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DIVORCE LAW: EXCLUSIONS AND DISPROPORTIONATE DIVISIONS OF MARITAL ESTATE

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I. INTRODUCTION

This Article examines the exclusion of gifted and inherited assets from the divisible marital estate upon divorce, under Section 767.255 of the Wisconsin Statutes.\(^1\) It discusses each of the following important areas:

1. The identity and character of excludible assets.
2. Income from excludible assets.
3. Appreciation of excludible assets.
4. Life insurance and joint tenancy property as excludible assets.
5. The hardship exception to exclusion.

It also considers the related issue of unequal division of the marital estate to compensate for gifted or inherited assets that have lost their excludible status or for assets owned prior to marriage, under Section 767.255(12) and Section 767.255(2), respectively. Also considered is unequal division under Section 767.255(2r) in favor of the nonrecipient spouse to compensate for excludible assets awarded to the recipient spouse.

Finally, this Article considers the property division treatment of three classes of assets:

1. Compensation for personal injury.
2. Retirement and disability benefits.
3. Accounts receivable used as a source of income for maintenance.

II. EXCLUSION OF GIFTED AND INHERITED ASSETS

A. General Principles

Section 767.255 governs the division of property in divorce actions. It excludes from division gifted and inherited assets or assets purchased with the proceeds thereof and establishes a presumption of equal division of all other assets as follows:

Upon every judgment of . . . divorce . . ., the court shall divide the property of the parties . . . . 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 . . . after considering:

(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.

(12) Such other factors as the court may in each individual case determine to be relevant.²

The legislature has thus excluded from the marital estate, as a matter of law, all gifted and inherited assets and assets purchased with their proceeds. It has also given the court discretion to compensate, by means of an unequal division of the marital estate, for assets brought to the marriage.³ This reflects a legislative policy determination that only assets acquired during the marriage, as a result of the efforts of either or both spouses, should be subject to division. This concept of marriage as an economic partnership is expressed in Wierman v. Wierman⁴ as follows:

The principles of equitable distribution for allocating property upon divorce are based upon the concept that marriage is a partnership or a shared enterprise in which each of the spouses makes a

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2. Wis. Stat. § 767.255(2), (2r), (12). In addition to subsections (2), (2r), and (12), nine other subsections enumerate factors that the court may consider in deciding whether to depart from the presumption of equal division. They all relate to the issue of division of the marital estate once it is determined. None of them are relevant to this Article, which discusses the issue of what assets should be included in the marital estate in the first instance.

3. It is difficult to understand why assets brought to the marriage are not excluded as a matter of law. There is no logical or equitable reason why, upon divorce, a nonowner spouse should have a greater claim to assets earned by the other spouse before marriage than to assets received by gift or inheritance before the marriage. Certainly there is no basis for a stronger claim for exclusion of assets acquired during the marriage by gift or inheritance than for assets owned by a spouse prior to the marriage.

4. 130 Wis. 2d 425, 387 N.W.2d 744 (1986); see also Popp v. Popp, 146 Wis. 2d 778, 432 N.W.2d 600 (Ct. App. 1988).
different but equally important contribution to the family and its welfare and to the acquisition of its property. Because each spouse contributes equally to the prosperity of the marriage by his or her efforts, each spouse has an equal right to the ownership of the property upon a divorce.

The equitable distribution-partnership concept of marriage recognizes that a marriage possesses an important, intangible asset: the capability of both spouses to contribute to the marriage and to the acquisition of property through their labor. To the extent that either spouse is remunerated for his or her labor during the marriage, the remuneration is marital property. Furthermore, the equitable distribution-partnership concept of marriage in Wisconsin recognizes that property acquired by gift is separate property because it was not obtained through the efforts of the marital partnership but from an independent source. Thus sec. 767.255 allows a spouse to retain separate property acquired by gift and to acquire marital property through the efforts of either spouse.

Wierman also refers with approval to the established canon of statutory construction favoring the interpretation that best implements the underlying legislative policy:

This court has repeatedly stated that "the aim of all statutory construction is to discern the intent of the legislature," and that a "cardinal rule in interpreting statutes" is to favor a construction which will fulfill the purpose of the statute over a construction which defeats the manifest object of the act.

The thesis of this Article is that the equitable distribution principles enunciated in Wierman accurately reflect the legislative intent underlying Section 767.255. These principles are unimpeachable, both equitably and logically. They are also consistent with the approach taken on the issue of maintenance in Gerth v. Gerth.

Upon divorce, the spouses should divide only those assets acquired as a result of the efforts of one or both during the marriage. There is no reason

5. The reference is to "gift" rather than to "gift or inheritance" because Wierman involved only a gift. Clearly the equitable distribution principles apply to inheritance as well as gifts.
6. Wierman, 130 Wis. 2d at 439-40, 387 N.W.2d at 750-51.
7. Id. at 433, 387 N.W.2d at 748 (citations omitted). For a good example of an application of this rule of construction, see Suburban State Bank v. Squires, 145 Wis. 2d 445, 427 N.W.2d 393 (Ct. App. 1988).
8. 159 Wis. 2d 678, 465 N.W.2d 507 (Ct. App. 1990). In Gerth, both parties worked throughout the 20-year marriage at the same jobs they held at the time they were married. The husband was earning $37,727 and the wife $17,436 at the time of divorce. The Court affirmed a denial of maintenance despite this disparity, stating: "The court determined that it was fair for the parties
why a spouse should share in an asset received by gift or inheritance or owned by the other spouse prior to marriage,⁹ absent a finding of hardship under Section 767.255.¹⁰ The equitable distribution principles of Wierman should control on all issues of exclusion and unequal division under Section 767.255. Each of these issues will be discussed and analyzed in light of this thesis.

B. Identity and Character of Excludible Assets

The spouse claiming excludibility must be able to identify the asset that was acquired by gift or inheritance or was acquired with the proceeds of such asset. Popp v. Popp¹¹ describes the requirement of establishing identity as follows: "Identity inquires ‘whether the gifted or inherited asset has been preserved in some present identifiable form such that it can be meaningfully valued and assigned.’"¹² The burden of proof on the issue of identity rests on the spouse claiming exclusion.¹³

Once identity has been established, an issue often arises as to whether the identified asset has lost its excludible character by transmutation as a result of a transfer into joint ownership with the other spouse. The burden of proof on this issue rests with the spouse claiming transmutation.¹⁴ This issue is described in Popp as follows: "Character, on the other hand, addresses the manner in which the parties have chosen to title or treat gifted or inherited assets. . . . Transmutation of non-marital property to marital property can occur when the character of such property is changed."¹⁵

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to have different income levels if those levels were unaffected by the marriage and obtained only through their own natural abilities and hard work." Id. at 682-83, 465 N.W.2d at 509.

In effect, the court is saying that disparate earning capacities that existed at the time of marriage need not be considered as a basis for making a maintenance award. This is analogous to using unequal division to return property brought into the marriage. It is also saying that only those changes in earning capacity that occur during the marriage as a result of efforts of one or both spouses can serve as the basis for an award of maintenance. This is consistent with the "equitable distribution" principle, which states that only assets acquired during the marriage by the efforts of one or both spouses should be divided upon divorce.

⁹. See infra part III (discussing assets brought to the marriage and unequal division of the marital estate under Section 767.255(2)).

¹⁰. See infra part II.F (discussing the hardship exception to exclusion).

¹¹. 146 Wis. 2d 778, 432 N.W.2d 600 (Ct. App. 1988).

¹². Id. at 787, 432 N.W.2d at 602 (citation omitted).


¹⁴. Id. at 409, 427 N.W.2d at 131.

¹⁵. Popp, 146 Wis. 2d at 788, 432 N.W.2d at 603.
The law relating to loss of excludible character as a result of transfer into joint ownership with the nonrecipient spouse has evolved in four recent decisions, which will be discussed in chronological order.16

In Bonnell v. Bonnell,17 the wife inherited a resort that she and her husband operated during the marriage. Many years after inheritance she transferred title into joint tenancy with her husband. The trial court found that she intended to make a gift by this transfer. The Wisconsin Supreme Court, with no reference to the trial court's finding, concluded that "once the properties came under . . . unified ownership . . . as joint tenants, they no longer retained their character as . . . [Mrs. Bonnell's] separate, inherited property. The properties thus became part of the marital estate subject to division."18

In Weiss v. Weiss,19 the husband received a $5000 gift that he invested in the purchase of a residence in joint tenancy with his wife. The husband argued that, unlike Bonnell, there was no evidence of an intent on his part to make a gift to his wife. The court rejected this argument, stating:

While the Bonnell decision does speak of the wife's intention to make a gift of the inherited property to her husband, the gift resulted from the conversion of her separate property to joint tenancy. . . . Here also, [the husband] has manifested his intent to make a gift by the conversion of his separate property into a joint tenancy with [the wife]. Just as Bonnell observed that "[i]t is clear that Mrs. Bonnell intended to create a joint tenancy in the subject properties" so also is it clear in this case that [the husband] harbored a similar intent.20

In Trattles v. Trattles,21 the wife received cash gifts that were used in part for mortgage payments, repairs, and improvements on a residence owned jointly with the husband. She attempted to distinguish Bonnell and Weiss based on the absence of any evidence of intent to make a gift. The court responded to her argument as follows:

The actions of [the wife] in using her gift proceeds . . . serve to establish evidence of her donative intent. . . .

16. A related issue arises when a portion of an excluded asset has been used for marital purposes, even though the form of ownership of the remainder has not changed. The contention that such use transmutes the character of the remainder of the asset has been rejected in both Popp and Weberg v. Weberg, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990).
18. Id. at 247, 344 N.W.2d at 127.
19. 122 Wis. 2d 688, 365 N.W.2d 608 (Ct. App. 1985).
20. Id. at 693, 365 N.W.2d at 611 (citation omitted).
The case law thus far has not addressed the effect of such evidence establishing donative intent. Neither Bonnell nor Weiss\(^\text{22}\) instructed whether such acts constitute a gift as a matter of law or are merely presumptive evidence of donative intent. . . .

An examination of the authorities from other jurisdictions, cited with approval by our supreme court in Bonnell, satisfies us that such acts create a presumption of donative intent, subject to rebuttal by sufficient countervailing evidence. . . . These authorities hold that a change in the character of the property from separate to marital creates a presumption of an intention to make a gift to the other spouse. Such a presumption is, of course, rebuttable by sufficient competent evidence.\(^\text{23}\)

In *Fowler v. Fowler*,\(^\text{24}\) the wife deposited gifted money into a checking account held jointly with the husband. The court upheld a finding by the trial court that she intended to make a gift, quoting from *Trattles* that "[t]he transfer of separately owned property into joint tenancy changes the character of the ownership interest in the entire property into marital property which is subject to division."\(^\text{25}\)

*Fowler* ignores the holding of *Trattles* that a transfer into joint ownership merely creates a rebuttable presumption of donative intent. *Fowler* makes no mention of whether the trial court had employed this rebuttable presumption analysis in making its finding of donative intent.

It is hoped that the Wisconsin Supreme Court will overrule the Bonnell line of decisions. These decisions conflict with basic rules of property division and of gift law, and with the Wierman principles of equitable distribution.

First, under basic property division rules, it is irrelevant how title to marital assets is held. All nonexcludible assets are subject to division regardless of which spouse holds record ownership at the time of divorce. Similarly, gifted or inherited assets should remain excludible regardless of their form of ownership at the time of divorce. They should be excluded from the marital estate without consideration of the happenstance of title at the time of divorce.

This point is best illustrated by assuming a situation in which all assets acquired during the marriage are titled in the husband’s name at the time of divorce.

\(^\text{22}\) This characterization of *Weiss* seems disingenuous. *Weiss* held that proof of actual intent was irrelevant because the transfer itself was sufficient to effect a transmutation of character as a matter of law.

\(^\text{23}\) *Trattles*, 126 Wis. 2d at 224, 376 N.W.2d at 382.

\(^\text{24}\) 158 Wis. 2d 508, 463 N.W.2d 370 (Ct. App. 1990).

\(^\text{25}\) *Id.* at 518, 463 N.W.2d at 373.
divorce. The husband would not even raise the contention that the wife has made a gift to him of her interest in these marital assets by agreeing to have title held in his name. He would make no claim that they had lost their character as marital assets and belonged exclusively to him.

Similarly, gifted or inherited assets should not lose their excludible status simply because the recipient transfers them into joint tenancy during the marriage. The sole determinant should be whether the assets were acquired by the efforts of the spouses, so as to be marital assets, or whether they were acquired by gift or inheritance, so as to be excludible from the marital estate. The source of the assets, rather than their form of ownership, should control the issue of excludibility.

Further, assume for purposes of discussion that a transfer between spouses should be given the effect of extinguishing excludibility if it satisfies the requirements of a valid gift. Under ordinary rules of gift law, any interspousal gift should be considered a conditional gift, conditioned upon a continuation of the marriage. Such a conditional gift would, of course, be invalidated by divorce. The basis for this conclusion is found in Brown v. Thomas. In Brown, the court held the gift of an engagement ring to be conditioned upon entry into marriage, stating:

A gift, however, may be conditioned on the performance of some act by the donee, and if the condition is not fulfilled the donor may recover the gift.

We find the conditional gift theory particularly appropriate when the contested property is an engagement ring. The inherent symbolism of this gift forecloses the need to establish an express condition that marriage will ensue. Rather the condition may be implied in fact or imposed by law in order to prevent unjust enrichment.

Thus, an engagement ring is treated as conditioned upon marriage in order to prevent unjust enrichment. Similarly, a gift to a spouse of excludible property should be treated as conditioned upon a continuation of the marriage. It is obvious that the gift of an engagement ring would not have been made except for an expectation of entry into marriage. It is equally obvious that the gift of excludible property would not have been made except for an expectation of continuation of the marriage. In both cases the
gift was made only because of the special relationship between the donor and donee. The donee would be unjustly enriched in both instances if permitted to retain the gift upon a termination of the relationship.

Finally, Bonnell and its progeny dramatically conflict with the equitable distribution principles so persuasively expounded in Wierman. In Wierman, the wife's father gifted an interest in a real estate venture to her and her sisters. The father retained control over the venture's operation, selling various lots and reinvesting the proceeds. At the time of the divorce, all of the original real estate had been sold, and the proceeds had been reinvested in real estate, life insurance, and bank accounts.

The Wierman opinion starts by analyzing Arneson v. Arneson and Plachta v. Plachta, both of which will be discussed in detail later. Arneson holds that income from excludible assets is includible in the marital estate. Plachta holds that appreciation of an excludible asset is itself excludible unless it is the result of efforts by one or both of the spouses.

After completing this analysis, the Wierman opinion states: "Although Plachta and Arneson are important in analyzing this case, it is apparent that these cases do not furnish a satisfactory solution to this case because neither case is factually analogous to this case. We therefore look to the principles of equitable distribution . . . for assistance in deciding the case."

The opinion concludes with a determination that all the assets in issue remain excludible:

In this case neither spouse contributed time or effort . . . and the increase in value is not due to the efforts or abilities of either spouse.

The increase in the value of [the wife's] separate property was due to market conditions or to the efforts of [the father]. [The father's] valuable personal services as business manager were obviously a gift to his daughter. Thus the increase in value . . . is attributable not to the efforts of either spouse or to the marital partnership but to a source independent of the marriage. Under the principles of equitable distribution, [the wife's] interest in the ven-

marriage, with the donee having the burden of proof to rebut the presumption, rather than concluding that such gifts are conditional as a matter of law, as contended above.

29. Wierman v. Wierman, 130 Wis. 2d 425, 387 N.W.2d 744 (1986); see also supra note 4 and accompanying text.
30. 120 Wis. 2d 236, 355 N.W.2d 16 (Ct. App. 1984).
31. 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984).
32. Wierman, 130 Wis. 2d at 438-39, 387 N.W.2d at 750-51.
33. See id. at 439-40, 387 N.W.2d at 750-51.
ture should be viewed as retaining its character as separate gifted property and not as marital property.\textsuperscript{34}

By definition, gifted or inherited assets are not the result of effort by the marital partnership. A change in the form of ownership of such assets by transfer into joint ownership is irrelevant under the \textit{Wierman} principles of equitable distribution.

Pending a reversal of the \textit{Bonnell} line of decisions, the courts must wrestle with the issue of the type of evidence required to overcome the presumption of donative intent.\textsuperscript{35} There is no discussion of this issue in \textit{Trattles} or in any subsequent decision. As discussed earlier, \textit{Trattles} states only that the presumption is "rebuttable by sufficient competent evidence."\textsuperscript{36} As also discussed earlier, \textit{Trattles} relies upon the three decisions from other jurisdictions cited in \textit{Bonnell} to support its conclusion that \textit{Bonnell} had intended to establish a rebuttable presumption. Unfortunately, these decisions furnish little guidance. Furthermore, only \textit{Conrad v. Bowers}\textsuperscript{37} makes any reference to this issue, and only in conclusional terms. It states merely that a transfer between spouses creates a presumption of gift, which can be overcome by "clear and convincing evidence that the transfer was not intended as . . . a gift to the other spouse."\textsuperscript{38}

As discussed, the \textit{Bonnell} transmutation rule is in direct conflict with basic rules of property division and gift law, and with the equitable distribution principles of \textit{Wierman}. The resultant undermining of the transmutation rule deserves great weight in determining what evidence should be required to rebut the presumption of donative intent. The most logical approach is to apply the conditional gift analysis previously discussed. However, the burden of proof must be imposed on the donor rather than the donee in order to comply with \textit{Trattles}. Under this approach, the presumption would be overcome by proof that the donor did not intend to make an unconditional gift. Stated conversely, the donor would be required to prove that the gift was made because the donor and donee were married at the time and because the donor assumed the marriage would continue indefinitely.

\textsuperscript{34} \textit{Id.} at 440-41, 387 N.W.2d at 751.
\textsuperscript{35} The burden of proof is obviously the ordinary civil burden. However, \textit{Trattles} fails to discuss what facts must be proved to overcome this presumption.
\textsuperscript{36} \textit{Trattles}, 126 Wis. 2d at 224, 376 N.W.2d at 382.
\textsuperscript{37} 533 S.W.2d 614, 622 (Mo. Ct. App. 1975).
\textsuperscript{38} \textit{Id.} at 622.
C. Income from Excludible Assets

In *Arneson v. Arneson*, the husband contended that the dividends he received from gifted and inherited stock should be excluded from the marital estate. The court rejected his contention, taking a purely semantical approach to the interpretation of Section 767.255 and stating that "[i]n construing a statute, the primary source is the language of the statute itself." Applying this approach, the court concluded that:

[in]othing in ch. 767 indicates that property *not* acquired by any of the means recited in the statute (gift, bequest, devise or inheritance) should be excluded because the purchase moneys were income generated by an asset entitled to such exclusionary status. . . . [T]o extend such exclusion to assets not expressly covered by the statute represents an unwarranted judicial intrusion into matters more properly left to the legislature.

The mere fact that the existence of this subsequently purchased property can be traced to income generated by the gifted property does not serve to undo the legislative intent manifested by the language of sec. 767.255, Stats., which extends exclusion only to property acquired by the means recited therein.

*Arneson* proceeds on the premise that the literal statutory language is the sole consideration in determining legislative intent. This approach is directly antithetical to *Wierman*, which, as previously discussed, holds that the legislative intent of Section 767.255 is to subject to division only those assets earned by the marital partnership, and that this intent should be given controlling effect in determining the proper interpretation of Section 767.255. *Arneson*'s conclusion that unearned income from excludible assets is includible in the marital estate cannot withstand scrutiny under the *Wierman* equitable distribution test. However, as will be discussed in Part II.D, which considers appreciation of excludible assets, the income from excludible assets is properly treated as a marital asset if its production results from the efforts of a spouse.

In *Wierman*, the supreme court did not find it necessary to overrule *Arneson*. Rather, it followed the traditional line of least resistance and simply distinguished *Arneson*. However, it is reasonable to anticipate that the supreme court will overrule *Arneson* when directly confronted with the is-

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39. 120 Wis. 2d 236, 355 N.W.2d 16 (Ct. App. 1984).
40. *Id.* at 243, 355 N.W.2d 19 (citing Wisconsin's Envtl. Decade, Inc. v. Public Serv. Comm'n, 81 Wis. 2d 344, 350, 260 N.W.2d 712, 715 (1978)).
41. *Id.* at 244, 355 N.W.2d at 20.
sue, due to the obvious irreconcilable conflict between *Arneson* and *Wierman*.

In any event, *Wierman* has limited the application of *Arneson* to income that comes within the direct control of the owner, such as interest and cash dividends. *Arneson* involves cash dividends and is limited to income that passes into the owner's direct control. *Wierman* discusses this limited scope of *Arneson* as follows:

The court of appeals cautioned, however, that it was not determining whether the rationale of the decision should extend to income generated by excluded gifted property where the "income generated by excluded assets does not pass through the hands of the owner for purposes of further use or reinvestment... [or where] income or dividend plans do not vest control in the owner over such property, or the investment, reinvestment, or other spending decisions."42

*Wierman* relies on this limitation in distinguishing *Arneson*, as follows:

There are, however, significant differences between the dividend income in *Arneson* and the proceeds of the sales in this case. In *Arneson*... the originally gifted property (shares of stock) remained separate and distinct from the income (cash dividend) it generated. The owner-husband of the gifted property received and controlled the income.

In this case, the originally gifted property... did not generate income separate and distinct from itself... The proceeds of the sales never came into [the wife's] possession or control...43

It is safe to conclude that stock dividends are excludible under *Wierman*. The subsequent decision of *Fowler v. Fowler*44 supports this conclusion. In *Fowler*, "Baby Bell" stock was substituted for the wife's inherited AT&T stock as a result of the AT&T divestiture. The court held that the Baby Bell stock was excludible because it was "merely substituted for the AT&T stock."45 Similarly, stock dividends are excludible because the new shares are merely added to the previous shares. This is the functional equivalent of substituting the new combined shares for the shares owned prior to the dividend.

42. *Wierman v. Wierman*, 130 Wis. 2d 425, 436-37, 387 N.W.2d 744, 749 (1986) (quoting *Arneson*, 120 Wis. 2d at 245 n.6, 355 N.W.2d at 20 n.6).
43. *Id.* at 438, 387 N.W.2d at 750.
44. 158 Wis. 2d 508, 463 N.W.2d 370 (Ct. App. 1990).
45. *Id.* at 516, 463 N.W.2d at 372.
D. Appreciation of Excludible Assets

Another recurring issue is the extent to which the appreciation of excludible assets is itself excludible. All the decisions in this area are consistent with *Wierman*, even though some of the opinions are confusing. The result reached in each decision is to exclude all appreciation except that which results from spousal efforts.

In *Plachta v. Plachta*, the wife acquired by gift during the marriage a residence worth $6000, which had appreciated to $27,000 by the time of divorce. Title had been retained in her name. The court held the entire appreciated value to be excludible. It employed a purely semantical analysis but fortunately reached a conclusion consistent with equitable distribution principles:

We find nothing in ch. 767 to support the argument that an appreciation in value of nonmarital property takes on the character of marital property, especially when it has increased in value without any contributions from the nonowning spouse. Without an express statutory provision to the contrary, assets that are separate property retain that identity and are generally not subject to property division regardless of appreciation or depreciation in value.*

The *Plachta* opinion then states the truism that the excludible appreciation on the residence would be subject to division if necessary to avoid a "hardship." The opinion concludes by confusing the concept of a finding of "hardship" under Section 767.255 with equitable distribution principles: "Failure to divide separate property could cause a hardship when the nonowning spouse contributes to the property's increased value. Under those circumstances, the trial court may distribute the nonmarital property in a manner reflecting each spouse's contribution toward the appreciated value."*

In *Haldemann v. Haldemann*, the wife inherited a farm prior to marriage and retained title in her name. The husband furnished the labor for repairs and additions throughout the marriage. The trial court awarded the farm to the wife and excluded the entire appreciated value. The court of appeals reversed, stating:

"First, we conclude that the appreciation in value of separate property due to the efforts and abilities of the nonowning spouse, is part

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46. 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984).
47. *Id.* at 333, 348 N.W.2d at 195.
48. This conclusion is self-evident because Section 767.255 provides that even the original nonappreciated excludible asset is subject to division to avoid "hardship."
49. *Plachta*, 118 Wis. 2d at 334, 348 N.W.2d at 195-96.
50. 145 Wis. 2d 296, 426 N.W.2d 107 (Ct. App. 1988).
of the marital estate to be divided pursuant to sec. 767.255, Stats. We further hold that it is not necessary that the nonowning spouse demonstrate that a refusal to divide the appreciation in value will create a hardship... 51

The last sentence of this quotation was necessary to clear up the confused treatment of "hardship" in Plachta.

The Haldemann opinion makes clear that it is predicated squarely on the principles of equitable distribution:

"The equitable distribution-partnership concept of marriage recognizes that a marriage possesses an important, intangible asset: the capability of both spouses to contribute to the marriage and to the acquisition of property through their labor."

Thus, if during the marriage, both spouses contribute to the acquisition of property through their abilities and efforts, that property is part of the marital estate. The property acquired may be the appreciation in value of an asset separately owned by one of the spouses. 52

The Haldemann decision concludes with a remand to the trial court for an allocation between economic appreciation and appreciation resulting from spousal labor and materials.

In Lendman v. Lendman, 53 the husband funded a closely held corporation with $8500 of inherited funds. The husband retained ownership of all corporate stock throughout the marriage. The corporation used the $8500 as the down payment on the $190,000 purchase price of a funeral home business. The husband operated the business, in corporate form, throughout the marriage. The monthly payment on the business note was paid entirely with income generated by the business. The trial court awarded the stock to the husband and excluded the entire appreciated value of the corporation from the marital estate. On appeal, the court reversed, ordering that all appreciation be treated as a marital asset, 54 stating:

The appreciation was paid for by corporate "income" generated through Paul's labors. In this regard, Arneson controls. In that case, we viewed income generated by an inherited asset as separate and distinct from the asset itself. . . .

Here, the money used to pay off the corporate debt was earned income. Thus, just as in Arneson where property purchased by dividend income of an inherited stock was held to be marital, the appre-

51. Id. at 300-01, 426 N.W.2d at 109.
52. Id. at 302, 426 N.W.2d at 109 (quoting Wierman v. Wierman, 130 Wis. 2d 425, 440, 387 N.W.2d 744, 750 (1986)).
53. 157 Wis. 2d 606, 460 N.W.2d 781 (Ct. App. 1990).
54. Presumably the original $8500 was returned to the husband as an excludible inheritance. However, the opinion is silent on this point.
ciation purchased by earned income of a corporation acquired by inherited funds is also marital.\textsuperscript{55}

As mentioned, all mortgage payments were made with income earned from the husband’s operation of the business. Therefore, all appreciation in value resulting from reduction of the note\textsuperscript{56} is a marital asset under \textit{Haldemann}. As noted, the \textit{Lendman} opinion purports to rely upon \textit{Arneson}. However, it fails to recognize the crucial distinction between unearned income, which \textit{Arneson} erroneously treats as a marital asset, and earned income, which is properly a marital asset under the rationale of \textit{Haldemann}. It reaches the right result, but under a flawed analysis.

In \textit{Torgerson v. Torgerson},\textsuperscript{57} the wife paid the down payment on a duplex with inherited funds and took title in her name. The parties lived in one unit of the duplex. The income from the rental unit paid part of the mortgage payment. The balance was paid from marital income, as was the cost of maintenance and improvements. The trial court awarded the duplex to the wife and excluded the entire value. The court of appeals reversed, holding that only the down payment was excludable: “Here, only the down payment has been made with exempt funds. The statute does not exempt property purchased by a spouse with his or her marital earnings, as is the case here.”\textsuperscript{58}

\textit{Torgerson} is basically consistent with the principles in \textit{Plachta}, \textit{Haldemann}, and \textit{Lendman}. However, the court’s analysis is glaringly incomplete. That part of the appreciation allocable to the down payment should have been excluded along with the down payment. This is best illustrated by assuming a cash purchase of real estate, with half the funds being inherited and the other half being marital funds. In that situation, half of the economic appreciation would be excludable as the product of the inherited half of the purchase price. Similarly, in \textit{Torgerson}, the wife should have received an exclusion of that percentage of the total economic appreciation equal to the ratio of the inherited down payment to the total investment of marital funds and labor in mortgage payments, maintenance, and improvements.

The simplest method of calculating this allocation would be to treat all of the subsequent marital contributions as having been made at the same time as the down payment and to weigh them equally with the down pay-

\begin{itemize}
  \item \textsuperscript{55} \textit{Lendman}, 157 Wis. 2d at 612, 460 N.W.2d at 784.
  \item \textsuperscript{56} The opinion assumes that all appreciation in value of the corporation resulted from reduction of the note balance. Apparently, the real estate was leased.
  \item \textsuperscript{57} 128 Wis. 2d 465, 383 N.W.2d 506 (Ct. App. 1986).
  \item \textsuperscript{58} \textit{Id.} at 469, 383 N.W.2d at 508.
\end{itemize}
ment. A more equitable approach would be to determine the date by which half of the total marital contributions had been made. All appreciation occurring prior to that date would be excludible. All appreciation occurring after that date would be allocated based on the ratio of the down payment to the total marital contributions. If a large single marital outlay had taken place at any given time, a separate calculation could also be made from that point forward.59

E. Life Insurance and Joint Tenancies as Excludible Inheritances

Lang v. Lang60 is the controlling Wisconsin decision on the issue of whether life insurance proceeds and property acquired by survivorship are excludible under Section 767.255 as an “inheritance.” In Lang, the wife brought to the marriage funds received as the beneficiary of a life insurance policy on her previous husband’s life. She also brought a residence that had been acquired by right of survivorship upon his death. The supreme court affirmed the trial court’s decision that neither asset was excludible as an “inheritance.”

The wife’s first argument in favor of exclusion was that any asset subject to inheritance tax under Section 72.12(7), such as life insurance, must be considered “inherited” under Section 767.255.61 In rejecting this argument, the court noted that Section 767.255 originally excluded only “property inherited by either party,” but was amended in 1977 to exclude any property acquired by “gift, bequest, devise or inheritance.”62 The court reasoned that if the legislature had intended the original phrase “property inherited” to be broad enough to encompass all assets subject to inheritance tax, there

59. Assume a $25,000 down payment from inherited funds at the time of marriage and $25,000 of total marital contributions at a basically even rate during a 20-year marriage. The mean payment date for the marital $25,000 would be 10 years. Therefore, the entire appreciation during the first 10 years would be allocable to the down payment and would be excluded. The appreciation for the final 10 years would be allocated equally between the $25,000 excludible down payment and the $25,000 nonexcludible marital contributions, which would be treated as having been paid in full on the 10-year mean payment date. Assume further that a $25,000 marital outlay, not included in the $25,000 total already considered, was made at the end of the 15th year. The marital contribution would total $50,000 at that point, or two-thirds of the investment, so that only one-third of the appreciation for the last five years would be excludible.

In summary, the entire down payment would be excluded, while all subsequent contributions of marital funds or labor would be included in the marital estate. All appreciation, being the excess value over the total of excludible and nonexcludible contributions, would be allocated to the excludible and nonexcludible components in accordance with the percentage calculations outlined above.

60. 161 Wis. 2d 210, 467 N.W.2d 772 (1991).
61. Id. at 217-18, 467 N.W.2d at 775.
62. Id. at 218-20, 467 N.W.2d at 775-76.
would have been no need for the amendment adding "bequest" and "devise," both of which are subject to inheritance tax. 63

Similarly, the court rejected the wife's second argument, stating:

The amendment of sec. 767.255 to include bequest and devise also undermines the petitioner's argument that inheritance should be interpreted to include life insurance proceeds because inheritance is commonly understood to include life insurance proceeds. When interpreting a term used in a statute, its "meaning must be found in its context and relation to the subject matter." Accordingly, a term with a common meaning and a technical meaning should be given its technical meaning if the context in which the term is used calls for such a meaning.

"Inheritance" was placed by the legislature in sec. 767.255 next to three terms with a technical meaning in the law: gift, bequest, and devise. In this context, inheritance should be given the technical meaning it is assigned in the law. . . .

. . . The only meaning that is reasonable in the context of sec. 767.255 is the traditional technical meaning of property taken by descent as the result of the intestate death of another. 64

The court also rejected the wife's final argument, stating:

The petitioner's third argument . . . is that life insurance proceeds are like bequests, devises, and inheritances and, therefore, should be treated like them. We disagree. The petitioner is, in effect, asking this court to insert the words "life insurance proceeds" into sec. 767.255. Doing so would violate four principles of statutory construction. First, it would violate the maxim that the expression of one thing is the exclusion of another. . . .

Second, we will not read extra words into a statute to achieve a specific result. Third, exceptions should be strictly construed. Accordingly, we should strictly construe the words "gift, bequest, devise or inheritance" because they are exceptions to the general rule that all property of the parties is subject to division.

Fourth, even if it were appropriate to liberally construe the relevant clause of sec. 767.255, we cannot, under the guise of liberal construction, supply something that is not provided in a statute. 65

Finally, the court rejected the wife's contention that the joint tenancy real estate received by survivorship is an "inheritance." The court basically relied on the same line of reasoning employed in the life insurance analysis.

63. Id. at 220-21, 467 N.W.2d at 775-76.
64. Id. at 221-22, 467 N.W.2d at 776-77 (citations omitted).
65. Id. at 223-24, 467 N.W.2d at 777-78 (citations omitted).
Lang makes no mention of Wierman and its emphatic endorsement of the principles of equitable distribution as the approach that best implements the legislative policy underlying Section 767.255. Nor does it refer to the canon of statutory construction relied upon in Wierman, which mandates the interpretation that best implements the underlying legislative policy. Instead, Lang places paramount importance on the 1977 amendment that added the technical terms “bequest” and “devise” to “inherited property.” The court felt constrained by this amendment to take a technical and semantical approach. It construed the amendment as compelling the conclusion that the legislature had intended the term “inherited property” to be given a technical and restrictive interpretation. The court was therefore unwilling to employ the expansive, policy-oriented approach of Wierman. The canons of construction previously quoted from Lang stand in stark contrast to those relied upon in Wierman.

Lang can be viewed as a unique result compelled by the controlling importance the court ascribed to the technical language used in the amendment. It is hoped that Lang will be limited to the technical issue presented by its facts and will not be construed in future decisions as having eroded the continuing validity of Wierman. This hope is strengthened by the previously noted fact that Lang completely overlooked the existence of Wierman.

Wierman definitively enunciated the equitable distribution principles that should govern the determination of all issues relating to exclusion of assets from the marital estate. The doctrine of equitable distribution reflects common sense and fairness. It is completely consistent with the legislative policy underlying Section 767.255. This Article assumes that the Wierman principles of equitable distribution will be given controlling effect in the future on all issues relating to exclusions from the marital estate. If Lang is treated in the future as having impliedly limited Wierman, the conclusions herein will be thrown into doubt.

F. The Hardship Exception to Exclusion

The proper standard for application of the “hardship” exception to the gift and inheritance exclusions in Section 767.255 was the subject of some uncertainty prior to Popp v. Popp, which established the definitive standard:

67. 146 Wis. 2d 778, 432 N.W.2d 600 (Ct. App. 1988).
We start with the well-accepted proposition that "[t]he division of property of the divorced parties rests upon the concept of marriage as a shared enterprise or joint undertaking."

... [W]e conclude that the party claiming hardship must demonstrate that a failure to include the exempt assets in the marital estate will result in a condition of financial privation or difficulty. ... A hardship determination must therefore be made in light of the facts and history of the case and the relative financial circumstances of the parties before and after the divorce. We reaffirm our statement in Asbeck that this consideration is not limited to essential needs only. The burden on this question is properly assigned to the party claiming hardship.68

Popp's restrictive definition of "hardship" is consistent with equitable distribution principles, which provide for inclusion in the marital estate of only those assets resulting from the efforts of a spouse.

III. Unequal Division of Marital Estate Under Section 767.255(2) and (12)

Section 767.255(2) and (12),69 outlined in Part II.A, authorize the court to depart from the statutory presumption of equal division of the marital estate based on "property brought to the marriage" and "other factors as the court may in each individual case determine to be relevant," respectively.

In Schwartz v. Linders,70 the husband inherited approximately $280,000 during the course of the three-year marriage. The trial court held that the excludable status of those funds had been lost because they had been commingled. It rejected the husband's request for an unequal division to compensate for these inherited assets, ruling that it had no discretion to do so, under Anstutz v. Anstutz.71 The husband appealed the refusal to make an unequal division. The court of appeals reversed, noting that Anstutz had simply stated the self-evident proposition that excludable funds should be excluded from the marital estate at the outset rather than being included and then returned to the recipient by means of an unequal division. The court stated:

We conclude that if inherited property has been commingled, Anstutz is inapplicable. There is no law saying that the court must ignore that property was once inherited. In fact, sec. 767.255, Stats.,

68. Id. at 792-93, 432 N.W.2d at 604-05 (citations omitted).
70. 145 Wis. 2d 258, 426 N.W.2d 97 (Ct. App. 1988).
71. 112 Wis. 2d 10, 331 N.W.2d 844 (Ct. App. 1983).
seems to suggest the opposite. Section 767.255(2) compels trial courts to consider the property brought to the marriage by each party. Surely, this cannot be limited to property brought to the marriage at its inception but must also include property brought to the marriage at any time which might be subject to division. Additionally, sec. 767.255(12), the "catchall" provision, requires trial courts to consider other factors as the court may in each individual case determine to be relevant.

We hold that a trial court has a statutory imprimatur to consider the prior inherited status of divisible property. Whether that can result in an unequal division of the property depends upon the facts of each case. It is enough to say that if the marriage is of short duration, and the trial court feels that one spouse will receive a windfall without having participated much in the economic partnership of the marriage, then the once inherited stature of divisible property may be a cogent reason for dividing an estate unequally.72

The quoted reference to the term "property brought to the marriage" as being broad enough to encompass property inherited during the marriage seems to be in error. The phrase "property brought to the marriage" is mutually exclusive with assets acquired after the marriage by inheritance or any other means. However, this erroneous interpretation is harmless because Section 767.255(12), the "catchall" provision, serves as a sound basis for return by unequal division of inherited or gifted assets that are acquired after the marriage and lose their excludible status.

Schwartz is consistent with Wierman, although it unfortunately fails to refer to Wierman. Under equitable distribution principles, the nonrecipient spouse should not share in an asset acquired by gift or inheritance, since it did not result from spousal effort. The fact that such an asset loses its excludible status by a technicality provides no basis in equity for division with the nonrecipient spouse. The policies underlying the doctrine of equitable distribution are justice and fairness. In order to give effect to these policies, trial courts should utilize unequal division under Section 767.255(2) to return property brought to the marriage and under Section 767.255(12) to return gifted or inherited property that loses its excludible status, as a matter of course.73

72. Schwartz, 145 Wis. 2d at 262-63, 426 N.W.2d at 99.
73. This return will ordinarily be accomplished by awarding off the top of the marital estate the amount in question, i.e., either the property brought to the marriage or the property received by gift or inheritance. The balance of the marital estate will be divided equally. If the assets in question are still in existence, this is a simple exercise. However, if they have been spent, a
The decisions in *Arneson v. Arneson* and *Lang v. Lang,* discussed in previous parts of this Article, are inconsistent with the preceding analysis. In *Arneson,* the trial court returned to the wife by unequal division under Section 767.255(2) the original $13,000 in premarital assets that she had invested in the marital homestead. The court refused to return any portion of the appreciation accruing to the homestead during the marriage. Upon appeal by the wife, the court affirmed, stating:

Nothing in *Plachta* suggests that its rationale should apply to property brought to the marriage by either party. The premise of *Plachta* is that the property is excluded by statute in the first instance. It does not apply to nongifted and noninherited property brought to a marriage by either party. We therefore reject any claim by [the wife] that her property brought to the marriage, and appreciation thereon, should have been excluded or otherwise awarded to her. 76

The *Arneson* opinion was correct in stating that *Plachta* concerned only appreciation of excludible property and did not address property brought to the marriage. However, *Arneson* is in direct conflict with *Wierman,* which was decided later and which dictates return by unequal division of all appreciation allocable to premarital assets, since the spouses played no role in their acquisition.

In *Lang,* as previously discussed, life insurance proceeds and a joint tenancy residence acquired by the wife upon the death of her prior husband and brought to the marriage were not excludible as inherited property. The wife had also brought to the marriage the cash surrender value of two life insurance policies on her life. The trial court rejected the wife's contention that all of these assets should be returned to her by unequal division under Section 767.255(2). The supreme court affirmed:

[T]he court may alter the presumed equal division of the property between the parties after considering a number of factors set forth in sec. 767.255, including the “property brought to the marriage by

chicken and egg debate arises as to whether they were used to purchase assets in the marital estate or were used to pay marital expenses.

Upon careful analysis, this inquiry is unnecessary. Assume that the assets in question were spent for marital expenses so that they are not in existence as part of the marital estate. Under this assumption, all assets are the result of marital income. The fact remains that the marital partnership enjoyed the benefit of these assets, which were not earned by efforts of the spouses, through their use for payment of marital expenses. Under the principles of equitable distribution, such assets should belong exclusively to the recipient spouse. Obviously, the marital estate would be correspondingly reduced if these assets had not been available for payment of marital expenses.

74. 120 Wis. 2d 236, 355 N.W.2d 16 (Ct. App. 1984).
75. 161 Wis. 2d 210, 467 N.W.2d 772 (1991).
76. *Arneson,* 120 Wis. 2d at 246, 355 N.W.2d at 21.
each party.” Section 767.255(2), Stats. The distribution of the property which is subject to division under sec. 767.255 is a discretionary act and, therefore, will not be reversed absent an abuse of discretion. In re Marriage of Krebs v. Krebs, 148 Wis. 2d 51, 55, 435 N.W.2d 240 (1989). The record shows that the circuit court did not abuse its discretion in dividing the property equally, notwithstanding the fact that the petitioner brought a significant amount of assets to the marriage, given the length of the marriage.77

Lang fails to give effect to the equitable distribution principles of Wierman. It is to be hoped that Lang represents merely an example of the broad latitude given to trial court decisions in divorce actions under the abuse of discretion standard, rather than an implied undermining of Wierman.78

As discussed, Schwartz refers to the short duration of the marriage as a factor favoring a return by unequal division, while Lang refers to the lengthy duration as a factor justifying a refusal to return. This reflects traditional thinking. It is generally assumed that the longer the marriage, the weaker the equities in favor of a return. This assumption does not stand up to careful analysis under the principles of equitable distribution. It is no more equitable for a long-term spouse to benefit from property acquired with no spousal effort than for a short-term spouse to do so. Duration of the marriage may be a factor to be weighed in determining the issue of “hardship.” It is always a crucial factor in determining the issue of maintenance. However, it is irrelevant under equitable distribution principles on the issue of return of premarital assets by unequal division.

A dramatic example of the injustice that can result from a failure to apply equitable distribution principles is Brandt v. Brandt.79 In this case, the wife inherited substantial sums of money during the marriage. The exact amount is not clear from the opinion, but an investment account funded primarily with inherited funds is described as having “a value as of the date of divorce in excess of $1 million.”80 The trial court found that, due to commingling, the inherited funds in this account had lost their identity and hence, their excludible status. The court of appeals affirmed, acknowledging the inherent inequity of awarding one half of these very substantial in-

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77. Lang, 161 Wis. 2d at 229-30, 467 N.W.2d at 780.
78. The established rule is that a trial court decision on property division issues will be sustained as long as it represents a reasonable exercise of discretion. Krebs, cited in Lang, holds that any such decision will be affirmed as long as the trial court considered the relevant facts, applied the appropriate law, and “demonstrated a rational process in reaching a conclusion that a reasonable judge could reach.” Krebs v. Krebs, 148 Wis. 2d 51, 55, 435 N.W.2d 240, 242 (1989) (citations omitted).
79. 145 Wis. 2d 394, 427 N.W.2d 126 (Ct. App. 1988).
80. Id. at 405, 427 N.W.2d at 130.
herited funds to the husband: "We observed in Trattles that tracing represents a 'complicated exercise capable of producing illogical and inequitable results.'" 81

Obviously, this inequity could have been avoided had the trial court returned all inherited assets to the wife by means of an unequal division under Section 767.255(12). A proper application of equitable distribution principles dictates this result. It also could have been avoided by a remand by the court of appeals to the trial court with directions to make such unequal division. The failure of either court to order an unequal division thwarted the sound policies of equitable distribution and worked a great injustice to the wife.

IV. Unequal Division of Marital Estate Under Section 767.255(2r)

Section 767.255(2r), quoted in Part II.A, authorizes the court to depart from the presumption of equal division based on "[w]hether one of the parties has substantial assets not subject to division by the court." 82

No case has been discovered in which this subsection has been utilized. Undoubtedly, this is because it is in direct conflict with the underlying policy of Section 767.255, which is to divide excludable gifts or inheritances only to the extent necessary to avoid a "hardship." When hardship is found, the court will, of course, include the otherwise excludable assets in the marital estate to the extent necessary to ameliorate the hardship. This is done by inclusion in the marital estate rather than by an unequal division under Section 767.255(2r). When the circumstances do not support a finding of hardship, there is no basis for indirectly dividing these excludable assets by means of unequal division under Section 767.255(2r).

Pfeil v. Pfeil 83 is a case on point with respect to this issue. There the trial court excluded the husband's military disability benefits from the marital estate, but made an offsetting unequal division of the marital assets in favor of the wife. The court of appeals reversed, stating:

In giving weight to the fact of future disability benefits being paid to the [husband], the trial court was doing indirectly what, under federal statutes and Leighton, it could not do directly. Authority for such compensatory award or balancing additional payment to the wife was found by the trial court in . . . Sec. 767.255 (2r), Stats. We

81. Id. at 413, 427 N.W.2d at 133 (citing Trattles v. Trattles, 126 Wis. 2d 219, 228, 376 N.W.2d 379, 384 (Ct. App. 1985)).
83. 115 Wis. 2d 502, 341 N.W.2d 699 (Ct. App. 1983).
hold that the reach of this . . . statute falls short of authorizing a division of or offsetting an award for federal military disability benefits or for railroad retirement benefits.\textsuperscript{84}

This same result was reached in \textit{Rommelfanger v. Rommelfanger},\textsuperscript{85} in which the court of appeals reversed an unequal division of the marital estate in favor of the nonemployee spouse, which had been done in an attempt to compensate for the value of excludible Railroad Retirement benefits.

\section*{V. Compensation for Personal Injury}

This section considers the property division treatment of compensation for personal injuries sustained by one of the spouses before or during the marriage.

\textit{Richardson v. Richardson}\textsuperscript{86} holds that personal injury proceeds constitute "property" subject to division upon divorce. It also holds that such property is not excludible, since it is neither a gift nor an inheritance. The opinion sets forth the rules for division of injury proceeds as follows:

We conclude that when a personal injury claim has at the time of divorce not resulted in either a judgment or a settlement, the unique nature of a personal injury claim constitutes a relevant factor that warrants the alteration of the statutory presumption of equal distribution. Sec. 767.255(12). . . . Just as each spouse is entitled to leave the marriage with his or her body, so the presumption should be that each spouse is entitled to leave the marriage with that which is designed to replace or compensate for a healthy body. We therefore conclude that the statutory presumption of equal distribution should be altered with respect to certain components of a personal injury claim. Instead of presuming equal distribution of a personal injury claim, the court should presume that the injured party is entitled to all of the compensation for pain, suffering, bodily injury and future earnings. With regard to other components of a personal injury claim, such as those that compensate for medical or other expenses and lost earnings incurred during the marriage, the court should presume equal distribution.

The presumption we announce . . . does not take away the flexibility a court needs to make an equitable property division. Flexibility is preserved because the court may alter the presumed distribution after considering the special circumstances of the per-

\textsuperscript{84} Id. at 504, 341 N.W.2d at 701.
\textsuperscript{85} 114 Wis. 2d 175, 337 N.W.2d 851 (Ct. App. 1983).
\textsuperscript{86} 139 Wis. 2d 778, 407 N.W.2d 231 (1987).
sonal injury claim in that case and of the parties under the statutory factors listed in sec. 767.255.87

In *Krebs v. Krebs*,88 the wife was injured in an accident during the marriage. Both spouses entered into a structured settlement with their auto insurer under their uninsured motorist coverage. The husband received $1000 plus $2000 medical payments, and the wife received $24,000 plus $2000 medical payments. In addition, the wife received monthly payments, which were to extend for many years beyond the date of divorce. The settlement agreement made no allocation among the various components of the injury claim. The court concluded:

[The structured settlement did not identify what portion of the future payments was to compensate for pain, suffering, bodily injury, future earnings, past medical and other expenses or lost earnings during the marriage. In spite of the lack of identification of separate amounts making up the structured settlement, we believe that the logic of *Richardson* applies and the trial court should employ the presumption that the injured person, Karen Krebs, is entitled to the remainder of the settlement. . . .

Given the facts of this case, equity requires that there be a presumption that Karen Krebs, as the injured person, is entitled to the compensation to be received in the future. However, the trial court must then apply the factors set out in sec. 767.255, Stats.

While there is a presumption that Karen Krebs is entitled exclusively to all remaining payments under the structured settlement, they are still subject to the relevant factors under sec. 767.255, Stats.89

*Krebs* seems to extend the *Richardson* presumption of exclusive entitlement to even those components identified in *Richardson* as presumptively subject to equal division when the settlement agreement contains no allocation. This is a drastic modification of *Richardson*. If *Krebs* is given this interpretation, it will lead to highly incongruous results. When the claim is resolved by trial, the amounts allocated by the verdict to pre-divorce wage loss and medical expense will be presumptively divided equally. However, when the claim is settled without trial and with no allocation in the settlement agreement,90 all the proceeds will presumptively belong to the injured spouse. This disparity of treatment is illogical and unfair. Additionally, it

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87. *Id.* at 785-86, 407 N.W.2d at 234-35.
88. 148 Wis. 2d 51, 435 N.W.2d 240 (1989); see also infra note 93.
89. *Krebs*, 148 Wis. 2d at 57-58, 435 N.W.2d at 243-44.
90. It is common knowledge that the vast majority of settlement agreements do not contain an allocation.
gives the injured spouse control over the outcome by deciding whether to settle or to proceed to trial.

Richardson states: "We recognize that this case does not raise, and we do not answer, numerous issues that may arise in determining the division of a personal injury claim in a divorce action . . . ."91 This language implies that trial courts will be required to factually determine the reasonable allocation of settlement proceeds between marital and nonmarital components. This determination necessarily will be based on all available evidence as to what amount represents reasonable compensation for each element of damage. It will be made at the time of divorce if the settlement has been completed. If not, it will be made in a postjudgment hearing, with the divorce judgment providing a formula for division following the allocation.

In Weberg v. Weberg,92 the husband was injured during the marriage and entered into a nonallocated worker's compensation settlement prior to divorce. The court affirmed an award to him of the entire balance remaining at the time of divorce,93 stating:

Richardson limited application of the presumption to compensation for personal injury and future earnings . . . .

In Krebs, however, the court appears to have dropped the qualification, for there the structured settlement did not distinguish among the various elements of damage, yet the court applied the Richardson presumption . . . .

The same is true here. The record of Weberg's settlement does not disclose any division or separation based on type of damage. Under Krebs, that fact is immaterial and the presumption that the settlement remains the property of the injured person is fully applicable.94

This language implies that Krebs has modified Richardson so that all proceeds presumptively belong to the injured spouse, even in the face of an allocation by verdict or settlement agreement. This interpretation of Krebs is too broad. Krebs contains no language purporting to eliminate the Richardson distinction between marital and nonmarital components when an allocation is available.

91. Richardson, 139 Wis. 2d at 784 n.3, 407 N.W.2d at 234 n.3.
92. 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990).
93. Weberg also discussed the fact that Richardson involved a claim which had not been resolved at the time of divorce and that Krebs involved payments due after divorce arising from a settlement reached before the divorce. It then reached the obvious conclusion that the Richardson rule also applies to that portion of the marital estate resulting from the proceeds of a settlement completed before divorce. Id. at 548-49, 463 N.W.2d at 385.
94. Id. at 549-50 n.3, 463 N.W.2d at 386 n.3.
It can be predicted that the supreme court will limit *Krebs* and make the *Richardson* dichotomy applicable even when no allocation is available. It will do so by requiring the trial court to make its own allocation in that situation. This prediction is based on the inequities and incongruities which would result from an abandonment of *Richardson*. Moreover, abandonment of *Richardson* would conflict with the principles of equitable distribution by preventing the noninjured spouse from sharing in the reimbursement of medical expense and wage loss incurred during the marriage.

Pending clarification, trial courts should continue to apply *Richardson* when there is a verdict or a settlement agreement containing an allocation. When there is neither, they should make an independent allocation and apply the *Richardson* dichotomy, despite the uncertainty created by *Krebs* and *Weberg*.

VI. RETIREMENT AND DISABILITY BENEFITS

Retirement benefits earned by a spouse from private, municipal, or state employment are includible in the marital estate. Any portion of such benefits attributable to employment prior to marriage may be returned to the employee spouse in the court's discretion, by means of an unequal division under Section 767.255(2), as property brought to the marriage. Certain federal benefits are excludible from the marital estate while others are includible. This section will consider the controlling decisions in this area.

*Mack v. Mack* holds that federal law permits the inclusion of federal Civil Service Retirement Act benefits in the marital estate. It also holds that federal law excludes Social Security benefits.

*Rommelfanger v. Rommelfanger* holds that Railroad Retirement Act benefits are excludible from the marital estate by federal law. It further holds that the nonemployee spouse cannot be awarded an unequal division of the marital estate to compensate for the value of these benefits because this would indirectly violate the federal statute.

*Pfeil v. Pfeil* applies the *Rommelfanger* rules of exclusion and prohibition against compensatory unequal division to disability benefits arising

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95. See, e.g., Mausing v. Mausing, 146 Wis. 2d 92, 429 N.W.2d 768 (1988).
96. See Rodak v. Rodak, 150 Wis. 2d 624, 442 N.W.2d 489 (Ct. App. 1989). The benefits earned prior to marriage should be returned to the employee by unequal division as a matter of course for the reasons discussed in Part II.B.
97. 108 Wis. 2d 604, 323 N.W.2d 153 (Ct. App. 1982).
98. 114 Wis. 2d 175, 337 N.W.2d 851 (Ct. App. 1983); see supra note 85 and accompanying text.
DIVORCE LAW

from military service. It also holds that $18,000 of disability benefits held in a bank account at the time of divorce are excludible, but that another $20,000 of disability benefits had lost its excludible status because it had been invested in a mortgage note and was no longer "immediately available."

Thorpe v. Thorpe \(^{100}\) contains an historical discussion of Wisconsin's treatment of military retirement benefits. Prior to the 1981 McCarty v. McCarty \(^{101}\) decision by the United States Supreme Court, military pensions had been included in the marital estate. McCarty held that federal law required their exclusion. Thereafter, Wisconsin followed McCarty until Congress reversed McCarty by enactment of the Uniformed Services Former Spouse Protection Act, \(^{102}\) which restored to state courts the power to divide military pensions upon divorce. \(^{103}\) Since then, Wisconsin has included military pensions in the marital estate.

In Loveland v. Loveland, \(^{104}\) the husband elected to waive a portion of his military retirement benefits in order to qualify for an equivalent sum in Veterans' Administration disability benefits. He made this election because disability benefits, unlike retirement benefits, are exempt from federal income taxation. The court recognized that such disability benefits are generally excludible from the marital estate. However, it concluded that here they should be included in the marital estate because they are the functional equivalent of the retirement benefits that were waived in order to qualify for receipt of the disability benefits. It reasoned that the underlying purpose of the Uniformed Services Former Spouses Protection Act required this result. The court also distinguished Pfeil on the obvious ground that the disability benefits there did not result from a waiver of retirement benefits.

In Weberg v. Weberg, \(^{105}\) the Wisconsin Court of Appeals stated in dictum that Loveland had been overruled by the United States Supreme Court decision in Mansell v. Mansell. \(^{106}\)

The issue in Mansell, however, was whether "military retirement pay waived by the retiree in order to receive veterans disability benefits" could be treated as property to be divided between divorcing parties under the language of the Uniformed Services Former

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100. 123 Wis. 2d 424, 367 N.W.2d 233 (Ct. App. 1985).
104. 147 Wis. 2d 605, 433 N.W.2d 625 (Ct. App. 1988).
105. 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990).
Spouses Protection Act, 10 U.S.C. Sec. 1408. The Court concluded that the waived retirement pay could not be treated as divisible property upon divorce. 107

In Weberg, the husband was receiving both Social Security and Veterans Administration disability benefits. He had never been eligible for military retirement benefits, so the Loveland and Mansell rules did not apply. The trial court considered both his social security and disability benefits in awarding maintenance to the wife. The court affirmed, distinguishing Pfeil and the other authorities relied on by the husband on the ground that they involved exclusion of disability benefits from the marital estate rather than the issue of whether such benefits may be considered in making an award of maintenance. The opinion concluded as follows: "In this case we are not asked to divide Weberg's benefits or award any portion thereof to his wife. We are to decide only whether the payments Weberg is presently receiving may be considered by the court as a factor in assessing his ability to pay spousal maintenance." 108

In summary, federal law requires exclusion from the marital estate of Social Security and Railroad Retirement Act benefits. It also requires exclusion of all Veterans Administration disability benefits, including those resulting from a waiver of military retirement benefits. However, all such benefits can be considered as a source of income for purposes of maintenance. All Civil Service and military retirement benefits are includible in the marital estate.

VII. ACCOUNTS RECEIVABLE USED AS A SOURCE OF INCOME FOR MAINTENANCE

Accounts receivable from a business or professional practice may either be included as an asset for purposes of property division or considered as a source of income for an award of maintenance, but not both. This rule was stated in Hubert v. Hubert: 109 "Generally, receivables are to be considered as assets subject to property division. On occasion, in fixing child support and maintenance, the family court can consider the accounts receivable as anticipated income when determining the party's ability to pay. However it is error if the court double counts receivables." 110

107. Weberg, 158 Wis. 2d 545, 463 N.W.2d 384. 108. Id. 109. 159 Wis. 2d 803, 465 N.W.2d 252 (Ct. App. 1990). 110. Id. at 812, 465 N.W.2d at 255 (citations omitted).
VIII. CONCLUSION

Except for Wierman, the decisions in the area of excludibility under Section 767.255 are confused and contradictory. They are based on semantics and myopic logic, with no consideration of underlying policy. Bonnell and its progeny hold that transfer of ownership into joint tenancy with the nonrecipient spouse creates a presumption of gift, with a resulting loss of excludibility. Arneson holds that unearned income from excludible property is not excludible because Section 767.255 does not expressly provide for exclusion of income. The Plachta line of decisions holds that the appreciation of excludible property is generally excludible because Section 767.255 does not provide that appreciation is not excludible, but that any appreciation resulting from the efforts of a spouse is includible in the marital estate.

Wierman offers a persuasive rationale for resolution of all issues of excludibility under Section 767.255, based on policy considerations, rather than on a sterile semantical approach. The equitable distribution principles of Wierman are sound law. They dictate that only property acquired through the efforts of either or both spouses during the marriage should be subject to division upon divorce. These principles should be applied in resolving all the property division issues discussed above. They lead to these results:

1. The Bonnell line of decisions should be overruled. Interspousal transfer of ownership should not cause a loss of excludibility.

2. Arneson should be overruled. Income from gifted or inherited property should be excluded, except to the extent that it results from the efforts of a spouse.

3. Plachta, Haldeman, Lendman, and Torgerson are consistent with Wierman and should continue to control. Appreciation of excludible assets should be excludible, except to the extent that it results from spousal effort.

4. Property brought into the marriage should be returned by a discretionary unequal division under Section 767.255(2) as a matter of course, except when such return would create a "hardship," as defined in Popp. Gifted or inherited assets that have lost their excludible status should be returned on this same basis, under Section 767.255(12).

Lang ignores Wierman and reaches an inconsistent result. It is hoped that Lang will be treated in the future as applicable only to the precise issue addressed and will not be broadly interpreted as impliedly limiting the application of Wierman.

The exact state of the law regarding treatment of personal injury proceeds is uncertain under Richardson, Krebs, and Weberg. It is clear that all components of compensation, other than wage loss or medical expense in-
curred during the marriage, presumptively belong exclusively to the injured spouse. It is highly probable that wage loss and medical expenses are to be treated as marital assets if they are ascertainable due to allocation in a settlement agreement or a verdict. If no such allocation is available, it is probable that the judge should make an independent allocation and treat these two components as marital assets, although the law is unclear on this point.

Generally, private, municipal, and state retirement benefits are includible in the marital estate. Any pro rata portion attributable to employment prior to marriage should be returned by unequal division under Section 767.255(2), based on Wierman. Civil Service Retirement benefits and military pensions are includible. Social Security benefits, Railroad Retirement Act benefits, and Veterans Administration disability benefits are excludible, but are to be considered as income for purposes of maintenance.

Finally, accounts receivable cannot be considered as marital assets if they are used as a source of income for an award of maintenance.