N.W.2d at 179. The court of appeals affirmed the trial court's decision. *Levy v. Levy*, No. 84-1425 (Ct. App. Aug. 15, 1985), *rev'd*, 130 Wis. 2d 523, 388 N.W.2d 170 (1986).

49. The Wisconsin Supreme Court rejected the trial court's reference to the public policy provisions against premarital agreements. The court noted that the cases upon which the trial judge relied allowed such agreements to "be considered" but stated that neither case supported the proposition that antenuptial agreements relating only to death furnished a basis for making a property division upon divorce. *Levy*, 130 Wis. 2d at 533 n.4, 388 N.W.2d at 174 n.4.

50. *Id.* at 534-35, 388 N.W.2d at 175.

51. In finding that the agreement was binding upon divorce as well as upon death, the trial court found that since a spouse could apparently recover 50% of the other spouse's estate upon divorce, the application of § 767.255 would promote others to "commence divorce actions rather than await the death of their spouses." *Id.* at 533, 388 N.W.2d at 174. The supreme court expressly rejected this rationale on the grounds that a trial court has broad latitude to divide the marital estate under § 767.255, and that a trial court could divide the marital estate along the same lines as set forth in the prenuptial or antenuptial agreement, if it felt that it was equitable to do so. *Id.* at 532, 388 N.W.2d at 173.

52. Although courts may give lip service to the provisions of WIS. STAT. § 767.255(1) that agreements are presumed to be equitable, the recent trend apparent in the court's decision in *Levy* seems to indicate a return to prior law which viewed such agreements as suspect. See also *infra* note 53.

Another case relating to the enforceability of prenuptial and antenuptial agreements bears noting. In *Button v. Button*,⁵³ the Wisconsin Supreme Court was faced with the issue of "when is equitableness of an antenuptial or postnuptial agreement [under subsection 767.255(11)]⁵⁴ to be determined — as of the time of execution of the agreement or as of the time of divorce?"⁵⁵ The court also addressed the issue of what constituted an equitable agreement.

The *Button* court concluded that an agreement is inequitable under section 767.255(11) if (1) either spouse failed to make a fair and reasonable disclosure of their financial status; (2) either spouse entered into the agreement involuntarily; or (3) the substantive provisions of the agreement dividing the property upon divorce were unfair to either spouse.⁵⁶ The first two requirements must be assessed as of the time of the execution of the agreement.⁵⁷ The third requirement is also to be assessed as of the time of the execution of the agreement; however, if circumstances significantly change after the agreement is signed, it must additionally be assessed as of the divorce.⁵⁸

Obviously, in light of the unilateral nature of the Louisiana Fruits Statement, the rules set forth in *Button* cannot be

53. 131 Wis. 2d 84, 388 N.W.2d 546 (1986).

54. WIS. STAT. § 767.255(11) (1983-84) provides:

Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

As noted by the court in *Button*, § 767.255(11) fails to specify the time at which the inequitable nature of the agreement is to be determined. 131 Wis. 2d at 98 n.3, 388 N.W.2d at 551 n.3.

55. *Id.* at 89, 388 N.W.2d at 548. On the same day that the court decided *Button*, the court also issued a decision in *Schumacher v. Schumacher*, 131 Wis. 2d 332, 388 N.W.2d 912 (1986). The court followed the standards set forth in *Button* and affirmed the trial court's decision setting aside an antenuptial agreement based on the fact that the parties did not make a full and fair disclosure of their assets prior to entering into the agreement. Although Mrs. Schumacher may have had a general knowledge of Mr. Schumacher's holdings, actual knowledge of the other party's assets is required under *Button*. *Id.* at 340, 388 N.W.2d at 915.

56. *Button*, 131 Wis. 2d at 89, 388 N.W.2d at 548.

57. *Id.*

58. *Id.*; cf. *Hengel v. Hengel*, 122 Wis. 2d 737, 745, 365 N.W.2d 16, 20 (Ct. App. 1985), discussed in *Button*, 131 Wis. 2d at 98 n.3, 388 N.W.2d at 551-52 n.3 ("[n]either party argues that equitability should be determined as of the time the agreement is enforced").

mechanically applied to determine whether a Louisiana Fruits Statement will bind a court in a divorce action. However, this case can provide guidance. Initially, one can again see the critical eye with which courts examine agreements which preclude an equitable distribution of marital assets.⁵⁹ Since courts so critically examine these agreements, especially where only one party is represented by counsel, it is obvious that unrelated Louisiana Fruits Statements will also be subject to very close scrutiny.

Perhaps even more importantly, *Button* will provide a yardstick whereby the trial court may measure the equitability of a Louisiana Fruits Statement in determining whether to reach the parties' separate assets under section 767.255. As noted above, section 767.255 gives the court the power to reach and divide separate assets "upon a finding that refusal to divide such property will create a hardship on the other party or on the children of the marriage."⁶⁰ Upon such a finding, the trial court has the authority to divide separate property in a fair and equitable manner.

Although a court need not find the Louisiana Fruits Statement to be inequitable before it can reach separate property under section 767.255, it stands to reason that the more onerous and one-sided a document is, the more such a document works a hardship on one party to the marriage. Since a party may now unilaterally exclude from the marital estate property which formerly was considered part of the marital estate, courts may more readily find that the failure to reach such

59. It is interesting to note that the courts subject these agreements to great scrutiny even in light of the mandate of Wis. STAT. § 767.255(11) (1983-84) which states that the court is to presume marital agreements are equitable. As noted in *Button*, while the legislature has recognized that prenuptial and antenuptial agreements serve useful functions in that they allow parties to structure their financial affairs to suit their needs, § 767.255(11) sets forth a competing public policy, i.e., marriage is a legal status in which the state has a special interest. Specifically the court stated:

Certain rights and obligations dictated by the state flow from marriage, and the legislature requires a divorce court to scrutinize an agreement between the spouses carefully. The parties are free to contract, but they contract in the shadow of the court's obligation to review the agreement on divorce to protect the spouses' financial interests on divorce.

Button, 131 Wis. 2d at 94, 388 N.W.2d at 550. It is clear that the courts will look at these "competing interests" and continue to closely scrutinize both prenuptial and antenuptial agreements.

60. Wis. STAT. § 767.255 (1983-84).

property will create a hardship and thereby circumvent the provisions of section 766.59 and reach the fruits of separate property.

CONCLUSION

Obviously, even though the legislature never intended Chapter 766 to conflict with present Wisconsin divorce law, such a conflict does exist. In light of the unilateral nature of Louisiana Fruits Statements, it is likely that these statements will be subject to close scrutiny in the Wisconsin courts. This scrutiny may result in a finding that Louisiana Fruits Statements are ineffective to bar the division of the income of separate assets upon the dissolution of a marriage.