

MARITAL PROPERTY BASICS

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I. The Rules

A. Marital property, including income, in Wisconsin is governed by Chapter 766.

- 1. Chapter 766 applies to married couples in Wisconsin upon their “determination date.” Sec 766.03(1). The determination date is the latest of the following:**
 - a. The date of the marriage,**
 - b. 12:01 a.m. on the date that both spouses are domiciled in this state,**
 - c. 12:01 a.m. on January 1, 1986.**

- 2.. There is a presumption that all property of a married couple is marital property. Sec 766.31(1),(2), Stats. Each party has an undivided one-half interest in each item of the marital property, subject to some exceptions. §766.31(3).**

- 3. Some property of spouses is not marital by virtue of the method of acquisition. §766.31(7) Such individual property includes:**
 - a. Property received by gift or inheritance from a third party,**
 - b. A distribution of principal or income from a trust created by a third party,**
 - c. Property exchanged for the individual property,**
 - d. Appreciation from individual property to the extent it is not mixed property; (this is generally passive appreciation and not interest or dividends that are marital even if from individual property.)**
 - e. By a decree, marital property agreement or reclassification agreement.**
 - f. The proceeds of recovery for damage to property under §766.70,**
 - g. Recovery for personal injury except for the loss of income during the marriage.**

- 4. Spouses can “opt out” of the marital property law, but to do so they need to have a valid signed Marital Property Agreement (“MPA”).**
 - a. Sec. 766.58 governs MPAs entered into between spouses after January 1, 1986. To be enforceable, the MPA must satisfy the following factors:**

- (i) Each spouse made a fair and reasonable financial disclosure to the other;
 - (ii) Each spouse entered into the agreement voluntarily; and
 - (iii) The substantive provisions dividing the property upon divorce are fair to each spouse.
- b. Sec. 766.58(6) specifically states that the MPA is not enforceable if the challenging spouse proves any of the following:
- (i) The marital property agreement was unconscionable when made.
 - (ii) That spouse did not execute the marital property agreement voluntarily.
 - (iii) Before execution of the marital property agreement, that spouse:
 1. Did not receive fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations; and
 2. Did not have notice of the other spouse's property or financial obligations.

Cases support the application of these requirements to determine if a MPA is valid and enforceable. Case law also requires that the Agreement be fair and reasonable at the time it is entered into and at the time it is enforced (typically at divorce or death). *Button v. Button*, 131 Wis. 2d 84, 99, 388 N.W.2d 546, 552 (1986). However, this does not mean that the division of assets or income must be equal. *Id.* at 98, 388 N.W.2d at 552.

- c. Sec. 766.585 governs MPAs entered into between spouses before the determination date.
- d. In addition, spouses can enter into certain other agreements or make certain statements about their income, but these will have limited scope or durability. See: §766.587 (statutory individual property classification agreement), §766.588 (statutory terminable marital property classification agreement), §766.589 (statutory terminable individual property classification agreement) and §766.59 (unilateral statement, income from nonmarital property.)
- e. Negotiation of or interpretation of MPAs is beyond the scope of this outline.

- B. Treatment of income. Except for limited circumstances, income earned or accrued by a spouse or attributable to the property of a spouse during the marriage and after the determination date is marital.

“Marital property consists of wealth created by a spouse’s efforts as well as income earned or accrued from a spouse’s property during a marriage and after the determination date. Each item of property is owned in present undivided one-half interests by the spouses.” K. Christiansen, F. Wm. Haberman, J Haydon, D. Minnamon, M. McGarity & M. Wilcox, Marital Property Law in Wisconsin, § 2-21 (3d ed. 2007) (hereafter “Marital Property Law in Wisconsin”), Sec. 766.31(3), Wis. Stats.

1. Income is broadly defined in § 766.01 (10), and was intended to include all forms of income and earnings. Marital Property Law in Wisconsin at 2-37.

2. The issue of what is meant by “earned or accrued during the marriage” can be illustrated by several examples:

- a. Portrait started by an artist before the marriage but completed and sold during the marriage. Discussed in Marital Property Law in Wisconsin at 2-37.

This could be considered 100% marital or apportioned based on the work performed during the marriage.

- b. Attorney contingency fees citing Waters v. Waters, 75 Cal. App. 2d 265, 170 P.2d 494 (1946); Due v. Due, 342 So. 2d 161 (La. 1977).

The court apportioned the fees based on the fees earned by the date of the divorce but not yet paid.

- c. Insurance agent’s right to receive renewal commissions after his termination from service. In re Marriage of Skaden, 19 Cal. 3d 679, 566 P. 2d 249, 139 Cal. Rptr 615 (1977).

The court equated this scenario to unmatured pension benefits and assigned a marital value to the renewal commissions and divided accordingly.

- d. Stock options granted during the marriage that do not mature until after the divorce can be treated as a deferred-employment-benefit plan and apportioned, but this is not clearly resolved in Wisconsin. *See Chen v. Chen*, 142 Wis. 2d 7, 12, 416 N.W.2d 661 (Ct. App. 1987)(“Although certain stock options are not exercisable until after the time of the divorce, they are nonetheless an economic resource acquired during the marriage. Because the stock options are part of the marital estate, Lusiang and Steve have a presumptively equal

interest in them. There is no compelling evidence that required setting the presumption aside in this case.” *Id.* at 18.)

- C. The presumption that all property is marital can be rebutted by adequate documentary evidence to the contrary. Marital Property Law in Wisconsin, § 3.3.
1. Such evidence could include segregated assets or adequate records. To rebut this presumption, a challenging party must prove that the time, method or source of an asset’s acquisition establishes it as nonmarital property. *Lloyd v. Lloyd*, 170 Wis.2d 240, 254, 487 N.W.2d 647, 653 (Ct. App. 1992). In other words, the challenging party would succeed in rebutting the presumption favoring marital property by proving that (1) the asset was acquired before the determination date, (2) that the asset was a gift or was inherited, or (3) that the asset was purchased with nonmarital funds. *Id.*
 2. The marital component in Wisconsin is an ownership interest, not a right to reimbursement. The party who challenges that the property is marital has the burden of proof. *Lloyd v. Lloyd*, 170 Wis. 2d 240, 254, 487 N.W.2d 647, 652 (Ct. App. 1992).

II. Classification and Title.

- A. Classification is how the asset or income is owned by the couple during the marriage.
1. In Wisconsin, the property and income of married couples who have not opted out, will be classified as marital, regardless of the title ownership.
 2. If the couple opts out completely from marital property using a MPA their property and income will be classified as the individual property of the title owner.
 3. Property can also be “mixed” in that it includes marital and nonmarital portions. However, there are rules that apply to mixing that can convert individual property to marital property.
 4. Property that is pre-determination date property of married couples, where there is no MPA, that would have been classified as marital if Ch. 766 applied, is called deferred marital property. §851.055. It is generally treated as if it were marital property and only comes into play after the death of one spouse while the couple is still married. *See Wisconsin Statutes Chapter 861.*
 5. Spouses can hold property in the “and” or “or” form and it will be considered marital property. §766.60(1) and (2). They can also hold assets as “survivorship marital property” which has the same effect as joint tenancy.
 6. There are special rules about how to classify life insurance, §766.61, and deferred retirement benefits, §766.62.

- B. Classification of assets at death is important because it determines how much of the assets the spouse is entitled to dispose of freely. *Lloyd v. Lloyd*, 170 Wis. 2d at 252, 487 N.W.2d at 651. “At death, a spouse may freely dispose of only the one-half interest he or she has in each item of marital property.” *Id.*, *In re the Estate of Bille*, 198 Wis. 2d. 867, 874, 543 N.W.2d 568, 570 (Ct. App. 1995) A spouse is free to dispose of all of any nonmarital asset. *Lloyd*, 170 Wis. 2d at 252, 487 N.W.2d at 651, *citing to Marital Property Law in Wisconsin*, at § 2.161a .
1. “Classification of nonmarital property as marital property through mixing is governed by [sec] 766.63(1), Stats, “ which provides “[e]xcept as provided otherwise in ss. 766.61 and 766.62, mixing marital property with property other than marital property reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced.” *Estate of Bille*, 198 Wis 2d at 876, 543 N.W.2d at 571.
 2. The party who wishes to establish the mixing of marital with nonmarital property has the burden of proof, while the burden of establishing tracing is on the party seeking to avoid reclassification of the asset as marital. *Id.*
 3. Income is marital. §766.31(4), *Lloyd*, 170 Wis. 2d at 254, 487 N.W.2d at 652. Mixing income with any other property reclassifies that property as marital unless the nonmarital component can be traced. *Id.*
- C. Title in Wisconsin. Title does not control ownership and proof of title to an asset does not rebut the presumption that the asset is marital. *Id.* 170 Wis. 2d at 255, 487 N.W.2d at 652. Title functions primarily to establish management and control over the asset. *Id.* “Consistent with this principle, the right to manage and control property neither determines classification nor rebuts the presumption favorable to marital property.” *Id.*
1. Management and control of property is governed by §766.51, which provides that the person whose name is on the title may manage and control the asset or income for the benefit of the community.
 2. If a party in Wisconsin wishes to prove that property is separate property, it must trace the property back to individual property. *Estate of Bille*, 198 Wis 2d at 876, 543 N.W.2d at 571.
 3. While other community property states may apply other forms of tracing, Wisconsin courts have applied direct tracing. *Ludwig v. Geise (In re Geise)*, 132 B.R. 908 (E.D. 1991) In *Geise*, authored by Judge Dee McGarity, one of the authors of the Marital Property Law in Wisconsin, the court used direct tracing to determine which assets in an IRA and an investment account were marital property and which assets were individual property. The treatise on Marital Property Law in Wisconsin at §3.18 states that:

“Direct tracing is the most accurate method of tracing in community property states. ... To maintain individual property through direct tracing it is necessary to have records of each transaction from the time an individual asset is acquired until the time the marriage terminates or a creditor raises the issue.”

4. In Wisconsin, unless unilateral statement is executed under §766.59, the spouse must not only record each deposit and each expenditure, but must also maintain a record of income earned on individual property and predetermination date property and deal with marital property in the same manner as earned income. Wis. Stat. §766.31(4). See also.: *Fowler v. Fowler*, 158 Wis. 2d 508, 462 N.W.2d 370 (Ct. App. 1990)(court held that funds wife had received by gift but placed into a savings account in the husband’s name which also contained funds from other sources were not traceable and lost their identity through commingling.
5. In Wisconsin, “[w]hen predetermination date assets are sold, the proceeds are reinvested, and the source of the reinvestment can be traced, the reinvestment retains the source’s predetermination date classification and ownership rights.” Keith A. Christiansen et al., *Marital Property Law in Wisconsin* § 2.154 (3d ed. 2007) (hereinafter *Marital Property Law in Wisconsin*). However, when an asset cannot be traced back to predetermination date property, the asset is reclassified as marital property. Wis. Stat. §766.63(1); *Marital Property Law in Wisconsin* §2.154
6. As stated in *Marital Property Law in Wisconsin*, when property that would have been marital property (deferred marital property) is mixed with property that would have been individual property, the mixed asset is reclassified as deferred marital property *unless* the component that would have been individual property can be traced. *Marital Property Law in Wisconsin* §3.4 (emphasis added). Further, when any predetermination property is mixed with marital property, the mixed asset becomes marital property *unless* the component that would have been predetermination property can be traced. *Marital Property Law in Wisconsin* §3.5 (emphasis added). As Wisconsin law dictates, “mixing marital property with property *other than marital property* reclassifies the *other property* to marital unless the component of the mixed property which is not marital can be traced.” Wis. Stat. §766.63(1) (emphasis added).

III. Obligations between spouses: creditors rights reign supreme

- A. The general rule is that an obligation or debt incurred during the marriage, including one attributable to an act or omission during the marriage is presumed to be in the interest of the marriage or family. §766.55(1). If the debt is in the interest of the marriage or family it can be satisfied from marital property. There are very specific rules about debts that include:

1. A spouse's obligation to satisfy a duty of support to the other spouse or a child incurred after the determination date can be satisfied from all marital property and from that spouse's other property. §766.55(2)(a).
 2. An obligation by a spouse in the interest of the marriage or family incurred after the determination date can be satisfied from all marital property and from all other property of the incurring spouse. §766.55(2)(b).
 3. An obligation incurred by a spouse before or during the marriage that is attributable to an obligation arising before the marriage or to an act or omission before the marriage may be satisfied only from property of that spouse that is not marital property or from that part of marital property that would have belonged to that spouse but for the marriage. §766.55(2)(c).
 4. Special rules apply to debts where the obligation arose before January 1, 1986. §766.55(2)(c)2.
 5. If the parties divorce, unless the divorce judgment (or any amendments thereto) states otherwise, no income of a non-incurring spouse can be used to satisfy an obligation under §766.55(2)(b) after entry of the divorce decree. §766.55(2m) Marital property of each spouse can be used to satisfy obligations to the extent of the value of that property of the date of the decree. If the divorce decree obligates the non-incurring spouse, however, then the obligation may be satisfied as if both spouses had incurred the obligation. *Id.*
 6. A MPA cannot be used to alter the rights of creditors unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred, or in the case of an open ended plan (i.e. credit card) when the plan was entered into. §766.55(4m)
- B. Creditors rights for credit cards and other "open-end" plans under marital property law are governed by Wis. Stat. §766.555.
1. When the determination date is 12:01 a.m. on January 1, 1986:
 - a. If the debt was incurred after the determination date but the plan was entered into before the determination date, then the creditor can pursue all nonmarital assets of the incurring spouse and any assets that would have been the incurring spouse's individual property but for the application of Ch. 766. §766.555(2)(b).
 - b. If the debt is incurred in the interest of the family and the creditor gives notice to the non-incurring spouse before the debt is incurred, then the creditor can pursue all marital property and individual property of the incurring spouse. §766.555(2)(c).

2. When the determination date is after 12:01 a.m. on January 1, 1986:
 - a. If the debt is incurred after the determination date but the plan was entered into before the determination date, the creditor can pursue all all nonmarital assets of the incurring spouse and any assets that would have been the incurring spouse's individual property but for the application of Ch. 766. §766.555(3)(b).
 - b. If the debt is incurred after the determination date but the plan was entered into before the determination date and is incurred in the interest of the family, then the creditor can pursue all marital property and all individual property of the incurring spouse. §766.555(3)(c).

C. Credit transactions with married persons.

1. When a spouse applies for credit, in evaluating the spouse's creditworthiness the creditor shall consider all marital property available to satisfy obligations in the same way that the creditor would evaluate the creditworthiness of a nonmarried applicant by review of his or her property. §766.56(1). This means that the creditor must consider income and assets (and debts) of the other spouse in deciding whether to give credit to a less propertied or lower income spouse.
2. Creditors must give notice in all applications for an extension of credit of the fact that an MPA or similar instrument or decree does not adversely affect the creditor unless the creditor had advance notice of the terms of the MPA before extending credit. §766.56(2). Most MPA's require that the parties give prior notice of the terms of the MPA to creditors, but many do not give notice before receiving credit.
3. If prior notice of the terms of an MPA or similar instrument or decree are given to the creditor before the extension of credit, then the creditor is bound the property classification, characterization of the obligation or management and control rights contained in the document. §766.56(2)(c).
4. Creditors are to give the nonapplicant spouse written notice of extensions of credit before any payment is due. §766.56(3)(b).

NOTE: the provisions stated above may not apply to renewals, extensions or modifications of an already existing debt.

IV. Remedies

- A. Spouses have certain remedies under Chapter 766. These include, upon request:

1. The right to make a claim against the other spouse for breach of the duty of good faith under §766.15 that resulted in damage to the claimant's property. §766.70(1)
 2. The right to request an accounting of the spouse's property and obligations and that a court determine the parties' rights of ownership in, beneficial enjoyment of or access to marital property and the classification of all property. §766.70(2)
 3. The right under §766.70(3) to have the spouse's name added to marital property or to a document evidencing the spouse's ownership of marital property held by the other spouse with certain exceptions such as:
 - a. Certain partnership or joint ventures,
 - b. An interest in an LLC held by the other spouse as a member,
 - c. An interest in a professional corporation, association or similar entity,
 - d. Or an asset of an unincorporated business if the other spouse is the only one of the spouses involved in the operation or management of the business.
 - e. A corporation the stock of which is not publically traded.
 4. If marital property has been or is likely to be substantially injured by the other spouse's gross mismanagement, waste or absence, the other spouse can seek relief that could include a change to the management and control rights, a change in classification, a division of the spouse's obligations as to the property, that the noninvolved spouse is no longer liable and her or his property is not available to satisfy obligations related to the matter after the date of the decree, among other remedies. §766.70(4)
 5. If marital property is used to satisfy the individual obligations of a spouse, the other spouse can ask a court to allocate marital property, reclassified as individual property to the spouse who did not owe the obligation, subject to the rights of other third parties and equitable considerations. There is a one year statute of limitations for this provision. §766.70(5)
 6. Marital property limits the size of gifts that a spouse can make without the consent of the other spouse under §766.53. If such gifts are made, a spouse can ask a court to recover the property or for a compensatory judgment equal to the amount that the gift exceeded the limits. §766.70(6). There are short time limits on the right to bring such an action.
 7. Spouses have certain rights to purchase a life insurance policy or deferred employment benefit plan from the estate of the other spouse at fair market value, within short time deadlines. §766.70(7)
- A. In reality, few of these remedies are used (or at least few reported cases exist.) If there are such problems between spouses, they often lead to divorce or legal separation. It is important to know that once a divorce is filed the right to sue

separately for an action under Chapter 766 is lost and any such claims must be brought as part of the divorce action.

1. Several cases have interpreted the interaction of section 767.331 and section 766.70. Section 767.331 provides that once a divorce action is filed, a spouse cannot bring a 766.70 action against the other spouse. Wis. Stat. § 767.331
2. *Gardner v. Gardner*, the wife filed a separate action for intentional misrepresentation of certain marital property against her husband while the divorce was pending. 175 Wis. 2d 420, 424, 499 N.W.2d 266, 267 (Ct. App. 1993). The court held that section 766.70(1) encompasses the common law action for intentional misrepresentation and, therefore, according to section 767.331, she was barred from filing the separate claim during the pendency of the divorce. *Id.* at 431, 270. Instead, matters involving marital property are addressed when determining property division during the divorce action. *Id.*
3. *Caulfield v. Caulfield* held that the wife could maintain a contract claim against her husband separate from the divorce action. 183 Wis. 2d 83, 90, 515 N.W.2d 278, 281 (Ct. App. 1994). Requiring the wife to join her contract claim with the divorce action would deprive her of her right to a jury trial, which is against public policy and not required by law. *Id.*
4. *Knafelc v. Dain Bosworth, Inc.*, the wife filed a complaint against her husband and his employer for securities fraud violations. 224 Wis. 2d 346, 348, 591 N.W.2d 611, 612 (Ct. App. 1999). The wife alleged that her husband acted in direct contradiction to her instructions on how to handle her investments and made trades without her knowledge and consent. *Id.* at 353, 614. In its analysis of the case law, the court in *Knafelc* focused on the distinction between *Gardner* and *Caulfield*. In *Caulfield*, the claim did not involve an allegation of a breach of good faith between spouses, but rather, involved legal claims based on domestic abuse and a contract claim. *Id.* 351, 613-14. In sum, section 766.70(1) creates a cause of action for breach of good faith between spouses concerning marital property and section 767.331 requires that once a divorce action is filed, a claim based on this cause of action must be resolved along with the divorce action. *Id.* at 352, 614. However, claims not related to a breach of good faith between spouses concerning marital property can be separate from the divorce action. *Id.*

V. Other Issues

A. Property subject to division at divorce.

1. Wisconsin law provides under §767.255, the court “shall divide the property of the parties.” Except for certain property acquired by gift or inheritance as described in §767.255(2), the statute goes on in (3) to state “[t]he court shall

presume that all property not described in sub.(2)(a) [gifted or inherited] is to be divided equally between the parties,” but may alter such a division if the factors under (3) warrant such a deviation.

2. Generally, the marital property laws do not apply in divorce. While both chapters 766 and 767 deal with property rights between spouse, chapter 766 takes them up to the filing of the divorce (and division for determination of values), and chapter 767 governs how the assets will be divided. See Haack v. Haack, 149 Wis. 2d 243, 440 N.W.2d 794 (Ct. App. 1989); Gardner v. Gardner, 175 Wis. 2d 420, 499 N.W.2d 266 (Ct. App. 1993)(Tort action for breach of duty of good faith under § 766.70(1) is barred once a divorce action is filed. All issues of what property is in the estate and what and how it is to be divided to be handled under chapter 767.)

B. Spousal elections. A spouse cannot be disinherited under marital property without his or her consent.

1. If a spouse is disinherited, he or she can file a petition to make an election pursuant to Wis. Stat. §861.02 and §861.08. In determining this election, the court is to take the “total value of the deferred marital property of the spouses, irrespective of where the property was acquired, where the property was located at the time of the relevant transfer or where the property is currently located, including real property located in another jurisdiction.” Certain deductions are made by the Court under §861.05. The court is to value the assets as of the date of death. §861.05.
2. The augmented deferred marital property share would include all probate and nonprobate transfers of the decedent’s deferred marital property, decedent’s gifts of marital property within two years of death and deferred marital property of the surviving spouse. §861.02 (2)(b).
3. The court makes certain deductions from the total assets of the couple under §861.05(3) including “an equitable portion of funeral and burial expenses, administrative expenses, other charges and fees and enforceable claims.”