The Wisconsin Marital Property Act: Sections in Need of Reform

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THE WISCONSIN MARITAL PROPERTY ACT:
SECTIONS IN NEED OF REFORM

I. INTRODUCTION

The institution of property is the embodiment of accidents, events, and the wisdom of the past. It is before us as clay into which we can introduce the coloration and configuration representing our wisdom. How great, how useful this new ingredient may be will largely determine the future happiness, and perhaps the continued existence of our society.¹

The Wisconsin Marital Property Act (WMPA) went into effect on January 1, 1986.² Wisconsin was the first (and is still the only) state to adopt a version of the Uniform Marital Property Act (UMPA).³ However, Wisconsin did not adopt the exact version of the UMPA approved by the National Conference of Commissioners on Uniform State Laws in 1983.⁴ Wisconsin not only added sections but also redrafted and amended certain sections of the UMPA.⁵ The provisions of the WMPA affect all married couples, unless they choose to alter these provisions, as permitted by Wisconsin Statutes section 766.58, through a marital property agreement.⁶

Before Wisconsin adopted its community property system, it recognized a need for reform concerning divorce and marriage issues and therefore enacted divorce reform legislation in 1977.⁷ "The new statutory rules governing property division at divorce ignored title-based ownership and incorporated concepts of contribution based upon the principle of marriage as a partnership."⁸ This set the stage for the Wisconsin legislature to begin its consideration, and possible reform, of

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³ Id. at 770. Wisconsin is one of nine community property states, along with Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington. Id. at 770 n.5.
⁴ Id. at 770 n.5.
⁵ Id.
⁷ Erlanger & Weisberger, supra note 2, at 771.
⁸ Id. See WIS. STAT. § 767.255 (1993-94) (property division).
The drafters of the UMPA recognized the equally important contributions made by men and women during the course of a marriage. The right during marriage and at death.\textsuperscript{9} 

"[D]uring 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."\textsuperscript{11} This right should outlive the marriage and retain legal recognition despite termination of the marriage by death, annulment, or divorce.\textsuperscript{12} "This policy should be appropriately implemented by legislation which would safeguard either spouse against improper alienation of property by the other."\textsuperscript{13}

This Comment will show that in drafting the WMPA the legislators implemented sections which, in certain circumstances, do not adequately safeguard a spouse against improper alienation of property by the other spouse. Part II will compare certain management and control and creditors' rights sections of the WMPA with the UMPA in order to show the extent to which Wisconsin's version is different and in need of reform. Part III will compare these same WMPA statutes with the applicable Arizona community property statutes, which employ the joinder requirements that Wisconsin should institute for certain obligations. Part III will further illustrate the need for reform of certain subsections of the WMPA.

II. Significant Differences Between the WMPA and the UMPA

A. Uniform Marital Property Act Section 8

Section 8 of the Uniform Marital Property Act states: "After the determination date . . . an obligation incurred by a spouse in the interest of the marriage or the family may be satisfied only from all marital property and all other property of that spouse that is not marital

\textsuperscript{9} Erlanger & Weisberger, supra note 2, at 772.
\textsuperscript{11} \textit{Id.} (quoting \textit{Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women} (1963)).
\textsuperscript{13} \textit{Id.} at 603-04 (quoting \textit{Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women} (1963)).
property . . ."  

The historical notes following Section 8 state that this section builds on a doctrine which has been developed and followed in Arizona, Washington, and Louisiana.  

The doctrine in this subsection is referred to as the "family purpose" doctrine and covers obligations incurred during the marriage.  This doctrine bifurcates those obligations relating to the marriage, family, or community from those obligations relating to the purely personal purposes of the incurring spouse. However, a presumption exists that "[a]n obligation incurred by a spouse during marriage is . . . incurred in the interest of the marriage or the family."  

The historical notes of the UMPA explicitly mention Arizona Statutes section 25-215 in its discussion of this doctrine. However, unlike section 25-215 of the Arizona Statutes, section 8 of the UMPA places no limits on the ways in which one spouse can bind the marital community in the interests of the family or the marriage. Arizona also allows either spouse to incur obligations for the family or the marriage that can be satisfied from the community property. However, Arizona requires joinder of both spouses for certain transactions such as a guaranty or a suretyship. Thus, Arizona does not allow unilateral decision making in certain transactions, whereas the UMPA allows unilateral decision making in any type of transaction as long as it is an obligation incurred in the interest of the family or the marriage.  

This practice of allowing unilateral decision making can lead to disastrous results. For example, one spouse can incur huge debts in the interest of the family or the marriage without the other spouse's consent or knowledge and cause the entire marital community to be liable. The end result can often be marital disharmony. One may argue that the


The basic premise of the U.M.P.A. is that spouses should be given vested rights of joint and equal ownership in all property acquired after the "determination date"—that is, either marriage, the coming into effect of the Act, or the founding of domicile in the enacting state, whichever is later.  

Patrick N. Parkinson, Who Needs The Uniform Marital Property Act?, 55 U. CIN. L. REV. 677, 678 (1987) (citing UMPA § 1(5)).  

15. UMPA § 8 cmt.  

16. Id.  

17. Id.  

18. Id.  

19. Id.  

20. See UMPA § 8.  

other spouse’s objection to the loan transaction and refusal to consent will also lead to disharmony. At least in that instance, however, the obligation cannot be satisfied with the nonconsenting spouse’s share of the marital property. Furthermore, upon discussion of the proposed transaction, the couple might compromise or decide that the transaction is not in their best interests, thereby actually avoiding marital disharmony.

Section 8 of the UMPA does not allow any provision of a marital property agreement to adversely affect a creditor’s interests “unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred.” While this provision is meritorious, it illustrates that the creditor’s rights are protected under this section, but the rights of the spouse who does not incur the marital obligation are left unprotected.

B. Wisconsin Marital Property Act Section 766.55

The WMPA significantly alters and clarifies the UMPA by guaranteeing spouses equal access to credit in Wisconsin Statutes sections 766.51(1m) and 766.56(1). Prior to the adoption of the WMPA, lenders used a title-based system of property ownership to make credit determinations. Under a title-based approach, married applicants did not have equal access to credit because a homemaker or lower wage-earning spouse usually did not have adequate income and assets to be deemed creditworthy. Under WMPA, spouses have equal access to credit and equal management and control, which allows a spouse to act unilaterally (regardless of the name of the title-holder) in the interest of the marriage or the family with the exception of:

- marital property interest in (1) a partnership in which the other spouse is a general partner; (2) a professional corporation, professional association, or similar entity held by the other spouse as a stockholder or member; (3) an asset of an unincorporated business if the other spouse is the only one of the spouses involved in operating or managing the business; or (4) an interest

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22. UMPA § 8(e). “The effect of this subsection may not be varied by a marital property agreement.” Id.
25. Id.
in a privately held corporation if the other spouse is an employee of the corporation.  

Similar to UMPA section 8(b)(ii), Wisconsin Statutes section 766.55 states: "After the determination date . . . [a]n obligation incurred by a spouse in the interest of the marriage or the family may be satisfied only from all marital property and all other property of the incurring spouse." This section also contains a rebuttable presumption regarding obligations: "An obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or the family."  

However, the Wisconsin legislature added a clause regarding statements of purpose to this section: 

A statement separately signed by the obligated or incurring spouse at or before the time the obligation is incurred stating that the obligation is or will be incurred in the interest of the marriage or the family is conclusive evidence that the obligation to which the statement refers is an obligation in the interest of the marriage or family, except that the existence of that statement does not affect any interspousal right or remedy.

This statement exists to clarify, for the spouses and the creditor, the nature of the incurred obligation and to "enhance certainty regarding what property is available to satisfy the obligation." The UMPA does not contain such a statement for a sound reason. Allowing a unilaterally signed statement to be conclusive evidence, rather than a rebuttable presumption, that an obligation is or will be incurred in the interest of the marriage or the family is a dangerous practice. "[I]f a married applicant signs a separate statement that the obligation is being incurred in the interest of the marriage or family, the creditor has conclusive or irrebuttable evidence of a family purpose obligation." Although the existence of the statement does not affect any interspousal right or

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28. Id. § 766.55(1). See UMPA § 8(a), which contains this same provision.
29. WIS. STAT. § 766.55(1) (1993-94). The WMPA deals with premarital agreements and the interests of creditors in a similar manner to the UMPA. See WIS. STAT. § 766.55(4m); UMPA § 8(e), at 118.
31. See UMPA § 8(a).
32. Weisberger & Wolek, supra note 24, at 18, 72.
remedy, these rights and remedies are inadequate because a spouse can unilaterally and detrimentally bind the marital community long before a remedy becomes available or possible. For example, Wisconsin Statutes section 766.70 states: "A spouse has a claim against the other spouse for a breach of the duty of good faith imposed by [section] 766.15 resulting in damage to the claimant spouse's property." It is difficult to see how this remedy will be adequate for the claimant spouse if the marital community goes bankrupt as a result of the incurring spouse's breach or gross mismanagement.

Wisconsin Statutes section 766.55(1) allows one spouse acting unilaterally to bind the marital community for an obligation as long as the spouse alleges that the obligation is incurred in the interest of the marriage or the family. Section 766.51 of the Wisconsin statutes (pertaining to management and control of spousal property) states: "Notwithstanding any provision in this section except par. (b), for the purpose of obtaining an extension of credit for an obligation described under s. 766.55(2)(b), a spouse acting alone may manage and control all of the marital property." The UMPA does not contain such a provision.

The legislative council notes for section 766.51 state that this "[c]larifies the special exception to the marital property management and control rules when a spouse is seeking an extension of credit." The council notes further state:

The revised language clarifies: (1) that the provision on management and control of marital property for credit purposes only applies to obligations incurred in the interest of the marriage or the family [i.e., those obligations described in s. 766.55(2)(b)]; and (2) that the management and control right under the provision extends only to obtaining unsecured credit and to extensions of

34. Id. § 766.70(1).
36. Wis. Stat. § 766.51(1m)(a) (1993-94). Paragraph (b) states:
Unless the spouse acting alone may otherwise under this section manage and control the property, the right to manage and control marital property under this subsection does not include the right to manage and control marital property described in s. 766.70(3)(a) to (d) or the right to assign, create a security interest in, mortgage or otherwise encumber marital property.
Id. § 766.51(1m)(b).
37. See UMPA § 5.
credit secured by purchase money security interests. The language permits a spouse to grant a purchase money security interest because, in most transactions, the property purchased will either be nontitled property or property titled in the name of the purchasing spouse.\(^{39}\)

Therefore, this section allows either spouse to make purchases unilaterally while subjecting the marital community to liability. For example, as long as a family purpose statement is included, one spouse can go to a bank and take out a credit card application or a loan to buy furniture without the other spouse’s signature on the loan.\(^{40}\) Furthermore, making the statement of marital or family purpose conclusive can lead to marital disharmony because it may require spouses to sue one another while they are still married. It makes more sense to require joinder\(^{41}\) of the spouses before certain obligations, such as guaranties, are incurred in the interest of the marriage or the family.

The only requirement written into the Wisconsin Statutes is that the creditor must give notice to the nonincurring spouse.\(^{42}\) Section 766.56-(3)(b) provides:

Except as provided in par. (c), if a creditor extends credit to a spouse in a credit transaction governed by chs. 421 to 427 and the extension of credit may result in an obligation described under s. 766.55(2)(b), the creditor shall give the nonapplicant spouse written notice of the extension of credit before any payment is due. The notice requirement may be satisfied by providing a copy of the instrument, document, agreement or contract evidencing the obligation to pay or any required credit disclosure which is given to the applicant spouse, or by providing a separate writing briefly describing the nature of the credit extended. Notice is considered given on the date it is mailed to the address of the nonapplicant spouse provided to the creditor by the applicant spouse. If the applicant spouse informs the creditor that

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39. *Id.*

40. The practice of some banks is to try to obtain the signatures of both spouses if possible.

41. Joinder is defined as: “The consent to an agreement or document by a party who has an interest in the subject matter of the agreement or document, but who is not himself an active party to the agreement or document.” BLACK’S LAW DICTIONARY 836 (6th ed. 1990).

the spouses reside at the same address, the notice may be enclosed in an envelope addressed to the nonapplicant spouse or both spouses.\textsuperscript{43}

However, the penalty for failure to give notice is nominal. Section 766.56 states that "[e]xcept as provided in par. (c), a creditor that fails to give notice under sub. (2)(b) is liable to each applicant spouse in the amount of $25."\textsuperscript{44} In Park Bank-West v. Mueller, the Wisconsin Court of Appeals held that notwithstanding the bank's failure to give notice to the nonapplicant spouse, the loan was still recoverable against the marital community, as well as against the applicant spouse's individual property.\textsuperscript{45}

Park Bank-West involved a loan that was an unsecured consumer credit transaction, which is governed by the Wisconsin Consumer Act, chapters 421 to 427 of the Wisconsin Statutes.\textsuperscript{46} The husband borrowed $25,000 from the bank for home improvement and signed a statement claiming that the obligation was being incurred in the interest of the marriage or the family.\textsuperscript{47} Since the obligation was incurred in the interest of the marriage or the family, it fell under Wisconsin Statutes section 766.55(2)(b). Therefore, the creditor was required to give written notice of the extension of credit to the nonapplicant spouse before any payment came due on the loan.\textsuperscript{48}

In this case, the bank conceded that it did not give the required written notice, pursuant to Wisconsin Statutes section 766.56(3)(b), to the nonapplicant spouse.\textsuperscript{49} The court noted that the purpose of the notice requirement was to inform the nonapplicant spouse of the family

\textsuperscript{43} Wis. Stat. § 766.56(3)(b) (1993-94). Paragraph (c) states that "n.notice is considered given under par. (b) if the nonapplicant spouse has actual knowledge that the credit is extended or waives the notice requirement in a signed writing." Id. § 766.56(3)(c). The UMPA does not contain either of these provisions because it does not have a section dealing with credit transactions with married persons like Wisconsin Statutes section 766.56. See UMPA §§ 1-20, at 104-144.

\textsuperscript{44} Wis. Stat. § 766.56(4)(b). Paragraph (c) states: "A creditor is not subject to a penalty under par. (b) if the creditor shows by a preponderance of the evidence that failure to give notice was unintentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error." Id. § 766.56(4)(c). The UMPA does not contain a similar clause. See supra note 43.

\textsuperscript{45} 151 Wis. 2d at 479, 444 N.W.2d at 756.

\textsuperscript{46} Id. at 481-82, 444 N.W.2d at 757.

\textsuperscript{47} Id. at 478, 444 N.W.2d at 756.

\textsuperscript{48} See supra text accompanying note 43.

\textsuperscript{49} Park Bank-West, 151 Wis. 2d at 480, 444 N.W.2d at 757. See also supra note 43 and accompanying text.
purpose obligations for which the marital estate was responsible and to allow the nonapplicant spouse to exercise rights such as termination of the account to the extent of any unused granted credit.

Concerning the nominal (i.e., $25) statutorily imposed liability for the bank’s failure to give notice to the nonapplicant spouse, the court remarked: "Such a penalty sounds in absurdity, given the fact that Sandra was denied an opportunity to protect her rights and interests. If Sandra had known of the indebtedness, she could have objected to it, or monitored the use of the funds, or participated in their repayment." Concerned with the fact that a creditor could break the law by not giving notice to the nonapplicant spouse and merely receive a slap on the wrist, the court further stated: "The precedential implications of this decision are clear, and we suggest a reevaluation of sec. 766.56(4), Stats., by the legislature." As of January 1996, the legislature has not amended section 766.56(4).

Until this section is amended, a creditor can be lax in sending out the notice mandated by the WMPA and still be protected because they are not barred from collecting the debt against the marital community. However, the nonapplicant spouse receives no protection for his or her share of the marital community. Furthermore, regardless of the nominal penalty imposed on creditors, the applicant spouse can easily intercept the mail, in which case the nonapplicant spouse once again will not receive notification of a family purpose obligation that can be satisfied from the marital community.

III. THE WMPA COMPARED TO ARIZONA’S COMMUNITY PROPERTY SYSTEM

Arizona has had a community property system in effect since 1865. Only a few statutes exist, but there is a wealth of common law interpreting these statutes. Arizona’s first community property statute was based on California law. Recently, however, Arizona courts have
stated that Arizona law is most similar to Washington community property law.\textsuperscript{57}

Arizona Statutes section 25-211 states: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, is the community property of the husband and wife."\textsuperscript{58} This statute creates a rebuttable presumption that all property acquired during the marriage (with the stated exceptions) is community property, regardless of whose name is on the title.\textsuperscript{59} The Arizona Supreme Court has described the presumption as being nearly conclusive.\textsuperscript{60}

Furthermore, Arizona has described the community of husband and wife to be "more analogous to a partnership than any other status known to [their] laws."\textsuperscript{61} Arizona Revised Statutes section 25-214, dealing with management and control, states: "The spouses have equal management, control and disposition rights over their community property, and have equal power to bind the community."\textsuperscript{62} Although allowing for equal management and equal power to bind, the statute requires joinder of both spouses for certain transactions in order to bind the community.

Section 25-214 further states:

Either spouse separately may acquire, manage, control or dispose of community property, or bind the community, except that joinder of both spouses is required in any of the following cases:

1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year.

\begin{itemize}
\item \textsuperscript{57} Id.
\item \textsuperscript{58} ARIZ. REV. STAT. ANN. § 25-211 (1995).
\item \textsuperscript{59} Lincoln Fire Ins. Co. v. Barnes, 88 P.2d 533, 534 (Ariz. 1939).
\item \textsuperscript{60} Arizona Cent. Credit Union v. Holden, 432 P.2d 276, 279 (Ariz. Ct. App. 1967). "This presumption may be overcome by proof that it was the intention of the spouses at the time of acquisition that the property should be the separate property of one or the other." Barnes, 88 P.2d at 534 (citing Jones v. Rigdon, 257 P. 639, 640 (Ariz. 1927)). The burden of proof rests with the spouse claiming that the property acquired during the marriage is his or her separate property, and this must be established by clear and satisfactory (convincing) evidence. Barnes, 88 P.2d at 534 (citing Rundle v. Winters, 298 P. 929, 931 (Ariz. 1931)). However, "where there is any doubt in the court's mind, the property will be treated as community property." Holden, 432 P.2d at 279 (citing Tyson v. Tyson, 149 P.2d 674, 679 (Ariz. 1944)).
\item \textsuperscript{62} ARIZ. REV. STAT. ANN. § 25-214(B) (1995).
\end{itemize}
2. Any transaction of guaranty, indemnity or suretyship.63

"[T]he plain language of section 25-214(C) 'requires that both spouses must execute a guaranty in order to bind the community.'"64 The Arizona Supreme Court "has found that the statute 'was intended to protect both spouses' interest in their common property.'"65 Thus, even though the marital community might have derived some benefits from a transaction (e.g., husband only signs a guaranty binding partnership), the marital community will not be liable for any debt if only one spouse's signature appears on one of the transactions enumerated in the statute for which joinder of both spouses is required.66 The Arizona Statutes also address the liability of community and separate property for community debts. "Community debts include those contracted by the husband in furtherance of community affairs and by the wife for necessaries for herself and her children during the marriage."67 Section 25-215 provides:

Except as prohibited in § 25-214, either spouse may contract debts and otherwise act for the benefit of the community. In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.68

Arizona’s community property system allows both spouses equal power to bind the marital community, but requires joinder before certain obligations can be incurred for the benefit of the community. As previously stated, all property acquired during marriage is presumed to be community property. The name on the title is irrelevant. Thus, while one spouse would be able to unilaterally enter into an obligation to benefit the community by exhibiting all of the community property assets for a creditworthiness evaluation, Arizona has further chosen to require joinder for certain obligations in order to protect both spouses. If Wisconsin had a similar joinder requirement for certain marital or family

63. Id. § 25-214(C)(1)-(2).
65. Id. (quoting Geronimo Hotel & Lodge v. Putzi, 728 P.2d 1227, 1230 (Ariz. 1986)).
66. Id. "While there may be circumstances where a spouse may be estopped from disaffirming a contract, we are constrained from adopting a rule which would preclude a spouse from disaffirming any contract from which the community has received benefits." Id. (quoting Grimm, 682 P.2d at 463).
purpose obligations, the nonapplicant spouse would receive protection before the marital community became liable.

Two additional purposes are served by a joinder requirement. 69 First, joinder "establishes a moral basis for allocating loss." 70 Second, "joinder ensures that any and all liable parties will have notice of the obligation at the time it is incurred." 71 Under the WMPA, the nonapplicant spouse does not receive notice that he or she, and the marital community, may be liable for a debt incurred by the applicant spouse until after the obligation has been incurred. The unfairness to the nonapplicant spouse is evident in such a situation.

In order for the judgment to be valid against the marital community, Arizona Statutes section 25-215(D) requires both spouses to be sued jointly on a community obligation. 72 The requirements of Section 25-215 have been described as "unique." 73 The WMPA’s management and control, spousal obligation, and creditors’ rights and obligations sections 74 should be amended so that Wisconsin would follow the Arizona community property system’s model of requiring joinder of both spouses for certain debts contracted for the benefit of the community. This system would extend fairness not only to the creditors who will be able to make claims against the community property of the spouses, but also to the spouses themselves who will be able to protect their interests in the community property.

IV. CONCLUSION

The WMPA has been successful in making marriage more akin to a partnership. With certain exceptions, spouses now have equal access to credit, as well as equal management and control of the marital community. However, the WMPA has gone too far in protecting the rights of creditors while leaving the rights of one or the other spouse almost completely unprotected.

A joinder requirement for certain marital obligations would alleviate
an unfair burden imposed on one of the spouses after the fact. In the alternative, the Wisconsin legislature should consider requiring joinder of the spouses for transactions above a certain dollar amount. At the very least, the WMPA notice requirement that creditors are required to give by law to the nonapplicant spouse when a marital or family obligation is incurred should be amended so that the creditor receives a greater penalty for a failure to execute the proper notice.

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