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AGREEMENTS BETWEEN SPOUSES UNDER THE WISCONSIN MARITAL PROPERTY ACT

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I. INTRODUCTION

The Wisconsin Marital Property Act¹ (the Act), and the Uniform Marital Property Act (UMPA)² upon which it is based, are remarkable for the scope and detail of their provisions regarding agreements between spouses. Present law in Wisconsin and in the eight community property states³ does not contain the broad and explicit authorization to spouses to regulate their relationship that is given to them by the Act and by UMPA.⁴

This Article will analyze the provisions of the Wisconsin Act concerning agreements between spouses. The provisions of the Act which govern agreements between spouses⁵ will fall into four categories: (1) matters which may be the subject of an enforceable agreement; (2) matters which may not be the subject of an enforceable agreement; (3) formal requirements for an agreement (including the requirements for its revocation); and (4) requirements that can be conveniently (if somewhat inaccurately) grouped under a rubric of "fairness"—conscionability, voluntariness, and disclosure.⁶

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1. 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. ch. 766). It is sometimes referred to as the Marital Property Reform Act.

2. UNIF. MARITAL PROP. ACT, 9A U.L.A. 21 (Supp. 1985) [hereinafter cited as UMPA].

3. The eight community property states are Arizona, California, Idaho, Louisiana, Nevada, Oregon, Texas, and Washington.

4. The comment to UMPA section 3 states: "The act permits a couple to move its marital economics from status to contract and encourages a type of interspousal contractual freedom little known in common law states."

5. The Act uses the term "marital property agreement." See 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. §§ 766.01(12), 766.58(1)).

6. See *id.* (to be codified at WIS. STAT. § 766.58). Two miscellaneous provisions not falling under any one of the four categories stated in the text are mentioned here for completeness. First, the Wisconsin Act contains a provision, not present in the UMPA, that authorizes the spouses to submit to binding arbitration "any controversies arising

This Article will discuss each of these categories. The final section of the Article will examine the relationship between the part of the Act which concerns marital agreements and the provisions of other law.

II. THE PERMISSIBLE SUBJECT MATTER

The broad power to make an agreement is conferred by future section 766.17: "Variation by marital property agreement. Except as provided . . . a marital property agreement may vary the effect of this chapter."⁷ However, the section which governs spousal agreements in the greatest detail is future section 766.58.⁸ Specifically, subsection three lists several matters about which spouses can make an enforceable agreement.⁹ In giving spouses the power to make an agreement concerning "[r]ights in and obligations with respect to any of either or both spouses' property whenever and wherever acquired or located,"¹⁰ the section specifically authorizes them

under this chapter or a marital property agreement." *Id.* (to be codified at WIS. STAT. § 766.58(10)). Second, the Act states that previous law applies to agreements signed before the Act's effective date unless the spouses provide otherwise in a marital property agreement. *See id.* (to be codified at WIS. STAT. § 766.58(12)).

7. *Id.* (to be codified at WIS. STAT. § 766.17). The four sections excepted from the rule are discussed *infra* at notes 12-16 and accompanying text.

8. *See* 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58).

9. 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(3)) provides:

Except as provided in §§ 766.15, 766.55(4m) and 766.57(3), and in sub. (2), in a marital property agreement spouses may agree with respect to any of the following:

(a) Rights in and obligations with respect to any of either or both spouses' property whenever and wherever acquired or located.

(b) Management and control of any of either or both spouses' property.

(c) Disposition of any or either of both spouses' property upon dissolution or death or upon the occurrence or nonoccurrence of any other event.

(d) Modification or elimination of spousal support, except as provided in sub. (9).

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

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

(g) Choice of law governing construction of the marital property agreement.

(h) Any other matter affecting either or both spouses' property not in violation of public policy or a statute imposing a criminal penalty.

10. 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(3)(a)). Additionally, "[s]pouses may reclassify their property by . . . marital property agreement." *Id.* (to be codified at WIS. STAT. § 766.31(10)).

to reclassify their property from marital to individual, or vice-versa, including property to be acquired in the future.¹¹

III. THE PROHIBITED SUBJECT MATTER

A number of other provisions in the Act list those matters which may not be the subject of an enforceable agreement. Four subsections are listed as exceptions to the general rule that spouses can make enforceable agreements which vary the effect of the Act. First, a spouse's obligation of good faith with respect to the other spouse may not be varied by a marital property agreement.¹² Second, no provision of a marital property agreement may adversely affect the interest of a creditor unless the creditor had knowledge of the provision.¹³ Third, the provision which protects bona fide purchasers of marital property from a spouse who has management and control of the property may not be varied by a marital property agreement.¹⁴ And fourth, an agreement may not adversely affect the right of a child to support.¹⁵

Two additional restrictions limit the spouses' power to make an agreement modifying spousal support during marriage or after the dissolution of marriage.¹⁶ This provision is contrary to the 1978 Wisconsin Court of Appeals decision in *Whitwam v. Whitwam*.¹⁷ In that case, the judgment of divorce, pursuant to a stipulation of the parties, provided in part that alimony would be payable if and when public assistance was received in the future by the dependent spouse. That portion of the judgment was declared invalid by the court of ap-

11. It is questionable whether it was necessary to list the matters with respect to which spouses can agree. Some of the matters listed in subsection three are specifically dealt with in some other section of the Act. See, e.g., 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.51). An agreement concerning those matters would "vary the effect of this chapter" and is, therefore, already authorized by future section 766.17. As for the matters listed in subsection three that are not covered by the Act, a married person has the same power to make a contract (or will) regarding them as has any other person, as long as the contract (or will) is not prohibited by statute or case law; specific authorization seems unnecessary. Perhaps the drafters thought it useful to list several of the provisions of the Act which spouses would most commonly wish to affect.

12. See *id.* (to be codified at WIS. STAT. § 766.15(1)).

13. See *id.* (to be codified at WIS. STAT. § 766.55(4m)).

14. See *id.* (to be codified at WIS. STAT. § 766.57(3)).

15. See *id.* (to be codified at WIS. STAT. § 766.58(2)).

16. See *id.* (to be codified at WIS. STAT. § 766.58(9)).

17. 87 Wis. 2d 22, 272 N.W.2d 366 (Ct. App. 1978).

peals, which stated that alimony is fixed on the basis of the dependent spouse's needs and the other spouse's ability to pay and that these facts are to be determined "upon the basis of circumstances existing at the time of the divorce."¹⁸ Pursuant to the Act, however, a court may declare invalid an agreement concerning maintenance on the ground that the agreement makes a spouse eligible for public assistance "after dissolution of the marriage."¹⁹ The language of the Act apparently allows a court to make such a declaration of invalidity at any time after the dissolution. As a result, a judgment concerning maintenance would never be final.²⁰

The Act also provides that spouses may agree with respect to "[a]ny other matter affecting either or both spouses' property not in violation of public policy or a statute imposing a criminal penalty."²¹ This phrase is unfortunate for two reasons. First, the phrase is unnecessary. To the extent that the Act does not change the present law, that law will still govern.²² Under present law, a court may refuse to enforce a contract which violates public policy or is "illegal," even in the absence of a specific statutory provision to that effect.²³ A marital property agreement, whether supported by consideration²⁴ or not,²⁵ would still be subject to this common-law rule. And second, the presence of the phrase referring to violations of public policy or a criminal statute in one subsection and its absence from preceding subsections imply that agreements on matters described in the preceding paragraphs *cannot* be declared unenforceable on the grounds of public policy or ille-

18. *Id.* at 27-28, 273 N.W.2d at 368.

19. 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(9)(b)).

20. See Walther, *The Uniform Marital Property Act Wisconsin Version*, 4 EQUITABLE DISTRIBUTION REP. 140, 143 (1983).

21. 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(3)(h)).

22. See *id.* (to be codified at WIS. STAT. § 766.96) which states: "Unless displaced by this chapter, the principles of law and equity supplement its provisions." See also *LePoidevin v. Wilson*, 111 Wis.2d 116, 129-30, 330 N.W.2d 555, 562 (1983).

23. Wisconsin courts have held contracts unenforceable under this doctrine. See, e.g., *Vic Hansen & Sons, Inc. v. Crowley*, 57 Wis. 2d 106, 203 N.W.2d 728 (1973); *Venisek v. Draski*, 35 Wis.2d 38, 150 N.W.2d 347 (1967); *Griffith v. Harris*, 17 Wis. 2d 255, 116 N.W.2d 133 (1962).

24. Such an agreement would constitute a contract. See *supra* note 23.

25. The agreement need not involve consideration to be enforceable. See 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(1)). The common-law rule has been applied to the analogous situation of wills. See *infra* note 26.

gality. Yet, an agreement on one of those matters might very well violate public policy or a criminal statute, and there is no reason to prevent the courts from declaring such agreements unenforceable once the Act becomes effective.²⁶

IV. FORMAL REQUIREMENTS

An agreement between spouses must be signed by both spouses.²⁷ Although the Act does not explicitly state that an agreement must be in writing, the signature requirement and the statement that an agreement "shall be a document"²⁸ evidences the legislative intent. Consideration is not a formal requirement for spousal agreements.²⁹

Although there is no requirement that a marital agreement be recorded, the Act states that married persons or persons intending to marry may record an agreement with the register of deeds.³⁰ The purpose of recording would only be for safekeeping of the instrument; the recording does not constitute notice to a third party.³¹

A marital property agreement may be amended or revoked only by a subsequent marital property agreement.³² The Act does not contain any provision stating that an agreement is revoked upon dissolution of the marriage by divorce, annulment, or legal separation. The Act does, however, confer upon the courts a broad authority to vary the relationship be-

26. For example, the Act authorizes spouses to agree with respect to disposition of a spouses' property upon death. See 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.58(3)(c)). That kind of agreement would be, in effect, a type of will, and provisions of wills have been held void in Wisconsin on the ground that they were contrary to public policy. See, e.g., *Estate of Hauck*, 239 Wis. 421, 1 N.W.2d (1942); *Will of Keenan*, 188 Wis. 163, 205 N.W. 1001 (1925). If the Act were read to "overrule" these cases, such provisions could appear in a marital property agreement but not in a will. This anomalous result could not have been intended.

27. See 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.58(1)).

28. See 1983 Wis. Laws 186, (to be codified at Wis. STAT. § 766.58(1)). See also UMPA, *supra* note 2, prefatory note.

29. See 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.58(1)).

30. See *id.* (to be codified at Wis. STAT. § 766.58(1)).

31. See *id.* (to be codified at Wis. STAT. § 766.56(2)(a)).

32. See *id.* (to be codified at Wis. STAT. § 766.58(4)). UMPA differs from the Wisconsin provision by including an additional sentence: "The amended agreement or the revocation is enforceable without consideration." UMPA, *supra* note 2, § 10(d). Since the amended agreement or the revocation is itself a marital property agreement, and since subsection (1) provides that a marital property agreement is enforceable without consideration, the additional sentence in UMPA is redundant.

tween spouses in a manner that would effectively abrogate the most common provisions of a marital agreement between them.³³

Likewise, there is no provision of the Act which would revoke an agreement at the death of a spouse. Since the agreement would not then be revocable by a subsequent agreement, it would be binding upon the survivor.³⁴ A provision for disposition of the survivor's property at death³⁵ would continue to have meaning; it would bind the survivor in the same way that a contract not to revoke a will binds the surviving party.³⁶

V. REQUIREMENTS OF "FAIRNESS"

The Act contains the remaining requirements for an enforceable agreement between spouses;³⁷ they will probably be the ones most frequently violated. Restated in an affirmative form, the statute sets forth the requirements for enforceability as follows: (1) the agreement was conscionable when made; (2) the spouse against whom enforcement is sought executed the agreement voluntarily; and (3) this spouse received fair

33. See 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.75(4)).

34. Of course, provisions of such an agreement concerning management and control of a spouse's property, its classification, and many other matters would no longer have any effect after one spouse's death.

35. See 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(3)(c), (f)).

36. See, e.g., *Estate of Phillips*, 54 Wis. 2d 296, 195 N.W.2d 485 (1972); *Estate of Chayka*, 47 Wis. 2d 102, 176 N.W.2d 561 (1970).

37. Future section 766.58(6) provides:

A marital property agreement executed before or during marriage is not enforceable if the spouse against whom enforcement is sought proves any of the following:

- (a) The marital property agreement was unconscionable when made.
- (b) That spouse did not execute the marital property agreement voluntarily.
- (c) Before execution of the marital property agreement, that spouse:
 1. Did not receive fair and reasonable disclosure of the other spouse's property or financial obligations;
 2. Did not voluntarily and expressly waive in a written consent any right to disclosure of the other spouse's property or financial obligations beyond that actually provided, or did waive the right to disclosure of the general categories of the other spouse's assets at the approximate fair market value less general categories of the other spouse's liabilities at approximate fair market value; and
 3. Did not have notice of the other spouse's property or financial obligations.

1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(6)). This provision has the effect of placing the burden of proof on the spouse who alleges that the agreement is unenforceable.

and reasonable disclosure of the other spouse's property and financial obligations, or one of the alternatives to disclosure was satisfied.³⁸

A. Conscionability

In a 1983 case, *Discount Fabric House v. Wisconsin Telephone Co.*,³⁹ the Wisconsin Court of Appeals discussed the unconscionability doctrine at length. The plaintiff had contracted with the defendant telephone company to place an advertisement in the yellow pages. The contract provided that the telephone company was not liable for errors or omissions in advertising beyond the amount charged. The plaintiff's advertisement as printed contained an error, and the plaintiff brought suit for damages due to lost profits. In finding the provision conscionable, the court of appeals quoted from a number of sources in attempting to give meaning to "unconscionability."

An unconscionable contract has been defined as one which no man in his senses, not under delusion, would

38. The statute lists two alternatives to the disclosure requirement: "notice" and waiver of the right to disclosure. See *id.* (to be codified at WIS. STAT. § 766.58(6)(2), (3)). See *infra* notes 53-65 and accompanying text for a discussion of the disclosure requirement and its alternatives.

UMPA differs from the Wisconsin Act in containing two different provisions dealing with these requirements — one concerning agreements executed during marriage and another for premarital agreements. See UMPA, *supra* note 2, § 10(f), (g).

Under the premarital provision, even an unconscionable agreement would be enforceable as long as there had been full disclosure. Similarly, an agreement between nondisclosing spouses would be enforceable if it was conscionable.

During the debates on UMPA, two factors were mentioned in support of dual standards. First, it was believed desirable that UMPA and the Uniform Premarital Agreements Act be consistent in their requirements for the enforceability of premarital agreements, and the present provision accomplishes that result. See 2 PROCEEDINGS IN COMMITTEE OF THE WHOLE OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS—MARITAL PROPERTY ACT 333 (July 23, 25 & 26, 1983) [hereinafter cited as PROCEEDINGS]; UMPA, *supra* note 2, § 10 comment. Second, because there is more opportunity for duress during marriage, the standard for agreements made then should be stricter. See 2 PROCEEDINGS, *supra* note 38, at 448, 458. On the other hand, some of the commissioners objected to the premarital standard on the ground that an agreement signed by a spouse who lacked knowledge of the other spouse's assets would probably be unconscionable. See *id.*

The other major difference between UMPA § 10(f) and 1983 WIS. LAWS 186, § 47 (to be codified at WIS. STAT. § 766.58(6)) is Wisconsin's addition to the waiver provision.

39. 113 Wis. 2d 258, 334 N.W.2d 922 (Ct. App. 1983).

make, on the one hand, and as one which no fair and honest man would accept, on the other. . . .[F]actors to be considered . . . include: (1) the use of printed form or 'boilerplate' contracts drawn by the party in the strongest economic position and offered to the weaker party on a take-it or leave-it basis. . . ; (2) exploitation of the underprivileged, unsophisticated, and uneducated buyer of consumer goods. . . ;and (3) the hiding of clauses disadvantageous to one party in a mass of fine print

Additionally, the courts consider such factors as: (1) significant cost-price disparity; (2) the inclusion of penalty clauses; (3) the circumstances surrounding the execution of the contract; (4) the phrasing of clauses in 'legalese' incomprehensible to a layman, and (5) an overall imbalance in the obligations and rights imposed by the bargain.⁴⁰

Under the Act, "[t]he issue of whether a marital property agreement is unconscionable is for the court to decide as a matter of law."⁴¹ Although the debates on UMPA are not entirely clear on the point, the commissioners apparently intended this provision to mean only that the question of unconscionability is for the judge, not the jury, to decide. According to the commissioners, the phrase "as a matter of law" does not require the spouse to establish a case to the extent necessary to take the case from the jury, nor does it prevent the court from considering all the facts and circumstances in reaching a decision.⁴²

Unconscionability is to be measured as of the time when the agreement was made.⁴³ Without that provision, an agreement that took no apparent advantage of a spouse when made would perhaps be found unconscionable when viewed in light of the circumstances at the time of its attempted enforcement. The provision in the Act limits a court, in its determination of unconscionability, to a consideration of the circumstances at the time the agreement was made.

40. *Id.* at 261-63, 334 N.W.2d at 924-25 (citations omitted). See also *Foursquare Properties v. Johnny's Loaf & Stein*, 116 Wis. 2d 679, 343 N.W.2d 126 (Ct. App. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 208 comments c, d, (1981).

41. 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(8)).

42. See 2 PROCEEDINGS, *supra* note 38, at 456-61.

43. See 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(6)(a)).

B. Independent Counsel

The Wisconsin Act added to the UMPA provisions on enforceability the following sentence: "In the event that legal counsel is retained in connection with a marital property agreement the fact that each party to a marital property agreement is not represented by independent counsel does not by itself make a marital property agreement unconscionable or otherwise affect its enforceability, if each spouse waived independent representation in writing."⁴⁴

C. Voluntariness

An agreement will not be enforceable if the spouse did not execute the agreement "voluntarily."⁴⁵ The term is not defined in the Act, and the definitions found in the case law are not helpful.⁴⁶

D. Disclosure and Its Alternatives

Finally, the Act requires that one of the following have occurred before execution of the agreement: (1) the spouse against whom enforcement is sought "receive[d] fair and reasonable disclosure of the other spouse's property [and]⁴⁷ financial obligations;"⁴⁸ (2) the spouse "voluntarily and expressly waive[d] in a written consent any right to disclosure of the other spouse's property and financial obligations beyond that actually provided,"⁴⁹ but did not make a general waiver;⁵⁰ or

44. See *id.* (to be codified at WIS. STAT. § 766.58(8)).

45. See *id.* (to be codified at WIS. STAT. § 766.58(6)(b)).

46. See, e.g. *Louisville & N.R. Co. v. Hall*, 233 Ala. 338, ___, 135 So. 466, 471 ("done by design or intentional; intentional; purposed; intended; not accidental") (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY), *cert. denied*, 284 U.S. 661 (1931); *R.T. Realty, Inc. v. Downes*, 14 Misc. 2d 322, 324, 182 N.Y.S.2d 79, 82 (1958) ("[t]he term, 'voluntarily,' envisions the exercise of the will—a deliberate choice between two (or more) known courses of action").

47. The statute uses the word "or," but it is believed the correct word is "and." The intended purpose of the provision is clearly to require disclosure of both the property and the financial obligations. See 2 PROCEEDINGS, *supra* note 38, at 467. The difficulty arises from an ambiguity in the syntax of the statute, which is phrased in the negative.

48. 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(6)(c)(1)).

49. *Id.* (to be codified at WIS. STAT. § 766.58(6)(c)(2)).

50. See *infra* note 64 and accompanying text.

(3) the spouse had "notice of the other spouse's property [and]⁵¹ financial obligations."⁵²

1. Fair and reasonable disclosure versus notice

The presence of both the disclosure alternative and the notice alternative is puzzling. In the absence of the "fair and reasonable" criteria which the Act attaches to disclosure, the disclosure alternative would be unnecessary because the notice alternative includes it. Receiving disclosure of a fact, after all, is but one way of having notice of it. The former denotes the act of another person in informing the spouse of the facts; the latter denotes knowledge acquired by any means, whether it be by disclosure or by the spouse's independent inquiry or accidental discovery.⁵³

The apparent purpose of requiring disclosure or notice is to assure a court that the spouse against whom enforcement of the agreement is requested was well-informed when making the agreement. Surely the only relevant criteria for sufficiency of the notice or disclosure, then, are the kind and amount (quality and quantity) of the information known by that spouse (or which that spouse had the opportunity to know); it should be entirely irrelevant whether that information was acquired by disclosure or by some other means.

The person making the disclosure need not be the spouse attempting enforcement of the agreement. The statute does not refer to the identity of the person making the disclosure. Of course, if the one making the disclosure were someone acting under the control and direction of the spouse seeking enforcement, it would be rational to charge that spouse with the acts of an agent for this purpose. But it need not be the case that the discloser is the agent of this spouse; that person could be anyone with access to the information who disclosed it to the opponent spouse.⁵⁴

Assuming that disclosure in the statute is interpreted to refer only to an act by the spouse seeking enforcement, it is

51. See *supra* note 47 regarding the use of "and."

52. 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58 (6)(c)(3)).

53. See *id.* (to be codified at WIS. STAT. § 766.01(13)(defining "notice")).

54. It is unlikely that someone other than the spouse seeking enforcement or an agent would have access to all the information that must be disclosed. However, the statute does not require that one person be the sole source of all the information.

not clear whether the "fair and reasonable" criteria are appropriate. If the purpose of requiring disclosure or notice of a spouse's property and financial obligations is to uphold agreements only between well-informed spouses, then the only aspects of disclosure that should be relevant are the quantity and quality of the facts disclosed, not the manner of disclosure. Any supposed impropriety in the manner of disclosure that did not affect the knowledge of the other spouse should be irrelevant to a decision regarding enforcement. If the impropriety of a spouse's actions in procuring the agreement is extreme, other parts of the Act afford a remedy.⁵⁵

With respect to major deficiencies in the manner of disclosure, the criteria of fairness and reasonableness are unnecessary: a disclosure which is egregiously unfair or unreasonable would not be disclosure at all. If, for example, the spouse seeking enforcement disclosed facts in an incomprehensible form, did not afford the other spouse adequate time to inspect them, or stated them in a way which was somehow misleading, a court should have little difficulty in holding that the spouse's action did not constitute disclosure.⁵⁶ On the other hand, deficiencies of disclosure that are not so extreme would be better prevented by criteria that speak more directly to the kind and amount of facts disclosed than to the criteria of fairness and reasonableness.⁵⁷

There is a second policy in addition to promoting sufficient disclosure: the statute should forgive inconsequential deficiencies of disclosure or of notice. Indeed, that seems to be the main effect of the criteria of fairness and reasonableness. They make the standard for disclosure less strict than that for notice. If the words "fair and reasonable" were absent, the

55. See, e.g., 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. §§ 766.15 (good-faith requirement), 766.58(6)(a) (conscionability requirement), 766.58(6)(b) (voluntariness requirement)).

56. Similarly, a major omission or inaccuracy would disqualify the spouse's actions from being a disclosure.

57. Furthermore, to the extent that the "fair and reasonable" criterion does have the effect of rejecting disclosure that is deficient because of its manner or content, this criterion should apply to noticed facts as well. Facts about the other spouse's financial condition are just as likely to be incomprehensible, incomplete, or misleading if independently acquired by the spouse against whom enforcement is sought as they would be if they were disclosed to that spouse. See 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.01(13)(defining "notice")).

provision would literally require disclosure of every item of property and every obligation. To say that disclosure must be fair and reasonable is to forgive minor deficiencies of disclosure that could not have caused the spouse to sign an otherwise unacceptable agreement. Given this interpretation, the fair and reasonable criteria are a useful limitation on the disclosure required. Again, however, their purpose would be better served by criteria which more clearly describe the quality and quantity of the facts known.⁵⁸

2. Waiver

The other alternative to disclosure under the Act is waiver of the right to disclosure.⁵⁹ Paraphrased in an affirmative form, this provision states that the disclosure requirement will be met if the spouse against whom enforcement is sought voluntarily and expressly waived in a written consent⁶⁰ any right to disclosure of the other spouse's property and⁶¹ financial obligations beyond that actually provided but⁶² did not waive the right to disclosure of the general categories of the other spouse's assets at approximate fair market value less general categories of the other spouse's liabilities at approximate fair market value.⁶³

What is the difference between the impermissible waiver and the permissible waiver of disclosure? Certainly there cannot be any significant difference in meaning between "property" and "assets"; if the legislature intended such a difference, it should make its intention known more explicitly through the use of definitional sections. In addition, a permis-

58. Given the fact that the meaning of "notice" subsumes that of "disclosure," the two alternatives should be written as one notice alternative. The following language is suggested as a substitute paragraph 1 (with paragraph 3 omitted to 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(6)(c))): "I. Did not have notice of facts which constituted a reasonably accurate and complete description of the other spouse's property and financial obligations."

59. See 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(6)(c)(2)).

60. "Written consent" is defined in 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.01(16)) as "a document signed by a person against whose interests it is sought to be enforced."

61. See *supra* note 47 regarding the use of "and."

62. When the provision is converted to its affirmative form, the "or" in the statute must be changed to an "and"; the logically equivalent "but" is used here as better reflecting the sense of the provision.

63. See 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(6)(c)).

sible waiver has to do with a spouse's "financial obligations"; an impermissible one concerns a spouse's "liabilities." The term "liabilities" is probably the broader one. For example, a spouse's duty to specifically perform as seller under a sales contract would be a liability but perhaps not a "financial obligation." The purpose of such a distinction — if one is indeed intended here — is not obvious; again, if a difference in meaning is intended, it should be made clearer.

Assuming there is little, if any, difference between "property" and "assets," and likewise little if any difference between "financial obligations" and "liabilities," one would find it a difficult task to draft an instrument which contains a permissible waiver without, at the same time, containing an impermissible one. A simple, unqualified waiver⁶⁴ has the effect of waiving the right to disclosure of all the other spouse's property and obligations; such a waiver necessarily includes a waiver of the "general categories." One way to avoid waiving disclosure of general categories would be to waive disclosure of property and obligations which are specifically set forth in the waiver. However, such a waiver would be a disclosure which would meet, or come close to meeting, the requirements of the disclosure alternative in paragraph one.⁶⁵

The meaning and purpose of the clause prohibiting a "general waiver" needs to be explained. Whatever its purpose, it could be better implemented by a provision which states the requirements for an effective waiver instead of the attributes of an ineffective one.

VI. RELATIONSHIP WITH OTHER LAW

A. *Scope*

The Act does not purport to state the entire body of law governing married persons. That which the Act fails to regulate will be governed by the provisions of present law.⁶⁶ For example, an agreement between spouses which is not a "marital property agreement" would not be subject to the requirements imposed by future section 766.58, but would be subject

64. For example, "I waive my right to disclosure of my wife's property and financial obligations."

65. See *supra* note 37.

66. See 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.95).

to the law that now exists governing agreements between spouses or others. The Act does not, however, clearly state which agreements are "marital property agreements" and which agreements are not.⁶⁷

The UMPA comment offers some guidance in resolving the question of what documents are subject to the Act. It states that "any arrangement that changes the application of the Act should be a marital property agreement . . . [and] should conform with Section 10."⁶⁸ Because the Act covers so many aspects of the relationship between spouses, however, it will be difficult to confidently apply the language of this comment.

The failure of the Act to give a meaningful definition of "marital property agreement" results in serious uncertainty about the scope of future section 766.58. The significance of this uncertainty and its ramifications on marital agreements under the Act must be understood by Wisconsin practitioners.⁶⁹

67. Compare 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.01(12)) (" 'marital property agreement' means an agreement complies with § 776.58) with *id.* (to be codified at Wis. STAT. § 766.58(6)) ("a marital property agreement . . . is not enforceable if . . . "). Thus, the circularity of the Act's definition provides no assistance.

68. UMPA, *supra* note 2, § 10 comment.

69. The uncertainty of Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.58) will be illustrated by the following examples.

The spouses can effect a reclassification of their property, from individual to marital or vice-versa, by gift or by marital property agreement. *See id.* (to be codified at Wis. STAT. § 766.31(10)). Indeed, such an agreement would appear to change the application of the Act and thus to meet the UMPA criterion for a marital property agreement. However, the Act contains no provision governing the validity of an interspousal gift; that would be controlled by other law. Suppose that a wife executed an instrument purporting to convey, as a gift, her individual real property to herself and her husband as their marital property. It is unlikely that the Wisconsin Legislature intended to provide that gifts between spouses after the effective date of the Act are invalid unless memorialized in an instrument signed by both donor and donee; in the case of real property, present law requires only the signature of the grantor. *See* Wis. STAT. § 706.02(1) (1983-84). Therefore, it must be that the instrument executed by the wife in the example is a deed of gift and not a marital property agreement effecting a reclassification of the spouses' property. If it were the latter, it would be invalid because it was not signed by both spouses.

But consider an instrument (or two separate instruments) signed by both spouses in which each spouse conveys all individual property to the "community" as the marital property of both. Is this transaction a gift, subject only to the requirements of the present statutes and of common law? Or is it a marital property agreement which is subject to the requirements of disclosure and conscionability? Does not the reciprocal

B. Exclusivity

1. The duty of good faith

The Act provides that "[e]ach spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse."⁷⁰ Does a court have the authority to declare an agreement unenforceable on the ground that it was a breach of the duty of good faith, even though the requirements for an enforceable marital agreement were met?⁷¹

First, the Act does not clearly preempt the field. It sets forth the conditions for the unenforceability of an agreement, not the conditions for enforceability. It does not, therefore, prevent other sections of the Act — or other sections of the present Wisconsin code or case law — from stating additional grounds for declaring an agreement unenforceable or from imposing additional requirements for enforceability. For example, a marital property agreement which stated a contract for the sale of real property would be unenforceable unless it com-

nature of the transaction and its coverage of all the spouses' individual property imply a *quid pro quo* that is an appropriate target of the disclosure and conscionability requirements?

As a second example, consider a will signed by both spouses. The spouses may make an agreement which provides for the "[d]isposition of any of either or both spouses' property upon dissolution or death." 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.58(3)(c)). Might it not be said that the will "changes the application of the Act" by preempting the provisions of the Act regarding intestate succession? See *id.* §§ 59-61 (to be codified at WIS. STAT. §§ 852.01(1)(a)(1-2)). Would that not clearly be so if the will created a testamentary trust which gave the trustee the sole right of management and control of the spouses' property? Is it then subject to being declared invalid because the disclosure and conscionability requirements were not met? Or is the document "only" a will which need not satisfy those requirements?

The final example is the creation of an interspousal agency. The spouses are authorized to make an agreement with respect to "[m]anagement and control of any of either or both spouses' property." *Id.* § 47 (to be codified at WIS. STAT. § 766.58(3)(b)). Must every power of attorney given by one spouse to another be signed by both spouses and comply with the other requirements of the marital agreement provision if it empowers the agent spouse who does not have the "right" of management and control to deal with such property under the Act? See *id.* (to be codified at WIS. STAT. § 766.51).

70. 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.51(1)).

71. The Act states that spouses cannot vary the duty of good faith by an agreement. See *id.* (to be codified at WIS. STAT. §§ 766.15(1), .58(3)). The disability of a spouse to make an agreement which varies the duty of good faith should be distinguished from a spouse's "ability" to breach the duty of good faith in procuring the other spouse's assent to the provisions of a marital property agreement. It is the latter which is the subject of the present discussion.

plied with the Wisconsin statute of frauds,⁷² which imposes a number of requirements beyond the basic one of a writing signed by the parties. Likewise, an agreement could not be enforced against a spouse who lacked capacity at the time of execution.⁷³ The UMPA comment supports this interpretation. That comment states: "Although the Act sets forth a specific group of requirements for enforceability [of agreements], they are not exclusive. Ordinary contract defenses not specifically ruled out by the Act . . . remain available."⁷⁴ If there is nothing in the enforceability provisions to prevent the use of ordinary contract defenses, then perhaps there is likewise nothing to prevent the use of a defense based on the duty of good faith.

Second, it would be possible for a spouse to be in compliance with the requirements of the Act and yet be acting in bad faith in procuring the agreement. The Act requires that an agreement be conscionable, not that it be in good faith.⁷⁵ The two terms do not have the same meaning. A court might hold that the procurement of an agreement constituted bad faith although the terms were not so one-sided as to be unconscionable. Moreover, a spouse who makes a financial misrepresentation prior to entering into an agreement would be acting in bad faith, but if the other spouse had notice of the first spouse's true financial condition, the requirements of the marital agreement provision would be met.⁷⁶

There is evidence from the UMPA debates that some of the commissioners believed that the good-faith requirement applied to the execution of marital property agreements.⁷⁷ In addition, the commissioners discussed whether it was appro-

72. WIS. STAT. § 706.02 (1983-84).

73. An example would be a spouse who is a minor.

74. UMPA, *supra* note 2, § 10 comment. An example of an ordinary contract defense not ruled out by the Act is lack of consideration.

75. *See supra* note 37.

76. In this situation one still might choose to enforce the agreement, even assuming a requirement of good faith, because the breach of that duty did not cause the execution of the agreement.

77. In a previous draft of UMPA, the section dealing with agreements stated in part:

(e) A marital property agreement is enforceable if the spouse against whom enforcement is sought voluntarily executed the agreement; and

(1) . . . a fair and reasonable disclosure . . . was provided . . . ; or

(2) [there was a waiver of the right to disclosure]; or

prate to provide, as the statute then did, that an unconscionable agreement was enforceable as long as there was disclosure.⁷⁸ It was then suggested by some of the commissioners that entering into an unconscionable agreement (which nevertheless was enforceable because there was disclosure) would be a violation of the duty of good faith.⁷⁹ The commissioners' comments seem to assume that the requirement of good faith was an additional limitation on the enforceability of agreements. At the time of that discussion, the section stated that an agreement "is enforceable" if the listed requirements were met.⁸⁰ That construction would not literally allow the imposition of other requirements for enforceability. If the section in that form was thought to allow additional requirements for enforceability, does the present language — which lists circumstances resulting in unenforceability — lend itself to that interpretation?

On the other hand, at least two aspects of the present statute imply that the good-faith requirement is not a limitation on the execution of marital agreements. First, the conduct described in the Act⁸¹ is so closely related to what is meant by "good faith" that one could fairly conclude that the marital agreement provision was intended to supplant the general good-faith provision⁸² with respect to agreements between spouses. Second, to say that each spouse "shall act in good faith" is not to say that an act taken in bad faith is void. The Act does, however, give a spouse "a claim against the other spouse for breach of the duty of good faith imposed by section 766.15 resulting in damage to the claimant spouse's present

(3) [there was notice of the property and obligations of the spouse seeking enforcement]; or

(4) the agreement was not unconscionable when it was executed.

1 PROCEEDINGS, *supra* note 38, at 100-01.

78. The following dialogue took place:

Mr. Wade: If the agreement within itself is not unconscionable, it would stand up? There [is] no duty to disclose?

Mr. Gregory: Assuming there was no good faith breach.

Id. at 105.

79. *See id.* at 105-07.

80. *See supra* note 77.

81. *See supra* note 37.

82. *See* 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.15(1)).

undivided 50% interest in marital property.”⁸³ Under the appropriate circumstances it should not be difficult to prove that an agreement resulted in such damage.

The situations in which this question might arise will be rare. However, resolution of the ambiguity by the legislature would save the unnecessary litigation expense required to resolve the question, if, and when, a plaintiff is presented.

2. Agreements concerning property division at dissolution

The enforceability of an agreement which concerns property division upon dissolution requires special attention. The present Wisconsin Statutes provide:

Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution [at dissolution] . . . 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.⁸⁴

The section differs from the marital agreement provision in a number of respects. It requires agreements to be equitable rather than conscionable. Presumably, equitability would be measured at the time of property division rather than at the time the agreement was made. In addition, there is no requirement of disclosure of property and obligations at the time the agreement was made.⁸⁵

83. 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.70(1)).

84. WIS. STAT. § 767.255(11) (1983-84). The statute provides in 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 . . . shall remain the property of such party and may not be subjected to a property division under this section except upon a finding [of hardship] . . . , and in that event the court may divest the party of such property in a fair and equitable manner. The court shall presume that all other property is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering: . . .

Id. A number of subsections follow, including subsection (11), quoted in the text. According to the structure of section WIS. STAT. § 767.255 (1983-84), subsection (11) does not apply to the division of gifted property. The language of subsection (11) itself, however, is broad enough to apply to a division of gifted property, and it would be an anomalous result if it did not. The discussion in the text assumes that it does so apply.

85. *But see* WIS. STAT. § 767.27 (1983-84)(disclosure of assets and liabilities at the time of the dissolution proceedings.)

These differences result, moreover, in a fundamental inconsistency between the division of property statute and the marital agreement provision that was apparently overlooked by the drafters. Clearly, an agreement between spouses which concerned property division upon dissolution would be governed by both sections. The Act states that in a marital property agreement the spouses may agree with respect to disposition of the spouses' property upon dissolution.⁸⁶ However, section 767.255(11) states that an agreement "shall be binding" unless it is inequitable.⁸⁷ This language leaves no room for the additional requirements imposed by the marital agreement provision.⁸⁸ An agreement which satisfies the requirements of the property division statute but not those of the marital agreement statute is "binding" under the former, but is "not enforceable" under the latter. Since the requirements of the agreements statute are stricter than those of the present property division statute, and since the legislature apparently intended the former to apply to an agreement concerning a property division at dissolution, the property division section should be amended so it does not appear to override the marital agreement section.⁸⁹

VII. CONCLUSION

The provisions of UMPA which govern interspousal agreements represent an ambitious attempt to regulate the manner in which spouses may transact with each other. Indeed, when the Wisconsin version of UMPA becomes effective, interspousal transactions in this state will be governed by a set of statutory rules which are more detailed than those of any other state. Because of the size and complexity of the task which the drafters of UMPA and the Wisconsin legislators set for themselves, it is not surprising that the product of their

86. See 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.58(3)(c)).

87. See *supra* note 84 and accompanying text.

88. See *supra* note 37 for a list of the requirements.

89. Wis. STAT. § 767.26 (1983-84) authorizes a court to order the payment of maintenance "after considering : . . . (8) Any mutual agreement made by the parties before or during the marriage" Unlike the language of Wis. STAT. § 767.255(11) (1983-84), this language is compatible with the imposition of additional requirements for enforceability in 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.58(6)).

efforts requires, in some of its provisions, clarification and perhaps correction. Perhaps, after a few years, Wisconsin's experience with its version of UMPA will suggest improvements to the Act which can be incorporated into a second draft and which will inure to the benefit of other adopting states.