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THE IMPACT OF WISCONSIN'S MARITAL PROPERTY ACT ON FAMILY LAW

JAMES J. PODELL*

I. INTRODUCTION

Wisconsin's new Marital Property Act1 was signed into law on April 4, 1984 and takes effect on January 1, 1986. This act is based upon the Uniform Marital Property Act,2 approved by the National Conference of Commissioners on Uniform State Laws on July 28, 1983 . . . . This new system of property rights embodies many principles of community property, the spousal property system presently existing in various forms in California, Washington, Oregon, Nevada, Idaho, Texas, Arizona, and Louisiana.3

It has been said that "[t]he Wisconsin Marital Property Act is legislation primarily concerned with the property rights of married persons during their marriage and when marriage ends at death. It was not intended to make any basic change to Wisconsin's existing divorce law."4 However, as this Article will show, the new law does bring change to divorce practice in Wisconsin.

II. CURRENT WISCONSIN DIVORCE LAW

What changes will the new act bring to Wisconsin divorce law? First, it is necessary to understand that Wisconsin divorce law is based upon the Uniform Marriage and Divorce Act (UMDA).5 A review of the background of chapter 767 of the Wisconsin Statutes demonstrates that UMDA brought

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1. 1983 Wis. Laws 186.
2. UNIF. MARITAL PROP. ACT, 9A U.L.A. 21 (Supp. 1985) [hereinafter referred to as UMPA].
3. WISCONSIN LEGISLATIVE REFERENCE BUREAU, INFORMATIONAL BULLETIN 84-IB-1, at 1 (1984) [hereinafter cited as INFORMATIONAL BULLETIN].
5. See Dixon v. Dixon, 107 Wis. 2d 492, 499 n.6, 319 N.W.2d 846, 850 n.6 (1982).
community property principles to Wisconsin divorce law. An examination of the history of UMDA shows that "[t]he Conference's original proposal was in substance that a community property rule govern the division of marital property." Professor Krauskopf pointed out that the original proposal for the division of property in the UMDA was in substance a community property rule.

Subsequently, section 307 of the UMDA was amended to provide two alternative paragraphs.

Alternative A, which is the alternative recommended generally for adoption, proceeds upon the principle that all the property of the spouses, however acquired, should be regarded as assets of the married couple, available for distribution among them, upon consideration of the various factors enumerated in subsection (a). It will be noted that among these are health, vocational skills and employability of the respective spouses and these contributions to the acquisition of the assets, including allowance for the contribution thereto of the "homemaker's services to the family unit." This last is a new concept in Anglo-American law.

Alternative B was included because a number of Commissioners from community property states represented that their jurisdictions would not wish to substitute, for their own systems, the great hotchpot of assets created by Alternative A, preferring to adhere to the distinction between commu-

6. FAMILY LAW REPORTER, DESK GUIDE TO THE UNIFORM MARRIAGE AND DIVORCE ACT 57 (1974) [hereinafter cited as DESK GUIDE].
7. See Krauskopf, A Theory for "Just" Division of Marital Property in Missouri, 41 Mo. L. Rev. 165, 166 (1976).

In opposition to the original proposal, Judge Ralph J. Podell, then chairman of the American Bar Association Family Section, wrote: "[T]he Uniform Law Commissioners have decided to impose upon the large majority of states some of the policies and law of community property states when they provide therein for division of only 'marital property.'" Podell, The Case for Revision of the Uniform Marriage and Divorce Act, 7 FAM. L.Q., Summer 1973, at 169, 175.

Professor Krauskopf rhetorically asked:

Why would the National Conference of Commissioners on Uniform Laws, composed principally of persons from common law states, recommend a community property model for property division at divorce? The Commissioners did not wish to foist the entire community property regime upon common law jurisdictions, but they did want to incorporate the shared enterprise or partnership theory of marriage—the heart of community property law—as a major guiding principle in dividing property at divorce.

Krauskopf, supra note 7, at 166.
nity property and separate property, and providing for the
distribution of that property alone, in accordance with the
enumeration of principles, resemblant, so far as applicable,
to those set forth in Alternative A. 8

A reading of Wisconsin Statute section 767.255 shows that
it basically follows alternative A. Although alternative B was
drafted as the community property alternative, “concepts of
the 1973 version of Alternative A go beyond the concepts of
community property law by providing that all property of the
spouses (which would include both separate and community
property) shall be ‘apportioned equitably’ between the
spouses.” 9

Currently, three community property states follow alter-
native A and allow the court, at least in certain situations, to
divide the separate property of the other spouse. 10 However,
the distinctions between alternatives A and B are lost when
one considers that both alternatives are based upon the com-
munity property principle that marriage is a partnership. 11

Thus, to summarize:

Both property division sections of the UMDA recognize that
the spouses have been partners in the marriage, and require
courts to look beyond title in deciding how much each
spouse should share in the assets to be distributed. Espe-
cially noteworthy is the fact that Alternative A goes further

8. DESK GUIDE, supra note 6, at 33.
9. W. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES 625
n.11 (1982).
10. In New Mexico, Texas, and Washington, the court has the power to divide
or assign the separate property of one spouse to the other spouse, but there are
circumstances in which this power is limited. In Nevada, the power of the court
is limited to certain situations and the cases appear to not have been consistent in
this area.

Id. at 528. Since Professor McClanahan published this statement, the Texas Supreme
Court has ruled that separate property could not be distributed to the non-owning
spouse in a division of property at dissolution, stating that “allowing a trial court to
divest separate property, from one spouse and award it to the other spouse as part of the
latter’s separate estate would impermissibly enlarge the exclusive constitutional defini-
tion of separate property.” Cameron v. Cameron, 641 S.W.2d 210, 213 (Tex. 1982).
11. It is readily apparent from the new statutes in common-law states that they
have accepted one of the cardinal principles of community-property law, that is,
that marriage is a partnership, a shared enterprise, in which each of the spouses
makes a different but equally important contribution to the family and its wel-
fare and to the acquisition of its property.

W. MCCLANAHAN, supra note 9, at 631.
than community property distribution principles by making all property subject to distribution . . . . Regardless of the property distribution section chosen, a common law state adopting the UMDA enacts legislation which specifically gives courts the power to implement sharing principles at divorce.\textsuperscript{12}

Therefore, section 767.255 of the Wisconsin Statutes is based upon community property principles.

III. COMMUNITY PROPERTY PRINCIPLES IN DIVORCE ACTIONS

A. Bonnell v. Bonnell

Wisconsin courts are currently deciding divorce cases on the basis of community property principles. In \textit{Bonnell v. Bonnell},\textsuperscript{13} the Wisconsin Supreme Court held that when Mrs. Bonnell took inherited property and changed the title to joint tenancy with her husband, she transmuted the separate property into marital property. The \textit{Bonnell} decision is analogous to a recent Arizona decision, \textit{Grant v. Grant}\textsuperscript{14} in which the court stated:

In the final analysis, the fact that a spouse puts separate property into joint tenancy with the other spouse must be an inference or indication that a gift was intended, but this is

\begin{scriptsize}
\begin{enumerate}
\item The policy of community property was to establish equality between husband and wife in the area of property rights in marital property acquisitions, in recognition of and to give effect to the fundamental equality between the spouses based upon the separate identity of each spouse and the actual contribution they each made to the success of the marriage.
\item W. DeFuniak & M. Vaughn, \textit{Principles of Community Property} 24 (2d ed. 1971).
\item The theory of the law being, that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution, in case one survived the other . . . .
\item 117 Wis. 2d 241, 344 N.W.2d 123 (1984), \textit{rev'g} 111 Wis. 2d 337, 330 N.W.2d 237 (Ct. App. 1983).
\end{enumerate}
\end{scriptsize}
considered only with all the other evidence bearing upon the issue of intent.

Here, the trial judge determined that the wife intended to make a gift of her separate property when she instructed her attorney to convert the stocks into a joint tenancy ownership.\textsuperscript{15}

The import of the \textit{Bonnell} and \textit{Grant} decisions is seen in the doctrines of "tracing" and "transmutation." "The tracing of funds is a procedure which allows the court to find that property which would otherwise fall within the definition of marital property is actually nonmarital property under one of the exceptions.' It has its roots in Community Property Law."\textsuperscript{16} Generally, tracing refers to the mechanics of following property through transactions or exchanges from the time the property originally acquired its status as separate or marital to the present time. Transactions or exchanges merely change the form of the property; they do not change the character of the property from separate to community or from community to separate.\textsuperscript{17} The concept of tracing plays an important role in the exception for gifted and inherited property found in Wisconsin Statute section 767.255, as well as in interpreting UMDA\textsuperscript{18} and Wisconsin's new Marital Property Act.\textsuperscript{19}

Transmutation, on the other hand, refers to a change in the character of the property.\textsuperscript{20} It can be thought of as a reclassification: property is transmuted from separate to marital, or marital to separate, when the parties show an intent to so alter the character of the property.\textsuperscript{21} Like the tracing doctrine, transmutation has its origin in community property law.\textsuperscript{22}

\begin{thebibliography}{22}
\item[15] \textit{Id.} at \textsubscript{——}, 581 P.2d at 706.
\item[17] \textit{See} W. \textsc{Reppy} \& C. \textsc{Samuel}, \textit{supra} note 12, at 2.
\item[18] \textit{See} UMDA, \textit{supra} note 2, § 14 comment.
\item[20] \textit{See} W. \textsc{Reppy} \& C. \textsc{Samuel}, \textit{supra} note 12, at 23.
\item[21] \textit{See} L. \textsc{Golden}, \textit{supra} note 16, at 132.
\item[22] \textit{See} W. \textsc{Defuniak} \& M. \textsc{Vaughn}, \textit{supra} note 12, § 144.
\end{thebibliography}
In addition to the Wisconsin Supreme Court focusing on the community property principles of tracing and transmutation in Bonnell, the Wisconsin Court of Appeals decided two cases in 1984 involving property questions within the context of divorce actions. In Plachta v. Plachta, the court held that appreciation of inherited or gifted property remains nonmarital. In Arneson v. Arneson, the court held that property purchased with income from inherited or gifted property is marital property. These concepts are consistent with the Uniform Marital Property Act and the Wisconsin version of UMPA. Like Plachta, section 4(g)(3) of UMPA and future section 766.31(7)(c) of the Wisconsin legislation provide that appreciation of a spouse's individual property remains individual property. Like Arneson, section 4(d) of UMPA and future section 766.31(4) of the Wisconsin Act provide that income earned or accrued from a spouse's individual property becomes marital property.

Only three of the community property states follow the rule found in UMPA, in the new Wisconsin Marital Property Act, and in Arneson: income from a spouse's individual property becomes marital property. "In Arizona, California, Nevada, New Mexico and Washington, income from separate property received during marriage is itself separate property. Idaho, Louisiana, and Texas, on the other hand follow the old civil law system under which income from separate property is community property." However, all of the community property states concur with the above rationale found in UMPA, in the new Wisconsin Marital Property Act, and in Plachta: appreciation of separate property remains separate property. Therefore, the theory of community property found in UMPA has been part of Wisconsin divorce law for

23. 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984).
24. 120 Wis. 2d 236, 355 N.W.2d 16 (Ct. App. 1984).
26. Even under the civil law system, however, increases in the value of separate property due to natural causes, (such as inflation or external market pressures) are also separate. Thus, in Idaho, Louisiana and Texas, ordinary income derived from separate property is community property, but capital gains derived from
several years. It is a theory of economic partnership. So if Wisconsin divorce law already considers community property principles, what changes will occur because of the enactment of community property legislation?

IV. DIVISION OF PROPERTY

The only direct change to Chapter 767, Wisconsin's divorce law, is the addition of subsection (5e) to Wisconsin Statute section 767.255: "Whether equity requires reimbursement of one spouse by the other because of certain transactions during the marriage." Prior to the enactment of this new law, section 767.255 contained twelve criteria for the court to consider in dividing the estate upon divorce. The twelfth standard, "such other factors as the court may in each individual case determine to be relevant," is a catchall. A basic rule of statutory construction is that a construction that would result in any portion of the statute being superfluous is to be avoided. "Effect must be given if possible to every word, clause and sentence thereof." Where the legislature used "two different phrases . . . in two paragraphs in the same (statutory) sec-

such property may be separate and partially community, depending on how much of the gain is attributable to natural increase.

The Wisconsin Committee on Marital Partnership Property Reform has concluded that the civil law system best reflects societal attitudes of marriage as a cooperative venture.

Id.

27. The basic concept (of the Uniform Marital Property Act), is to view marriage as an economic partnership and to recognize that, notwithstanding the technicalities of title, each spouse would have a presently vested interest in property acquired during marriage.

In dissolution, the Act does not attempt to spell out how marital property is to be divided, nor the extent to which separate property may be taken into account in dividing marital property. It does bring the parties' marital property to the door of the dissolution court with 50/50 ownership, regardless of title. The court would then proceed according to state law and practice. This would not be significantly different from such common law states as Colorado, which recognizes equitable distribution.


28. 1983 Wis. Laws 186, § 90 (to be codified at Wis. Stat. § 767.255(5e)).
30. See State v. Wachsmuth, 73 Wis. 2d 318, 324, 243 N.W.2d 410, 414 (1976).
tion, it is presumed to have intended the two phrases to have different meanings."32 Therefore, the addition of subsection (5e) must add a meaning other than already found in subsection (12). What was the legislature contemplating?

Subsection (5e) must add a concept of "economic fault" to our statute. Attorneys in divorce actions will have to review the entire marriage with their clients to contemplate whether there was economic waste by either their client or the other party. Perhaps one of the parties spent money on an individual hobby or, perhaps, an extramarital affair. These events should be brought before the court, since equity might require reimbursement of one spouse by the other for these transactions. Subsection (5e) should be repealed in future legislation.

V. ETHICAL PROBLEMS FACING ATTORNEYS

The new law raises the question of whether it is ethical for the attorney for a small business in which either of the parties has an ownership interest to represent one of the parties in a divorce action.33 This question was recently decided in California.34 In that case, the husband owned a family business that was community property. The husband retained the family-business attorney to represent him in the divorce. Upon objection by the wife, the California Supreme Court granted a hearing and then transferred the matter back to the intermediate appellate court. The appellate court held that a lawyer for a business owes it a continuing and undivided loyalty and could not take sides in a serious dispute between the owners. The court rhetorically asked what dispute could be more serious than the dissolution of a marriage. The court concluded:

We believe the proper focus should be on the fact that in representing an ongoing family corporation, Mr. Kralowec in a very real sense continues to represent wife. . . . We believe that the fact Mr. Kralowec continues to represent wife's interest in a family business which will be the focus of the marital dissolution is sufficient to disqualify Mr. Kralowec from representing husband.35

33. Clearly, if both parties own the business, the ethical question arises.
35. Id. at 935-36, 197 Cal. Rptr. at 188-89.
The court went on to say: "We conclude that, absent consent or waiver, the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a dissolution action."36

The question is only superficially different when just one of the parties, rather than both husband and wife, owns all or a substantial portion of the business. The new act does provide that even if the property is individual property under the new act, "[i]ncome earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property."37 Furthermore, "[i]n a dissolution, all property then owned by either or both spouses which was acquired during marriage and before the determination date and which would have been marital property under this chapter if acquired after the determination date shall be treated as if it were marital property."38 Therefore, even if a business is titled in the name of only one of the spouses, both spouses have an interest in the business,39 and it would be improper for the attorney for the business to represent either spouse.

VI. CONFLICTS BETWEEN CHAPTERS 766 AND 767

The concept of deferred marital property provides that property acquired during the marriage and before the determination date, which would have been marital property under this chapter if acquired after the determination date, shall, upon the death of the owner, be treated as if it were marital property.40 This concept, also found in UMPA41 is based upon California42 and Idaho43 statutes. The approach is to create a deferred property right that applies at death.44
An example of this situation is when one of the parties, A, purchases stock with A's wages during the marriage but prior to January 1, 1986. Upon A's death, the stock becomes marital property and passes through the normal probate procedures. However, if B predeceases A, B would not be able to dispose of the stock by will. Furthermore, while both A and B are alive, B will be unable to give away any of the stock as a gift. On the other hand, during the marriage, A could dispose of the stock, either directly to a third person or by selling the stock and purchasing a gift for a third person. If that occurs, and A transfers marital property to someone outside the marriage, what remedies are available to B under the new statute?

B could bring an action for divorce under chapter 767 or pursue a remedy under the newly enacted section 766.53, "Gifts of Marital Property to 3rd Persons." Under the divorce statute, B would have the right to add the asset back into A's portion of the marital estate pursuant to section 767.275, if the asset was transferred during the period commencing one year prior to the filing of the petition. On the other hand, under section 766.53, B must commence an action within the earlier of either one year after acquiring notice of the gift or three years after the gift.

Under section 767.275, B may look for relief from any property of either or both spouses which had been dissipated by A, whereas under section 766.53, one is limited to an action for the dissipation of marital property only. The relief is that the property wasted or given away is rebuttably presumed to be part of the estate for purposes of section 767.255. Under section 766.53, the spouse may bring an action to recover the property or for a compensatory judgment. Finally, under section 767.275, one must try the action before the court, whereas under section 766.53, a trial by jury is available.

These variations between the marital property statute and the divorce statute must be considered by attorneys when they look for relief on behalf of their clients. A further problem of relief under section 766.53 is that it states:

A spouse acting alone may give to a 3rd person marital property that the spouse has the right to manage and control only if the value of the marital property given to the 3rd person does not aggregate more than either $500 in a calendar year, or a larger amount if, when made, the gift is reason-
able in amount considering the economic position of the spouses. Any other gift of marital property to a 3rd person is subject to sub. (2) unless both spouses act together in making the gift.45

Nowhere is there guidance as to how to determine whether the gift is a reasonable amount considering the economic position of the spouses. Attorneys must consider this ambiguous language before they bring action under this provision. Even the comment to the UMPA version of this statute states in part that in addition to the $500 safe harbor provision, this section "also has a less objective test of reasonableness with reference to the economic position of the spouses when made."46 Rather than "less objective," the comment should say "subjective." Only through litigation will we know how the courts will interpret what is a reasonable amount considering the economic position of the spouses.

Future section 766.75 is probably not necessary to carry out the intent of the new law because section 767.255 allows the court to divide all property owned by either or both the parties, with the exception of property acquired by gift, bequest, devise, or inheritance unless upon a finding that failure to divide the property would create a hardship.

Future section 766.70, "Interspousal Remedies," provides that the court may order an accounting of the spouses' property and obligations and may determine various rights in and to the property of the spouses. "[W]hile it is not the purpose of the section to open the door to a torrent of interspousal economic fault litigation, it is nonetheless necessary to provide remedies for conduct that injures the interest of one of the spouses."47 Unfortunately, the utilization of interspousal remedies will, in most cases, lead to divorce court.

Furthermore, a question arises as to the use of marital money by one of the spouses to pay a retainer to a divorce attorney. Under future section 766.53, any gift exceeding the value of $500 in a calendar year, or a larger amount if it exceeds the reasonableness test, is subject to recovery. However,

45. 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. § 766.53(1) (emphasis added)).
46. UMPA, supra note 2, § 6 comment.
47. Id., § 15 comment.
future section 766.55 provides an exception if the obligation is incurred in the interest of the marriage or the family. Is a retainer which is paid to a divorce attorney by one of the parties an obligation incurred in the interest of the marriage? In all likelihood, litigation will be needed to answer that question.

VII. PAYMENTS TO SPOUSE AND CHILDREN FROM PRIOR MARRIAGE

Future section 766.55(2)(a) states that if a party is ordered to pay maintenance or child support or both to a spouse from a prior marriage and no marital property agreement exists, a spouse's obligation to satisfy a duty of support to the other spouse or to a child of the marriage may be satisfied only from marital property and all other property of the obligated spouse.

A problem arises when one wishes to pay for the college education of a child from a prior marriage, but the obligation was not made a part of the judgment of divorce. In that case, upon remarriage, the new spouse could object under future section 766.53 to the payments. To prevent such problems, spouses who believe that they may possibly find themselves in that position should be sure to avail themselves of the protection of a marital property agreement prior to any subsequent remarriage.

VIII. COMMUNITY PROPERTY TAXATION

Attorneys and judges in Wisconsin have long realized that tax implications play a significant role in any divorce proceeding. Wisconsin's statutes require consideration of tax consequences in setting awards for maintenance, child support, and division of estate. With the advent of community prop-

49. See Wis. Stat. § 767.25(1m)(h) (1983-84).
50. See Wis. Stat. § 767.255(10) (1983-84). The Wisconsin Supreme Court has held:
We think in making a division of property or in granting alimony or both that consideration should be given to the tax consequences. Disregarding the effect of taxes may result in an unrealistic and unjust result. We do not hold that the trial court must adopt as a solution a method which produces the least amount of tax for the husband or for the wife, but in arriving at a determination of the business
 arity in Wisconsin, attorneys will have to learn a new set of tax laws.

The United States Supreme Court has held that any income designated by state law as community income is taxable one-half to each spouse. An example is a husband and wife who live in a community property state. During the year, the wife earns $30,000 and the husband earns $20,000. Each spouse is co-owner of the total earnings of $50,000 and will be taxed on one-half that amount, or $25,000. Because of that principle, a significant body of law has arisen to protect the "innocent spouse." Each spouse may claim one-half of the deductions and credits if the income is marital.

During the pendency of a divorce action, the recipient of maintenance is not taxed on any maintenance payments made from that share of community income. Maintenance payments less than the recipient's share of community property income are not taxable, regardless of whether the source of the payments is community or separate. Furthermore, all sup-

side of the divorce the tax impact is a consideration which permeates the whole process.

Wetzel v. Wetzel, 35 Wis. 2d 103, 110, 150 N.W.2d 482, 485 (1967). The Wisconsin Supreme Court has also stated that:

[The duty placed on the judge in Wetzel involved a contested divorce in which the division of property, both as to the amount and the form of division, was made by the trial court. In the case before us, the division, both as to amount and form, was made by the parties by stipulation in open court.

Counsel when entering into a divorce stipulation has the duty to consider tax consequences to his client. The trial court is obliged to consider income tax consequences in a property stipulation.


52. Half of the earnings are taxable to each spouse, even if the non-earner receives no benefits from the earnings. See United States v. Mitchell, 403 U.S. 190 (1971). The income earned by a spouse is community income even if the parties are physically separated. See Bagur v. C.I.R., 603 F.2d 491, 494 (5th Cir. 1979).


54. See Stewart v. Commissioner, 95 F.2d 821, 822 (5th Cir. 1938). The deductions associated with the spouses' earned income may be divided between the spouses. See Sharon v. Commissioner, 10 T.C. 1177 (1948) (Nonacq. 1949-1 CB 6). Each spouse may claim one-half of the total income tax withholding made on community income. See Treas. Reg. § 1.31-1 (A) (1984).


port payments greater than the recipient’s share of community income are subject to section 71.  

IX. Marital Property Agreements

Perhaps the greatest impact of the Marital Property Act on the practice of family law will be that portion of the law dealing with marital property agreements. Except as provided in the good faith requirement section, the creditor’s rights provision section, the provision concerning bona fide purchasers, and the child support provision section, a marital


Given the above basic rules concerning community property taxation in divorce actions, a better understanding may be gleaned from the following example. Assume that Wisconsin has now adopted community property tax rules and a divorce was granted on June 30. During the first six months of the year, the husband earned $40,000, and paid $16,000 to his wife as maintenance. She had no other income. He earned an additional $30,000 during the last half of the year, for a total income of $70,000 for that year. He paid to his wife an additional $16,000 as maintenance during the last six months, for a total of $32,000 for the year. The tax returns for the year should show that the first six months the husband had income of $20,000 (one-half of the $40,000) and no deduction for maintenance because the $16,000 maintenance received by the wife was less than her $20,000 portion of the community income for that six-month period. During the last six months, the husband earned an additional $30,000 and had a deduction of $16,000 for maintenance.

The wife, on the other hand, will show income of $20,000 for the first six months, even though she received only $16,000 in maintenance. In addition, she will receive $16,000 in maintenance for the second six months. Therefore, for the calendar year she will have a total of $36,000 in taxable income.

The problem, of course, is that for the first six months the wife is being taxed on $20,000 of income, although she received only $16,000. This situation must be recognized by attorneys and courts.

To vary the example set forth above, assume the same facts, except that the husband paid $24,000 in maintenance to his wife during the first six months, and an additional $24,000 in maintenance during the second six months. In that situation, for the first six months the husband would show income of $20,000 less maintenance paid of $4,000 (the difference between the $24,000 in maintenance which he actually paid and the $20,000 which was presumed to be the wife’s share of his $40,000 income). During the second six months, the husband would have an income of $30,000 less a maintenance deduction of $24,000. Therefore, for the year, he would have total income of $50,000, less a deduction for maintenance of $28,000.

His wife, on the other hand, would show income of $20,000 for the first six months, maintenance received of $4,000 for the first six months, and maintenance received of $24,000 for the second six months, for a total of $20,000 income for the year, plus $28,000 in maintenance received.

59. See id. (to be codified at Wis. Stat. § 766.55(4m)).
60. See id. (to be codified at Wis. Stat. § 766.57(3)).
61. See id. (to be codified at Wis. Stat. § 766.58(2)).
agreement may vary the effect of the Act. Future section 766.58 sets forth detailed subsections concerning marital property agreements.\textsuperscript{62}

\textbf{A. Requirements}

Subsection one states that the document shall be signed by both spouses. Witnesses are not required. There are no formal drafting requirements. No consideration is required under the new law; the document need not be witnessed.

Subsection two states that the agreement may not adversely affect the right of a child to support. Although child support may be held open, it may not be denied.

Subsection three indicates that except as indicated above, spouses may agree regarding: (a) rights in and obligations regarding either or both spouses' property; (b) management and control of either or both spouses' property; (c) disposition of either or both spouses' property upon dissolution or death or the occurrence or nonoccurrence of any event; (d) modification or elimination of spousal support, except as provided in subsection nine; (e) provisions to be incorporated within their respective wills; (f) disposition of property without probate to a designated person, trust, or other entity by nontestamentary disposition;\textsuperscript{63} (g) choice of law governing construction of the agreement;\textsuperscript{64} and (h) any other matter affecting either or both

\begin{footnotesize}
\textsuperscript{62} A comparison of the new Wisconsin statute with section 10 of the Uniform Marital Property Act shows that the Wisconsin law is almost identical to UMPA. The basic difference is additions to the Wisconsin act in subsections (6) (c) (2), (9a), (9b), (10), and (11) of section 766.58. A further comparison of the provisions in UMPA with the Uniform Premarital Agreement Act shows the two uniform acts to be basically the same with generally only semantic differences, except for the enforceability clauses. \textit{See George, Marching to a Single Beat, 6 Fam. Advoc., Winter 1984, at 24.}

\textsuperscript{63} This is what has been called a "Washington will" because of its utilization as a will substitute in the State of Washington.

\textsuperscript{64} What were the drafters referring to when they enacted this portion of the statute? A reasonable answer might be that the parties could choose any forum in which they have a reasonable basis to allege jurisdiction. In other words, there must be some minimal contacts with a state in order for that state's law to be selected. In all likelihood this section was intended to cover the situation in which the parties owned property in several states or intended to move to another state.

On the other hand, nothing in the language of the statute limits the choice of law to a state in which the parties have some contact, and it could be argued that the statute
spouses' property not in violation of public policy or a statute imposing a criminal penalty.65

Subsection four of the Act provides that a marital property agreement may be amended or revoked only by a later marital property agreement. In other words, if the parties decide to terminate their agreement, they cannot simply tear up their document. They must draft a new document, revoking the prior agreement. Under the present draft, a subsequent divorce does not terminate the agreement. Some provision should be added to the law allowing for termination of agreements upon divorce.

Subsection five provides that when agreements are executed before the marriage of the parties, the agreements shall not become effective until the marriage. Thus, marital property agreements under this Act will not cover situations in which the parties are living together without being married.

allows them to choose the law of any state if that is their desire. Nothing in the comment to section 10 of UMPA aids in the interpretation of this subsection.

Furthermore, when one looks to the Uniform Premarital Agreement Act (UPAA) one sees that although section (3) of the UPAA is the basis for section 10 of UMPA and future section 766.58 of the Wisconsin Act, there is no comment to subsection (a)(7), which is the subsection regarding the choice of law. Therefore, it will be only through further court litigation that we will have an ultimate determination of the meaning of the words "choice of law governing construction of the agreement."

65. The problem with this subsection is that in the past, marital property agreements covered non-property issues. Many times, the parties would agree to the religious upbringing of their future children, particularly in religiously mixed marriages. See, e.g., Ernstoff, Forcing Rites on Children, 6 Fam. Advoc., Winter 1984, at 13. In other instances, the parties would contract regarding lifestyle arrangements. Occasionally, the parties would contract that if they subsequently had children, one party would stay home and take care of the children while the other party was employed, or that the parties would take turns staying home with the children. These were very important issues, and the agreements served an important purpose. However, under the new Wisconsin legislation, there is no provision for agreements on these non-property issues.

One may argue that the inclusion of these arrangements in the marital property agreement is not prohibited. However, one can only contract to that which is found within the statute. Furthermore, if a couple drafts one agreement regarding property issues which comes within the statute, and then contracts in a separate agreement regarding non-property issues, what effect will the courts give to the second agreement? Would the courts enforce both agreements?

Although this subsection is identical to section 10(c)(8) of UMPA, they both differ from the comparable section in UPAA, section 3(a)(8). That subsection provides that the parties may contract with respect to "any other matter, including their personal rights and obligations, not in violation of public policy, or a statute imposing a criminal penalty." The Wisconsin Act should be amended to specifically allow agreement on non-property issues.
Subsection six concerns the enforceability of agreements and is one of the more controversial subsections of this Act. If one spouse desires to prove the agreement unenforceable, that spouse must meet one of three tests. The first test, found in subsection (6)(a), is that the marital property agreement was unconscionable when made. The second test, found in subsection (6)(b), provides that the marital property agreement is not enforceable if the spouse against whom enforcement is sought shows that the spouse did not execute the marital property agreement voluntarily. Subsection (6)(c) provides an additional ground to set aside the agreement. This subsection sets forth three standards, all of which must be met, to show inadequate disclosure by the other spouse of property or financial obligations prior to the execution of the agreement. It contains language not found in either UMPA or the Uniform Premarital Agreement Act (UPAA) which renders the subsection unclear. The intent of the entire subsection is to allow a party to request the court to set aside the marital property agreement if the party did not receive a fair and reasonable disclosure of the other spouse’s property or financial obligations. The question of what disclosure is “fair and reasonable” will lead to extensive litigation; instead, the require-

66. See Frumkes & Greene, How to Get an Agreement Set Aside, 6 FAM. ADVOC., Winter 1984, at 20; Rutkin, When Prenuptial Contracts Are Challenged in Court, 6 FAM. ADVOC., Winter 1984, at 18.

67. What does “unconscionable” mean? This subsection is identical to section 10(f)(1) of UMPA. However, the comments to UMPA do not particularly assist one in determining the meaning of the word “unconscionable.” The comments do state: “Although the Act sets forth a specific group of requirements for enforceability, they are not exclusive. Ordinary contract defense is not specifically ruled out by the Act (as lack of consideration) when made available.” UMPA, supra note 2, § 10 comment. Therefore, Wisconsin courts should look to previous court decisions to understand the word unconscionable. See, e.g., Discount Fabric House v. Wisconsin Tel. Co., 117 Wis. 2d 587, 601-02, 345 N.W. 2d 417, 424-425 (1984).

68. What does “voluntarily” mean? Nothing in the comments to either UMPA or UPAA provides any guidance. Future cases will have to determine the question of voluntariness when one prospective spouse requests the other to execute a marital property agreement a day, a week, or possibly even a month before the wedding date. With the wedding planned, the contracts for the reception having already been signed, the dresses or tuxedos ordered, just how voluntary is the requirement to sign a marital property agreement? At what point will the court say that the prospective spouse is signing under duress?
Subsection eight states that the issue of whether the marital property agreement is "unconscionable" is for the court to decide as a matter of law. If legal counsel is retained by only one spouse in connection with a marital property agreement, this fact "does not by itself make a marital property agreement unconscionable or otherwise affect its enforceability if each spouse waived representation in writing." If neither party has an attorney, there does not appear to be any problem. Furthermore, if the parties retain one attorney between them, then that fact does not by itself affect the enforceability. However, since it is unethical for one attorney to represent both parties in a divorce, attorneys should not represent both parties in marital property agreements. An attorney who does draft such an agreement may later be subject to severe criticism if one of the parties asks the court to set aside the agreement in a subsequent divorce.

Subsection (9)(a) provides that modification or elimination of spousal support during the marriage may not result in a spouse having less than necessary and adequate support, taking into consideration all sources of support. This subsection, not found in UMPA or UPAA, appears to be a restatement of Wisconsin Statute section 52.055(1), which provides that any person who, without just cause, intentionally neglects or refuses to provide for the necessary and adequate maintenance for a spouse, shall be guilty of a misdemeanor. Subsection (9)(b) provides that if a marital property agreement modifies or eliminates spousal support so as to make one spouse eligible for public assistance upon or after dissolution of marriage, the

69. In Wisconsin, the divorce statute requires:
[F]ull disclosure of all assets owned in full or in part by either party separately or by the parties jointly. . . . The court shall also require each party to furnish, on the same standard form, information pertaining to all debts and liabilities of the parties.

Wis. Stat. § 767.27(1)(1983-84). Why should the law require full disclosure upon divorce, but only "fair and reasonable" disclosure in a marital property agreement that may be used in a subsequent divorce? Anything less than full disclosure should not be permitted by the statute.

70. The Wisconsin drafters inadvertently omitted a subsection number when numbering this provision.

71. See 1983 Wis. Laws 186, § 47 (to be codified at Wis. Stat. § 766.58(8)).
court may require the other spouse to provide support necessary to avoid that eligibility.\footnote{72}

Subsection ten provides that if the parties agree in writing to arbitrate any controversies under Chapter 766 or a marital property agreement, then the arbitration is enforceable.

Subsection eleven allows the parties to record a marital property agreement with the register of deeds under section 59.51(18) of the Wisconsin Statutes. What have the parties gained by recording that agreement? No recorded marital property agreement constitutes actual or constructive notice to a third party,\footnote{73} and the rights of a bona fide purchaser may not be varied by a marital property agreement.\footnote{74} It appears that the only reason to record the document is if that one spouse is concerned that the other spouse will tear up both copies of the document, and the spouse desires a safe place to store the agreement.

Subsection twelve states that the documents signed before the effective date of the new law are not affected by the new law, unless the spouses provide otherwise in a marital property agreement made after the determination date.

\textbf{B. Conflicts with Wisconsin Statute Section 767.255(11)}

The test of the marital agreement provision is whether the agreement was unconscionable when made,\footnote{75} while it appears that the property division statute looks to whether it is inequitable at the time of the divorce.\footnote{76} Furthermore, the property division statute provides that the court shall presume any such agreement to be equitable as to both parties.\footnote{77}

\footnote{72. This subsection goes beyond the language of either UMPA or UPAA to provide that a marital property agreement cannot prevent a court from imposing maintenance if a former spouse became eligible for public assistance even after the divorce was granted. Despite this provision, the divorce court still lacks the authority to condition the future payment of alimony upon the dependent spouse's receipt of public assistance. \textit{See} Whitwam v. Whitwam, 87 Wis. 2d 22, 27-28, 273 N.W.2d 366, 368 (1978). Perhaps subsection (9) should just be deleted from the Act.}

\footnote{73. \textit{See} 1983 Wis. Laws 186, § 47 (to be codified at Wis. STAT. § 766.56(2)(a)).}

\footnote{74. \textit{See} id. (to be codified at Wis. STAT. § 766.57(3)).}

\footnote{75. \textit{See} id. (to be codified at Wis. STAT. § 766.58(6)(a)).}

\footnote{76. \textit{See} Wis. STAT. § 767.255(11)(1983-84).}

\footnote{77. \textit{See} id.}
X. MOVING BETWEEN COMMUNITY PROPERTY AND COMMON-LAW STATES

With Wisconsin becoming a community property state in 1986, questions may arise regarding the property owned by parties who now live in Wisconsin but acquired by them when they lived in common-law states. Similarly, questions may arise when parties leave Wisconsin and move to common law states.

To address the first issue, it is immaterial for Wisconsin divorce purposes whether or not people own property in community property states or common-law states prior to their moving to Wisconsin. Wisconsin divorce law provides that the court shall divide the property of the parties, regardless of whether title is in the husband's name, the wife's name, or both. However, an attorney faced with a case of this type may wish to review other articles which examine the cases and laws of the various community property states to compare those situations to the one facing the attorney. On the other hand, when a person is considering leaving Wisconsin and moving to a common-law state (after Wisconsin's community statute has been in effect), the parties must realize before they leave that their interest in property which they owned in the community property state might be treated differently in common-law states.

XI. DIFFERENCES BETWEEN THE VARIOUS COMMUNITY PROPERTY LAWS

In this final section a review will be made of the manner in which each of the community property states treats property division upon divorce. The laws of the various states treat property upon divorce in different ways. "[D]ivorce law has always been considered as wholly statutory in the United

79. See, e.g., Note, Division Of Property Upon Divorce — Property Acquired During Marriage in a Common Law State Except by Gift, Devise or Descent Should be Treated as Community Property, 14 St. Mary's L.J. 789 (1983).
States." In the 1970s, all the community property jurisdictions made major changes in their laws in the areas of management and control of community property, its disposition upon the death of the spouse, the grounds for divorce, or the division and disposition of community and separate property upon divorce. As a general statement, it may be said that California, Louisiana, New Mexico, and Puerto Rico now specify an equal division between the spouses. On the other hand, Arizona, Idaho, Nevada, Texas, and Washington now specify an equitable distribution between the spouses. Furthermore, the statutes allow some discretion to the court in unusual circumstances and in dealing with alimony and spousal support. It appears that the court can transfer separate property of one spouse to the other in Nevada, New Mexico, and Washington, but not in the other jurisdictions. However, some states allow alimony or "spousal support to be made a charge against and a lien upon the separate property" of the other spouse.

When attorneys begin trying cases under Wisconsin's new community property law, they must understand that community property refers to a concept rather than a specific rule. Therefore, in citing cases or statutes from other jurisdictions, they will have to be aware of the variations between the community property laws of the other states.

XII. CONCLUSION

Although the Marital Property Act was not intended to disturb Wisconsin's community property based divorce law, the Act does present further challenges to family law attorneys. An additional element will be added to the property division statute. Community property tax laws will now be applied to the Act. Marital property agreements may be scrutinized in accordance with statutory requirements. And ethical problems will increase. Anticipated problems concerning the Act may be prevented through further legislation.

81. W. MCCLANAHAN, supra note 9, at 525.
82. See id. at 529.
83. See id. at 531-32.
84. See id. at 530. However, in Texas the court no longer has the power to divide or assign the separate property of one spouse to the other. See supra note 10.
Whether they are or are not, family law attorneys must study the Act, help resolve its ambiguities through litigation, and protect the interests of varied, individual clients.