

The Uniform Marital Property Act: Origin and Intent

William P. Cantwell

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

William P. Cantwell, *The Uniform Marital Property Act: Origin and Intent*, 68 Marq. L. Rev. 383 (1985).
Available at: <http://scholarship.law.marquette.edu/mulr/vol68/iss3/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

THE UNIFORM MARITAL PROPERTY ACT: ORIGIN AND INTENT

WILLIAM P. CANTWELL*

In the fall of 1979 the National Conference of Commissioners on Uniform State Laws established a committee¹ to draft a proposed uniform act dealing with marital property. In July 1983, the Conference promulgated the Uniform Marital Property Act (UMPA).² In August 1984, the American Bar Association approved the UMPA as appropriate for those states desiring to embody its concepts in their substantive law.³

The drafting committee was an uninstructed one. In that posture it set its agenda and developed its approach. An early principle it settled upon was that sharing should be the essential characteristic of the spouses' relationship toward their property.⁴ That principle appeared to the committee to be well established, given the development of equitable distribution patterns developed in the last decade and a half in the divorce area.⁵ A sharing principle is confirmed by the increas-

* B.A., Williams College, 1942; J.D., Yale University, 1948; Partner, Sherman & Howard, Denver, Colorado. The author wishes to thank Brian Formella for his preparation of the footnotes for this Article.

1. Members of the Special Committee who acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Marital Property Act included: George C. Berk, William P. Cantwell, Thomas E. Cavendish, John C. Deacon, Peter J. Dykman, Bion M. Gregory, M. King Hill, Jr., William C. Hillman, Linda Judd, William J. Pierce, Carlyle C. Ring, Jr., Henry D. Stratton, and Richard V. Wellman.

Members of the Review Committee were: K. King Burnett, Jack Davies, Susan S. Engeleiter, and Glee S. Smith.

Serving as Advisors to the Special Committee were: Thomas M. Boykoff, Edwin H. Frank, Jr., John Goode, Beverly A. Groner, Robert Halfyard, Ruth-Arlene Howe, and Mary Moers Wenig.

2. The Uniform Marital Property Act was approved and recommended for enactment in all the states in July 1983 at the annual conference of the National Conference of Commissioners on Uniform State Laws.

3. A.B.A. Res. No. 103 (1984)(approved by the A.B.A. House of Delegates on August 8, 1984, in Chicago, IL).

4. See UNIF. MARITAL PROP. ACT prefatory note, 9A U.L.A. 21, 24-25 (Supp. 1985) [hereinafter cited as UMPA].

5. See, e.g., WIS. STAT. § 767.255 (1983-84). Entitled "Property Division," section 767.255 states in relevant part:

ing attention given in recent years to the elective rights of

Upon every judgment of annulment, divorce or legal separation. . . the court shall divide the property of the parties and divest and transfer the title of any such property accordingly. . . . 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. *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:

(1) The length of the marriage.

(2) The property brought to the marriage by each party.

(2r) Whether one of the parties has substantial assets not subject to division by the court.

(3) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(4) The age and physical and emotional health of the parties.

(5) The contribution by one party to the education, training or increased earning power of the other.

(5e) Whether equity requires reimbursement of one spouse by the other because of certain transactions during the marriage.

(6) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(7) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having custody of any children.

(8) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.

(9) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(10) The tax consequences to each party.

(11) 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.

(12) Such other factors as the court may in each individual case determine to be relevant.

Id. (emphasis added). Cf. *Bahr v. Bahr*, 107 Wis. 2d 72, 81, 318 N.W.2d 391, 396 (1982) ("The division of the property of the divorced parties rests upon the concept of

spouses at death⁶ and in the liberalization of state and federal death tax laws applying to interspousal transfers.⁷

Accepting sharing as a fundamental organizing principle was not itself sufficient enough to start the drafting process. Both equitable distribution and elective shares at death create a certain form of sharing. These concepts suggested the second major issue faced by the drafting committee — sharing, yes, but sharing when? The answer to that issue came after concluding that an appropriate law dealing with spousal economics ought not to be one dealing only with the pathological events of marriage — divorce or death. A proper law ought to be one designed for application throughout the marriage, in the best of times as well as the worst of times. Hence the answer to the question: sharing from the inception of property rights resulting from spousal effort during marriage.⁸

From the two basic principles of sharing and sharing immediately, the entire balance of the drafting project flowed. If property rights of both spouses are to attach to wealth as it arises, a statutory scheme needed to be developed to deal with those property rights originating inside the marriage as well as outside.

The inside relationship raised questions ultimately resolved by provisions dealing with the good faith duty of the spouses toward each other;⁹ interspousal remedies for interfering with property rights or violating the good faith duty;¹⁰

marriage as a shared enterprise or joint undertaking.’”) (quoting *Lacey v. Lacey*, 45 Wis. 2d 378, 382, 173 N.W.2d 142, 144 (1970)).

6. See, e.g., WIS. STAT. § 861.05 (1983-84). Entitled “Right to elective share; effect of election,” section 861.05(1) states in relevant part:

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

7. See, e.g., I.R.C. § 2056(a) (1985); WIS. STAT. § 72.15(5) (1983-84) (“Any transfer to a surviving spouse is exempt from the tax imposed by this subchapter.”)

8. See UMPA, *supra* note 4, prefatory note, 9A U.L.A. at 22-23.

9. See *id.* § 2(a), 9A U.L.A. at 28. “The duty is between spouses, and is one of good faith.” *Id.* § 2 comment. See also 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.15(1)).

10. See UMPA, *supra* note 4, § 15, 9A U.L.A. at 15. See also 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.70).

contractual options to create liberal customizing opportunities by way of marital property agreements;¹¹ reasonable restrictions on gifts to third parties that might otherwise impair the property interest of one spouse or the other;¹² and a defined set of management and control rights.¹³

The outside relationships were seen as occurring principally with creditors, purchasers, and donees. They were solved with respective provisions: (1) indicating the accessibility of spousal property to creditors;¹⁴ (2) addressing bona fide purchaser situations;¹⁵ and (3) creating a voidability aspect to certain gifts, subject to a statute of limitations.¹⁶ The bona fide purchaser provisions are cognate with the management and control provisions and essentially tie directly to traditional separate property concepts of a title-based transfer and third-party protection system. That was no accident, but rather a very deliberate response to suggestions from many sources during the drafting process. The central thrust of those suggestions was that every effort be made to avoid the necessity of joinder of both spouses in the majority of transactions involving third parties. The response is in the structure of UMPA that basically accords management and control to the spouse with title to marital assets¹⁷ and provides that a bona fide purchaser acquiring assets from that spouse acquires a title free from the claim of the other spouse.¹⁸

11. See UMPA, *supra* note 4, §§ 3, 7(b), & 10, 9A U.L.A. at 28, 34, 37-38. "[A] couple may opt-out, opt-in, or do both in part. Custom tailored marital property regimes are possible." *Id.* § 3 comment. See also 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. §§ 766.17, .58).

12. See UMPA, *supra* note 4, § 6, 9A U.L.A. at 29. See also 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.53).

13. See UMPA, *supra* note 4, § 5, 9A U.L.A. at 32-33. See also 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.51).

14. See UMPA, *supra* note 4, § 8, 9A U.L.A. at 34-35. See also 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. §§ 766.55, .56).

15. See UMPA, *supra* note 4, § 9, 9A U.L.A. at 36-37. See also 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.57).

16. See UMPA, *supra* note 4, § 6(b), 9A U.L.A. at 34. See also 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.57).

17. See UMPA, *supra* note 4, § 5(a) & comment, 9A U.L.A. at 32, 33. See also 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.51(1)).

18. See UMPA, *supra* note 4, § 9(c), 9A U.L.A. at 37. See also 1983 Wis. Laws 186, § 47 (to be codified at § 766.57(3)).

The comment following section 9 states in part:

Articulation with respect to divorce property division procedures is essentially handled by going to the door of the divorce court but not through it. The drafters foresaw the opportunity for adopting jurisdictions to leave their existing procedures entirely in place. If an adopting jurisdiction already allowed the court to divide *all* property of the spouses, then that plan would continue, and the marital property would simply be part of that universe of divisible assets.¹⁹ For example, if a given state's procedure had a lesser reach, such as a defined type of divorce-only marital property, that could easily be integrated with UMPA. The important point, from the drafters' perspective, was to permit complete latitude and not to urge in any respect that marital property must necessarily be divided in precisely equal ratios, unless that was already the preference of an adopting state.

Disposition at death was similarly left for determination by an adopting state.²⁰ A lengthy comment on the varying possibilities is included in the official draft of UMPA, and it urges an adopting state to give the most careful attention to the interaction between the equal vested property interests of the spouses in the marital property with existing intestacy, elective share, and spousal allowance provisions.²¹ The intent was that local preferences be canvassed and used in integrating UMPA with an adopting state's overall inheritance pattern.

There are many other particularized provisions of UMPA that deal with more limited subject matter. These include such matters as special title forms,²² life insurance,²³ em-

Third parties will deal with the spouse or spouses who manage and control, and that in turn depends on which spouse "holds" marital property. When one who satisfies the bona fide purchaser requirements deals with a spouse who has management and control rights under section 5, the transaction is free from the claim of the other spouse. This section . . . cannot be altered by a marital property agreement.

UMPA, *supra* note 4, § 9 commentary at 21, 9A U.L.A. at 37.

19. See UMPA, *supra* note 4, prefatory note, 9A U.L.A. at 24. See also 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.75).

20. See UMPA, *supra* note 4, prefatory note, 9A U.L.A. at 24. See also *id.* § 18; 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.77).

21. See UMPA, *supra* note 4, § 18 comment, 9A U.L.A. at 51-54.

22. See UMPA, *supra* note 4, § 11, 9A U.L.A. at 39-40. See also 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.60).

23. See UMPA, *supra* note 4, § 12, 9A U.L.A. at 40-42. See also 1983 Wis. Laws

ployee benefits,²⁴ personal effort expended on individual property,²⁵ and mixing marital property with other property.²⁶

In the adoption process, UMPA received two full readings by the entire Conference, as well as a partial reading, over the period from 1981 to 1983. Countless suggestions arose in these readings, and many of them were included in the promulgated draft. Liaison was continuous with concerned sections of the American Bar Association and with several other groups, including the American College of Real Estate Lawyers and the American Land Title Association. The various drafts of UMPA were furnished to more than fifty law professors teaching in the covered areas. A program on UMPA was offered at annual meetings of the American Bar Association in 1981, 1982, and 1983, and a program was also offered at the annual convention of the Association of American Law Schools in 1982. A public hearing of which dozens of interested organizations were given notice was held in Washington, D.C., in 1983. Continuing liaison with activities in Wisconsin occurred as a result of membership on the drafting committee of Peter Dykman of the Wisconsin Legislative Reference Bureau.

In the final analysis, it is fair to ask what this effort is designed to accomplish. UMPA responds to a challenge set forth in the report of the 1963 President's Commission on the Status of Women.²⁷ That challenge was formed in these words:

Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind. Accordingly, the Committee concludes that

186, § 47 (to be codified at WIS. STAT. § 766.61).

24. See UMPA, *supra* note 4, § 13, 9A U.L.A. at 43. See also 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.62).

25. See UMPA, *supra* note 4, § 14(b), 9A U.L.A. at 44. See also 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.63(1)).

26. See UMPA, *supra* note 4, § 14(a), 9A U.L.A. at 44. See also 1983 Wis. Laws 186, § 47 (to be codified at WIS. STAT. § 766.63(1)).

27. COMMITTEE ON CIVIL AND POLITICAL RIGHTS, REPORT TO THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN (1963).

during marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property. Such right should survive the marriage and be legally recognized in the event of its termination by annulment, divorce, or death. This policy should be appropriately implemented by legislation which would safeguard either spouse against improper alienation of property by the other.²⁸

28. *Id.* at 18, quoted in UMPA, *supra* note 4, prefatory note, 9A U.L.A. at 21.