

1991 Assembly Bill 983

Date of enactment: **April 30, 1992**Date of publication*: **May 13, 1992**

1991 WISCONSIN ACT 301

AN ACT *to repeal* 766.70 (6) (b) 3; *to renumber and amend* 861.05 (3) and 867.046 (1); *to amend* 71.03 (2) (i) 3, 71.78 (1), 71.78 (4) (k), 71.78 (5), 71.80 (3m) (d), 700.18, 700.19 (2), 766.01 (7), 766.31 (1), 766.31 (10), 766.58 (3) (f), 766.589 (1) (c) 1, 766.59 (title), 766.60 (4) (b) 1. (intro.), 766.605, 766.61 (1) (b), 766.61 (2m) (a) and (3) (c) 2, 766.61 (3) (e), 766.61 (7), 766.61 (8), 766.62 (1) (b) and (2), 766.63 (1), 766.70 (6) (b) 2, 859.02 (2) (a), 859.18 (6), 861.02 (1), 861.07 (3) (a), 861.09 (2), 861.31 (4), 861.33 (1) (a) 1, 861.35 (3), 867.046 (2) (intro.), 867.046 (2) (a) and (2m) and 867.046 (3); and *to create* 71.78 (4m), 701.27 (2) (bm), 766.03 (6), 766.58 (7), 766.588 (1) (d), 766.59 (6), 767.266, 806.15 (5), 815.205, 861.02 (1m), 861.05 (3) (b) and 867.046 (1) of the statutes, **relating to:** the confidentiality of tax returns of spouses and former spouses, determination of joint tenancy, removing certain judgment liens that have attached to property that is exempt from execution, allowances to a surviving spouse, summary procedures for confirming interests in property and various changes to the marital property law.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

PREFATORY NOTE: This bill was developed by the legislative council special committee on marital property implementation. Provisions of the bill are explained in the NOTES inserted throughout the bill.

SECTION 1. 71.03 (2) (i) 3. of the statutes is amended to read:

71.03 (2) (i) 3. There has been mailed to either spouse, with respect to that taxable year, a notice of adjustment under ss. 71.74 to 71.77 and the spouse, as to that notice, files a petition for redetermination under subch. XIV, except that, if both spouses request and the department consents, the election under par. (g) may be made.

NOTE: Allows spouses who have filed separate income tax returns to file, with the consent of the department of revenue (DOR), a joint return after a notice of adjustment in income tax liability has been sent by DOR to either spouse. The amendment gives express statutory authority for a practice of DOR which is currently supported by implied authority. Often, spouses who have filed a separate return are separated and in the process of a divorce. Filing separate returns may result in inaccurate reporting of income and a dispute with DOR. In addition, the filing of separate returns may be financially disadvantageous to the taxpaying spouses. By

allowing the later filing of a joint return, their tax liability may be reduced and a settlement with DOR may be facilitated.

SECTION 2. 71.78 (1) of the statutes is amended to read:

71.78 (1) DIVULGING INFORMATION. Except as provided in subs. (4), (4m) and (10), no person may divulge or circulate or offer to obtain, divulge or circulate any information derived from an income, franchise, withholding, fiduciary, partnership or gift tax return or tax credit claim, including information which may be furnished by the department of revenue as provided in this section. This subsection does not prohibit publication by any newspaper of information lawfully derived from such returns or claims for purposes of argument or prohibit any public speaker from referring to such information in any address. This subsection does not prohibit the department of revenue from publishing statistics classified so as not to disclose the identity of particular returns, or claims or reports and the items thereof. This subsection does not prohibit employes or agents of the department of revenue from offering or submitting any return, including joint returns of a spouse or former spouse, separate returns of a spouse, individual returns of a spouse or former spouse and combined individual income tax

returns, or from offering or submitting any claim, schedule, exhibit, writing or audit report or a copy of, and any information derived from, any of those documents as evidence into the record of any contested matter involving the department in proceedings or litigation on state tax matters if, in the department's judgment, that evidence has reasonable probative value.

NOTE: Clarifies that the phrase "any return" includes separate returns and individual returns.

Clarifies that DOR makes the determination whether tax-related information has reasonable probative value in a contested matter involving DOR and, therefore, may be offered or submitted by DOR into evidence. If the tax appeals commission or a court makes the initial determination on whether such evidence has reasonable probative value, the determination will be made only after the evidence has been disclosed and confidentiality, therefore, has been lost.

SECTION 3. 71.78 (4) (k) of the statutes is amended to read:

71.78 (4) (k) The spouse or former spouse of the person who filed the return or claim if the spouse or former spouse may be liable, or the property of the spouse or former spouse is subject to collection, for the delinquency, or the department has issued an assessment or denial of a claim to the spouse or former spouse regarding the return or claim.

NOTE: Permits the spouse or former spouse of a person who filed a tax return or claim to examine the return or claim if DOR has issued an assessment or denial of a claim to the spouse or former spouse regarding the return or claim. The provision facilitates settlement of disputes that have arisen over disparate reporting of marital property income, while also preserving confidentiality of the information. Disclosure will occur only when DOR has not been able to convince the 2 spouses, or former spouses, to agree. At this point, DOR usually issues assessments in the alternative [s. 71.74 (9)] against both persons. Currently, DOR may not disclose the returns in question until the hearing on the dispute (in the absence of consent of the parties) even though the assessments are based on the returns. Allowing disclosure after assessment or denial of a claim, in addition to facilitating settlement, will often result in less cost to all parties. Further, permitting disclosure only after an assessment eliminates concerns that a former spouse might engage in a "fishing expedition" in connection with the returns of a former spouse. See, also, the treatment of s. 71.78 (5).

SECTION 4. 71.78 (4m) of the statutes is created to read:

71.78 (4m) DISCLOSURE OF CERTAIN DATES TO SPOUSES AND FORMER SPOUSES. The department may disclose to the spouse or former spouse of the person who filed a return or claim specified under sub. (1) whether an extension for filing the return or claim was obtained, the extended due date for filing the return or claim and the date on which the return or claim was filed with the department.

NOTE: Allows DOR to disclose to the spouse or former spouse of a person who has filed a tax return or claim whether an extension for filing the return or claim was obtained, the extended due date for filing the return or claim and the date on which the return or claim was filed. The disclosure allowed does not divulge any personal income, deductions or other tax

information about the filer or claimant. However, the information may be of assistance to the spouse or former spouse in connection with a number of liability or notification issues relating to when a return or claim was filed. For example, a spouse or former spouse is not liable, under the innocent-spouse provision of s. 71.10 (6) (b), for unreported marital property income generated by the taxpayer which a taxpayer did not report on his or her separate return, if the taxpayer failed to notify the spouse or former spouse about the amount and nature of the income before the due date of the taxpayer's return, including extensions, for the taxable year in which the income was derived.

SECTION 5. 71.78 (5) of the statutes is amended to read:

71.78 (5) AGREEMENT WITH DEPARTMENT. Copies of returns and claims specified in sub. (1) and related schedules, exhibits, writings or audit reports shall not be furnished to the persons listed under sub. (4), except persons under sub. (4) (e) and (k) or under an agreement between the department of revenue and another agency of government.

NOTE: Allows DOR, in the limited circumstances described under amended s. 71.78 (4) (k), to furnish a copy of a tax return or claim to the spouse or former spouse of a person who filed the return or claim. Section 71.78 (4) merely allows examination of returns or claims; in order for the access to a return or claim to be useful to a spouse or former spouse, it may be necessary that a copy of the return or claim be available.

SECTION 6. 71.80 (3m) (d) of the statutes, as affected by 1991 Wisconsin Act 39, is amended to read:

71.80 (3m) (d) If a spouse does not receive notice under par. (c) and if the department of revenue incorrectly credits the state tax overpayment, refund or a refundable credit of a spouse or spouses against a liability under par. (a) or (b) or both, a claim for refund of the incorrectly credited amount may be filed under s. 71.75 (5) within 2 years after the date of the offset that was the subject of the notice under par. (c).

NOTE: Links the time period within which a refund claim for an incorrectly credited tax overpayment may be made to when the overpayment is credited, rather than to when the notice of the offset is received. Because this paragraph assumes that a spouse has not received notice of the offset, the current reference to "2 years after the notice" is incongruent.

SECTION 7. 700.18 of the statutes is amended to read:
700.18 Determination of cotenancy generally.

Two or more persons named as owners in a document of title, transferees in an instrument of transfer or buyers in a bill of sale are tenants in common, except as otherwise provided in s. 700.19 or ch. 766.

NOTE: Reflects that ch. 766 may provide for a different result when spouses are named as owners. See, for example, ss. 766.60 and 766.605.

SECTION 8. 700.19 (2) of the statutes is amended to read:

700.19 (2) HUSBAND AND WIFE. If persons named as owners in a document of title, transferees in an instrument of transfer or buyers in a bill of sale are described in the document, instrument or bill of sale as husband and wife, or are in fact husband and wife, they are joint ten-

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ants, unless the intent to create a tenancy in common is expressed in the document, instrument or bill of sale. This subsection applies to property acquired before January 1, 1986, and, if ch. 766 does not apply when the property is acquired, to property acquired on or after January 1, 1986.

NOTE: Extends the rule under the subsection to property acquired between husband and wife on or after January 1, 1986 (effective date of the marital property law), when ch. 766 (marital property law) does not apply because one or both of the spouses is not domiciled in Wisconsin at the time of acquisition.

SECTION 9. 701.27 (2) (bm) of the statutes is created to read:

701.27 (2) (bm) *Survivorship marital property.* Upon the death of a spouse, the surviving spouse may disclaim the decedent spouse's interest in survivorship marital property.

NOTE: Clarifies that a surviving spouse may disclaim the decedent spouse's interest in survivorship marital property, under s. 701.27, relating to disclaimer of transfers under non-testamentary instruments. Such a disclaimer is not necessarily effective for federal gift tax purposes.

SECTION 10. 766.01 (7) of the statutes is amended to read:

766.01 (7) "Dissolution" means termination of a marriage by a decree of dissolution, divorce, annulment or declaration of invalidity or entry of a decree of legal separation or separate maintenance. The term does not include a decree resulting from an action available under ch. 767 which is not an annulment, a divorce or a legal separation.

NOTE: Clarifies that reference in the definition to decrees of "dissolution", "declaration of invalidity" or "separate maintenance" are not intended to apply to any actions available in Wisconsin short of an annulment, a divorce or a legal separation. The terms are included in the definition to cover actions to terminate a marriage which may be available in other states. See comment no. 7 to section 1, uniform marital property act, which cites the utility of retaining references in the definition to actions which are not available in the adopting state "in order to deal with possible multi-state problems that could involve a state ... using ... [the other procedures]".

Questions have been raised about the possible application of the term "separate maintenance" to temporary orders under s. 767.23 and to judgments for maintenance under s. 767.58. It is clear that, in the context of ch. 766, "separate maintenance" does not apply to any currently available action or proceeding in this state.

Questions also have been raised regarding the possible application of "dissolution" to 1989 Wisconsin Act 132, relating to grounds for legal separation of spouses. Act 132 merely provides new grounds for legal separation; a decree based on the new grounds is a legal separation, with the same attributes of that judgment as a judgment based under the previous, but still available, grounds.

SECTION 11. 766.03 (6) of the statutes is created to read:

766.03 (6) This chapter does not affect the property available to satisfy an obligation incurred by a spouse that is attributable to an obligation arising when one or

both spouses are not domiciled in this state or to an act or omission occurring when one or both spouses are not domiciled in this state.

NOTE: Provides that ch. 766, relating to marital property, does not affect property available to satisfy an obligation incurred by a spouse that is attributable to an obligation arising, or to an act or omission occurring, when ch. 766 does not apply because one or both spouses are not domiciled in the state. This is consistent with other provisions of s. 766.55 which prevent creditors from utilizing obligation-satisfaction provisions of that section to obtain a windfall and which prevent obligated spouses from utilizing the same to the detriment of creditors.

The substance of this provision is implicit under ch. 766. It is made explicit because its absence, in light of the detailed provisions under s. 766.55 on what property is available to satisfy obligations, has raised questions.

SECTION 12. 766.31 (1) of the statutes is amended to read:

766.31 (1) All property of spouses is marital property except that which is classified otherwise by this chapter and that which is described in sub. (8).

NOTE: Clarifies the scope of the exception. There is some confusion as to whether the property described in s. 766.31 (8) is "classified" by ch. 766. Subsection (8) provides:

"Except as provided otherwise in this chapter, the enactment of this chapter does not alter the classification and ownership rights of property acquired before the determination date or the classification and ownership rights of property acquired after the determination date in exchange for or with the proceeds of property acquired before the determination date."

While it is reasonably clear that, read in context, property which is "classified otherwise by this chapter" includes the property described in sub. (8) [see, also, section 4, uniform marital property act, and the comments to subsection (h) of section 4], the clarification should cure any existing confusion.

SECTION 13. 766.31 (10) of the statutes is amended to read:

766.31 (10) Spouses may reclassify their property by gift, conveyance, as defined in s. 706.01 (4), signed by both spouses, marital property agreement, written consent under s. 766.61 (3) (e) or unilateral statement under s. 766.59 and, if the property is a security, as defined in s. 705.21 (11), by an instrument, signed by both spouses, which conveys an interest in the security. If a spouse gives property to the other spouse and intends at the time the gift is made that the property be the individual property of the donee spouse, the income from the property is the individual property of the donee spouse unless a contrary intent of the donor spouse regarding the classification of income is established.

NOTE: Provides that a security may be reclassified by conveyance.

SECTION 14. 766.58 (3) (f) of the statutes is amended to read:

766.58 (3) (f) Providing that upon the death of either spouse any of either or both spouses' property, including after-acquired property, passes without probate to a designated person, trust or other entity by nontestamentary

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disposition. Any such provision in a marital property agreement is revoked upon dissolution of the marriage as provided in s. 767.266. If a marital property agreement provides for the nontestamentary disposition of property, without probate, at the death of the 2nd spouse, at any time after the death of the first spouse the surviving spouse may amend the marital property agreement with regard to property to be disposed of at his or her death unless the marital property agreement expressly provides otherwise and except to the extent property is held in a trust expressly established under the marital property agreement.

NOTE: See the treatment of s. 767.266 by SECTION 31 and the NOTE thereto.

SECTION 15. 766.58 (7) of the statutes is created to read:

766.58 (7) (a) Unless the marital property agreement expressly provides otherwise, a marital property agreement that classifies a deferred employment benefit as marital property does not affect the operation of s. 766.62 (5).

(b) Unless the marital property agreement expressly provides otherwise, marital property agreement that classifies as marital property the noninsured spouse's interest in a policy that designates the other spouse as the owner and insured does not affect the operation of s. 766.61 (7). In this paragraph, "owner" has the meaning given in s. 766.61 (1) (a) and "policy" has the meaning given in s. 766.61 (1) (c).

NOTE: 1. Retains, unless the marital property agreement expressly provides otherwise, the terminable interest rule for a deferred employment benefit when a marital property agreement classifies the benefit as marital property.

The provision is not intended to encourage or discourage parties to marital property agreements to classify deferred employment benefits as marital property (which may result, for example, in unintended tax consequences) but to provide a rule when the agreement is silent on the issue. Compare s. 766.588 (1) (b) 1.

See, also, sub. (2) of SECTION 49.

2. Retains, unless the marital property agreement expressly provides otherwise, the valuation rule of s. 766.61 (7) (identified by some commentators as the "frozen interest" rule) when a marital property agreement classifies as marital property the noninsured spouse's interest in a life insurance policy which designates the other spouse as the owner and insured.

The provision is not intended to encourage or discourage parties to marital property agreements to classify as marital property the surviving spouse's interest in a life insurance policy that designates the other spouse as the owner and insured. Rather, the provision simply states the rule when the agreement is silent on the issue. Compare s. 766.588 (1) (b) 2.

See, also, sub. (3) of SECTION 49.

SECTION 16. 766.588 (1) (d) of the statutes is created to read:

766.588 (1) (d) 1. In this paragraph:

a. "Joint account" has the meaning given in s. 705.01 (4).

b. "Marital account" has the meaning given in s. 705.01 (4m).

2. An agreement under this section does not defeat the survivorship feature of a joint account under s. 705.04 (1).

3. An agreement under this section does not affect the ownership, under s. 705.04 (2m), of sums remaining on deposit in a marital account at the death of a party to the account, regardless of when the agreement became effective or the marital account was established.

NOTE: Clarifies that a statutory terminable marital property classification agreement (STMPCA) does not affect the ch. 705 treatment of joint accounts and marital accounts. In particular, questions have been raised about the possible effect of a STMPCA on the treatment under s. 705.04 (1) and (2m) of a joint account and marital account, respectively, when one of the spouses who is party to the account dies. As the clarifying language indicates, a STMPCA does not affect the at-death provisions of s. 705.04 (1) and (2m). Thus: 1) in the case of a joint account, sums remaining on deposit at the death of a spouse who is party to the account belong to the surviving party (or parties) to the account as against the estate of the decedent spouse; and 2) in the case of a marital account, after deducting all payments and certifications made under s. 404.405, 50% of the sums remaining on deposit at the death of a spouse belongs to and may, upon the maturity of the account, be withdrawn by the surviving spouse and 50% belongs to and may, upon the maturity of the account, be withdrawn by the decedent's estate [thereby avoiding the possible result of 75% to the surviving spouse, and 25% to the decedent's estate if the STMPCA affected the ch. 705 treatment of marital accounts]. Of course, the clarifying language does not affect any remedy that a spouse may have regarding an account between the other spouse and a 3rd party, including any remedy available under s. 766.70.

The clarifications are consistent with the treatment of joint tenancies and tenancies in common by STMPCA's [s. 766.588 (1) (c)] and with ch. 705, whose operation is independent of the ch. 766 classification of property in an account governed by ch. 705.

SECTION 17. 766.589 (1) (c) 1. of the statutes is amended to read:

766.589 (1) (c) 1. If at the time an agreement under this section is executed property is held as survivorship marital property, the property is classified as the individual property of the owners and is owned as a joint tenancy, ~~or if the~~. If at the time an agreement under this section is executed property is held in a form as provided under s. 766.60 (1) or (2), the property is classified as the individual property of the owners and is owned as a tenancy in common. If while an agreement is in effect spouses acquire property as a joint tenancy exclusively between themselves or as survivorship marital property, the property is classified as the individual property of the owners and is owned as a joint tenancy. If while an agreement is in effect spouses acquire property as tenants in common exclusively between themselves, the spouses' respective ownership interests in the property are classified as the individual property of the owners. If while an

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agreement is in effect spouses acquire property held in a form as provided under s. 766.60 (1) or (2), the property is classified as the individual property of the owners and is owned as a tenancy in common. An agreement under this section does not affect the incidents under ch. 705 of a joint account, as defined in s. 705.01 (4).

NOTE: 1. Clarifies that a statutory terminable individual classification agreement does not affect the ch. 705 treatment of a joint account, including the incident of survivorship.

2. Makes remedial changes for improved clarity and consistency.

SECTION 18. 766.59 (title) of the statutes is amended to read:

766.59 (title) unilateral statement; income from nonmarital property.

NOTE: Amends the title by removing reference to "individual property" and substituting "nonmarital property" in order to make the title consistent with the substance of the section.

SECTION 19. 766.59 (6) of the statutes is created to read:

766.59 (6) A person intending to marry may execute a statement under this section as if married. A statement executed by a person intending to marry is effective upon the marriage or at a later time if so provided in the statement. Within 5 days after the statement is executed, the person executing the statement shall notify the person whom he or she intends to marry or has married of the statement's contents by personally delivering a copy of the statement to that person or by sending a copy by certified mail to that person's address. Failure to give notice is a breach of the duty of good faith imposed by s. 766.15.

NOTE: Allows a person who is intending to marry to execute a unilateral statement under s. 766.59, classifying the income attributable to property other than marital property as individual property. Permitting prospective spouses to execute such statements will facilitate prenuptial planning. Within 5 days after the statement is executed, the person executing the statement must provide a copy of the statement to the person whom he or she intends to marry or has married. Failure to provide the copy is a breach of the duty of good faith.

SECTION 20. 766.60 (4) (b) 1. (intro.) of the statutes is amended to read:

766.60 (4) (b) 1. (intro.) Except as provided in subd. 2 or in a marital property agreement under s. 766.58:

NOTE: Expressly states that a marital property agreement may create exceptions to the following 2 general rules [set forth in s. 766.60 (4) (b) 1.] regarding attempts to create a joint tenancy or tenancy in common exclusively between spouses:

1. If a document of title, instrument of transfer or bill of sale expresses an intent to establish a joint tenancy exclusively between spouses after the determination date, the property is survivorship marital property.

2. If a document of title, instrument of transfer or bill of sale expresses an intent to establish a tenancy in common exclusively between spouses after the determination date, the property is marital property.

See legislative council NOTE to SECTION 124 of 1985 Wisconsin Act 37, which provides: "Should spouses wish to have the incidents of traditional joint tenancy or tenancy in

common, regardless of the classification of the property, they may do so by marital property agreement."

Of course, a creditor, if adversely affected, is not bound by such a provision in a marital property agreement unless the creditor has received the requisite notice.

SECTION 21. 766.605 of the statutes is amended to read:

766.605 Classification of homestead. A homestead acquired after the determination date which, when acquired, is held exclusively between spouses with no 3rd party is survivorship marital property if no intent to the contrary is expressed on the instrument of transfer or in a marital property agreement. A homestead may be reclassified under s. 766.31 (10).

NOTE: Clarifies that the section, which has its roots in s. 700.19, classifies a homestead as survivorship marital property, in the absence of a contrary intent, when the homestead is "titled" at the time of acquisition exclusively in both spouses' names, as distinguished from "owned" exclusively between the spouses.

SECTION 22. 766.61 (1) (b) of the statutes is amended to read:

766.61 (1) (b) "Ownership interest" Except as provided in sub. (3) (e), "ownership interest" means the rights of an owner under a policy.

NOTE: See the treatment of s. 766.61 (3) (e) by SECTION 24.

SECTION 23. 766.61 (2m) (a) and (3) (c) 2. of the statutes are amended to read:

766.61 (2m) (a) In determining the marital property component of the ownership interest and proceeds of a policy under sub. (3), the date on which a policy becomes effective is the date of original issuance or coverage of the policy, whichever is earlier, if the policy is thereafter kept in force merely by continuing premium payments, without any further underwriting by the issuer. If additional underwriting is required after original issuance of the policy or if the amount of proceeds increases after original issuance as a result of unscheduled additional premiums paid by the policyholder, the effective date of the policy is the date on which the newly underwritten ~~or newly increased coverage~~ right to proceeds or the right to increased proceeds begins.

(3) (c) 2. If after the issuance of a policy described under subd. 1 the insured or his or her spouse are at any time not domiciled in this state, the ownership interest and proceeds of the policy are ~~mixed~~ individual property and property that is other than individual or marital property. The individual property component of the ownership interest and proceeds is the amount which results from multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the entire period during ~~marriage and after the determination date that~~ which the policy was in effect ~~less that period during which the insured or his or her spouse were at any time not domiciled in this state~~ and the denominator of which is the entire period that the policy was in effect.

NOTE: 1. Substitutes "proceeds" for "coverage" because the former term, a term of art in the insurance industry, includes any economic benefit.

2. Deletes reference to "mixed property" because, as ordinarily used in the marital property law, the term assumes a component of marital property, which is absent here.

3. Deletes reference to "during marriage and after the determination date" because the ownership interest and proceeds of a policy which designates the spouse of the insured as the owner arguably are classified by s. 766.61 (3) (c) 1. as individual property, even if the policy was issued before January 1, 1986. Therefore, the operative period for determining the individual property component of such a policy is the period during which both spouses are domiciled in the state after the policy is issued.

SECTION 24. 766.61 (3) (e) of the statutes is amended to read:

766.61 (3) (e) A written consent in which a spouse consents to the designation of another person as the beneficiary of the proceeds of a policy or consents to the use of property to pay premiums on a policy is effective, to the extent that the written consent provides, to relinquish or reclassify all or a portion of that spouse's interest in property used to pay premiums on the policy or in the ownership interest or proceeds of the policy without regard to the classification of property used by a spouse or another person to pay premiums on that policy. Unless the written consent expressly provides otherwise, a written consent under this paragraph is revocable in writing and is effective only with respect to the beneficiary named in it. Unless the written consent expressly provides otherwise, a revocation of a written consent is effective no earlier than the date on which it is signed by the revoking spouse and does not operate to reclassify any property which was reclassified or in which the revoking spouse relinquished an interest from the date of the consent to the date of revocation. In this paragraph, "ownership interest" includes the interests of a spouse in a policy who is not an owner under the policy.

NOTE: Use of the term "ownership interest" in s. 766.61 (3) (e), relating to written consents in connection with insurance policies, is intended to be broader than the defined term [see, in particular, the definition of "owner" in s. 766.61 (1) (a)]. The new language, therefore, expands the term for purposes of s. 766.61 (3) (e). Note that the definition of "policy" was expanded for similar reasons in 1987 Wisconsin Act 393.

SECTION 25. 766.61 (7) of the statutes is amended to read:

766.61 (7) If a noninsured spouse predeceases an insured spouse, the marital property interest of the decedent spouse in a policy which designates the surviving spouse as the owner and insured is limited, ~~for purposes of an action under s. 766.70 (6) (b) 3. to recover the interest,~~ to a dollar amount equal to one-half of the marital property interest in the interpolated terminal reserve and in the unused portion of the term premium of the policy on the date of death of the deceased spouse. ~~If an action is available under s. 766.70 (6) (b) 3., all~~ All other rights of the decedent spouse in the ownership interest or pro-

ceeds of the policy, other than the marital property interest described in this subsection, terminate ~~upon the failure of the surviving spouse to purchase the decedent spouse's marital property interest under s. 766.70 (7) at the decedent spouse's death.~~

NOTE: 1. Removes reference to the remedies under s. 766.70 (6) (b) 3. See the treatment of s. 766.70 (6) (b) 3. by SECTION 30.

2. Removes reference to failure of the surviving spouse to purchase the decedent spouse's marital property interest under s. 766.70 (7).

The above changes reflect that s. 766.61 (7) is intended simply to be a rule on the value of the noninsured spouse's marital property interest in a policy owned by the insured spouse when the noninsured spouse dies first.

SECTION 26. 766.61 (8) of the statutes is amended to read:

766.61 (8) This section does not apply to a policy held by a deferred employment benefit plan. ~~Classification of the ownership interest and proceeds of such a policy a deferred employment benefit, regardless of the nature of the assets held by the deferred employment benefit plan,~~ is determined under s. 766.62.

NOTE: Clarifies that s. 766.62 does not classify the ownership interest and proceeds of a life insurance policy held by a deferred employment benefit plan; rather, the section classifies deferred employment benefits.

SECTION 27. 766.62 (1) (b) and (2) of the statutes are amended to read:

766.62 (1) (b) A deferred employment benefit attributable to employment of a spouse occurring after the determination date is mixed property if, after the determination date and during the period of employment giving rise to the benefit, the employed spouse or his or her spouse are at any time not domiciled in this state. The marital property component of that mixed property is the amount which results from multiplying the entire benefit by a fraction, the numerator of which is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator of which is the total period of ~~the~~ employment giving rise to the benefit.

(2) A deferred employment benefit attributable to employment of a spouse occurring ~~during marriage~~ while the spouse is married and partly before and partly after the determination date is mixed property. The marital property component of that mixed property is the amount which results from multiplying the entire benefit by a fraction, the numerator of which is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator of which is the total period of ~~the~~ employment giving rise to the benefit.

NOTE: 1. Clarifies that the operative period of employment for determining the marital property component of a mixed property deferred employment benefit is the period of employment giving rise to the benefit, for purposes of both the numerator and the denominator of the formula.

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2. Substitutes “while the spouse is married” for “during marriage” in recognition that revisions to the latter term by 1987 Wisconsin Act 393 render inconsistent the use of the term in juxtaposition with “partly before and partly after the determination date”. As now defined, “during marriage” cannot apply to any period of time before the determination date [s. 766.01 (8)].

SECTION 28. 766.63 (1) of the statutes is amended to read:

766.63 (1) Except as provided otherwise in ss. 766.61 and 766.62, mixing marital property with property ~~having any other classification~~ 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.

NOTE: See SECTION 12 and the NOTE thereto.

SECTION 29. 766.70 (6) (b) 2. of the statutes is amended to read:

766.70 (6) (b) 2. If the spouse entitled to a remedy under subd. 1 predeceases the donor spouse, no action may be commenced later than one year after the decedent’s death. Except as provided in ~~subd. 3 s. 766.61 (7)~~, recovery in such an action is the same as if the donor spouse had predeceased the spouse entitled to recover, but is valued at the date of death of the spouse entitled to recover.

NOTE: Clarification. See the treatment of s. 766.61 (7) by SECTION 25 and the treatment of s. 766.70 (6) (b) 3. by SECTION 30.

SECTION 30. 766.70 (6) (b) 3. of the statutes is repealed.

NOTE: Repealed as unnecessary. The repealed language provides as follows:

“766.70 (6) (b) 3. If there is a remedy under subd. 2 to recover a decedent spouse’s marital property interest in a life insurance policy which designates the surviving spouse as the owner and insured, the estate shall sell the interest under sub. (7) if the surviving spouse offers to purchase the interest within the time period under sub. (7). If there is no offer to purchase the interest, an action under subd. 2 may be commenced but recovery is limited as provided in s. 766.61 (7). The surviving spouse is liable for the amount of such recovery but this subdivision does not preclude the use of any other applicable remedy to obtain the recovery.”.

SECTION 31. 767.266 of the statutes is created to read:

767.266 Revocation of nontestamentary disposition provision in marital property agreement. Unless the judgment provides otherwise, a judgment of annulment, divorce or legal separation revokes a provision in a marital property agreement under s. 766.58 which provides that, upon the death of either spouse, any of either or both spouses’ property, including after-acquired property, passes without probate to a designated person, trust or other entity by nontestamentary disposition.

NOTE: Provides that a “Washington will” provision in a marital property agreement is revoked, as a matter of law, upon a judgment of annulment, divorce or legal separation, unless the judgment provides otherwise. The provision is similar to s. 853.11, which provides that any provision in a will in favor of the testator’s spouse is revoked by an annulment or a divorce.

See, also, sub. (1) of SECTION 49.

SECTION 32. 806.15 (5) of the statutes is created to read:

806.15 (5) If a judgment lien has attached under sub. (4) (b) to property that is exempt under s. 815.205 (1) from execution on the judgment lien and execution has not been issued in connection with the enforcement of the judgment lien, a person with an ownership interest in the property may proceed under s. 806.04 for declaratory relief if, within 10 days after demand, the owner of the judgment fails to execute a recordable release of the property from the judgment lien.

NOTE: Provides a procedure for lifting a judgment lien that has attached to the real property of a nonobligated spouse or former spouse of a judgment debtor if the property is exempt from execution on the judgment lien because the property is not available under s. 766.55 to satisfy the obligation for which the judgment was rendered.

Under s. 806.15 (4), a judgment lien attaches to real property that is held by the spouse or former spouse of a judgment debtor and that is not held by the judgment debtor himself or herself, if the spouse or former spouse of the judgment debtor is a named defendant in the action for which the judgment is rendered, the spouse of the judgment debtor is named in the judgment itself, the obligation is an obligation covered under s. 766.55 (2) and:

1. If the property is held by the spouse of the judgment debtor when the judgment is docketed, the property is expressly determined to be available under s. 766.55 to satisfy the obligation; or

2. The property is acquired after the judgment is docketed.

It is to the latter situation (i.e., a lien attaching to property acquired after the judgment is docketed) that this new provision is addressed. If the spouse or former spouse’s real property is not available to satisfy the underlying obligation and is, therefore, exempt from execution under new s. 815.205 (1), then the property should not be available to the creditor upon enforcement of the judgment. The provision created here applies before execution is issued in connection with the enforcement of the judgment lien. See the treatment of s. 815.205 by SECTION 33 and the NOTE thereto.

SECTION 33. 815.205 of the statutes is created to read:

815.205 Certain property of spouse exempt from execution. (1) Property described in s. 806.15 (4) (intro.) is exempt from execution on a judgment lien that attaches to that property under s. 806.15 (4) (b) if the property is not available under s. 766.55 to satisfy the obligation for which the judgment was rendered.

(2) (a) If execution is issued in connection with the enforcement of a judgment lien on property that is exempt under sub. (1) from execution on the judgment lien, a person with an ownership interest in the property other than the judgment debtor may, at any time before the sale of the property, notify the officer making the levy that the property is exempt from execution. The person making the notification of the exemption shall provide the officer with a description of the property.

(b) If notification is made under par. (a), sale of the property is stayed if, within 5 days after the notification, demand on the owner of the judgment is made by a person

with an ownership interest in the property other than the judgment debtor for a recordable release of the property from the judgment. If within 5 days after the demand the owner of the judgment fails to execute the recordable release, the stay on the sale of the property continues if a person with an ownership interest in the property other than the judgment debtor commences an action under s. 806.04 for declaratory relief within 15 days after the demand was made. The stay on the sale of the property continues until the court determines whether the property is exempt under sub. (1). If no action under s. 806.04 is commenced within the required period, the stay lapses on the expiration of the required period.

(c) If the sale of property is stayed under this subsection, no additional stay on the sale of that property is available under this subsection, regardless of whether the additional stay is sought by the person who initially gave notice under par. (a) or by any other person with an ownership interest in the property.

NOTE: 1. Exempts from execution in connection with the enforcement of a judgment lien that real property to which the judgment lien has attached because the property was acquired after the judgment was docketed and the other conditions required under s. 806.15 (4) have been met.

2. Provides a procedure for preventing the exempt real property from being sold in connection with the enforcement of a judgment lien after execution is issued.

See, also, the treatment of s. 806.15 (5) by SECTION 32 and the NOTE thereto.

SECTION 34. 859.02 (2) (a) of the statutes, as affected by 1991 Wisconsin Act 89, section 71, is amended to read:

859.02 (2) (a) It is a claim based on tort, on a marital property agreement that is subject to the time limitations under s. 766.58 (13) (b) or (c), on Wisconsin income, franchise, sales, withholding, gift or death taxes, or on unemployment compensation contributions due or benefits overpaid, a claim for funeral or administrative expenses or a claim of the United States; or

NOTE: Provides that a claim against an estate based on a marital property agreement which is subject to the time limitations under s. 766.58 (13) (b) and (c) (generally, 6 months after the inventory is filed) is not barred by the general 3-month to 4-month period of ss. 859.01 and 859.02 (1) for bringing claims against an estate.

SECTION 35. 859.18 (6) of the statutes is amended to read:

859.18 (6) A provision in a marital property agreement, as defined under s. 766.01 (12), may which provides for the disposition of either or both spouses' property upon the death of a spouse does not affect property available under this section for satisfaction unless that property was not available for satisfaction under the marital property agreement while both spouses were alive and the agreement is binding on the creditor under s. 766.55 (4m) or 766.56 (2) (c).

NOTE: Clarifies intent. The broad language of the original provision has caused confusion about the provision's import.

The more specific amended language clarifies that the disposition of property by a marital agreement on the death of a spouse does not affect the property available to a creditor to satisfy an obligation of a spouse, unless under the agreement that property was unavailable to the creditor while both spouses were alive.

SECTION 36. 861.02 (1) of the statutes is amended to read:

861.02 (1) In addition to the right to elect under s. 861.03 and unless barred under s. 861.13, at the death of a spouse whose domicile is in this state the surviving spouse may elect, under s. 861.11, not more than a one-half interest in any or all items of the deferred marital property then owned by the decedent spouse which is subject to administration, reduced by any of that elected property which is used to satisfy obligations for which the property is available under s. 859.18. Property elected by a surviving spouse under this subsection, except to the extent that no other property is available to satisfy the obligation, is not subject to claims for the decedent's funeral expenses, to federal death taxes against the decedent's estate or to taxes imposed under subch. III of ch. 72, 1989 stats., against the decedent's estate. Failure of a surviving spouse to elect under this subsection is not a transfer of property and does not result in a gift from the surviving spouse to the decedent spouse's estate or any beneficiary of the estate.

NOTE: 1. Clarifies that deferred marital property elected by a surviving spouse, except to the extent that no other property is available to satisfy the obligation, is not subject to claims for the decedent's funeral expenses, federal death taxes against the decedent's estate or state taxes against the decedent's estate.

2. Clarifies that failure to elect deferred marital property is not a transfer of property and, therefore, does not result in a gift. See, also, SECTION 48 and the NOTE thereto.

SECTION 37. 861.02 (1m) of the statutes is created to read:

861.02 (1m) For purposes of the election under sub. (1), deferred marital property then owned by the decedent spouse which is subject to administration includes real property located in another state and owned by the decedent spouse at his or her death which:

(a) Would be classified as deferred marital property, if located in this state; and

(b) Would be subject to administration, if located in this state.

NOTE: Clarifies that it is the intent of the legislature that a surviving spouse should be allowed to exercise the deferred marital property election against real property located in another state. It is recognized that the law of the state in which the property is located ordinarily determines whether the election will be allowed.

SECTION 38. 861.05 (3) of the statutes is renumbered 861.05 (3) (a) and amended to read:

861.05 (3) (a) Property is valued under this section as of the decedent's death. ~~Property is valued under this section without regard to any beneficial interest of the surviving spouse in any life estate or in any trust. The~~

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value of property is included in this section only to the extent that the decedent did not receive adequate consideration for the transfer.

NOTE: See the treatment of s. 861.05 (3) (b) by SECTION 39 and the NOTE thereto.

SECTION 39. 861.05 (3) (b) of the statutes is created to read:

861.05 (3) (b) The surviving spouse's beneficial interest in a trust, life estate, insurance policy, retirement plan, annuity or other arrangement described in this section is valued as follows:

1. A mandatory income interest is valued in accordance with valuation tables used by the internal revenue service for estate tax purposes.

2. A mandatory income interest together with a general testamentary power of appointment is valued at 100% of the trust.

3. A lifetime unlimited power of withdrawal is valued at 100% of the property subject to the power.

4. A discretionary or any other beneficial interest or power is valued at zero.

NOTE: Incorporates the valuation rules of s. 861.07 ("cutback" of the augmented marital property estate), for valuing a surviving spouse's beneficial interest in certain property, into s. 861.05 (property included in the augmented marital property estate). Fairness and simplicity support making the valuation rule for determining a surviving spouse's beneficial interest consistent for purposes of determining the amount in the augmented estate and the amount of the cutback of the augmented estate.

SECTION 40. 861.07 (3) (a) of the statutes is amended to read:

861.07 (3) (a) A mandatory income interest is valued in accordance with valuation tables ~~designated by the department of revenue under ch. 72 used by the internal revenue service for estate tax purposes.~~

NOTE: Reflects that DOR no longer designates valuation tables for use under ch. 72.

SECTION 41. 861.09 (2) of the statutes is amended to read:

861.09 (2) The amount remaining after reducing the surviving spouse's share of the augmented marital property estate under s. 861.07 shall be satisfied, in proportion to the percentage elected under s. 861.03, from each item of property the value of which was included under s. 861.05 to determine the value of the augmented marital property estate, apportioned among transferees of the property in proportion to the value of their interests in the property. Only the original transferees from or appointees of the decedent, and any donees of those transferees to the extent the donees have the property or its proceeds, are subject under this section to contribution to satisfy the election of the augmented marital property estate. A person liable for contribution may satisfy the contribution with the property transferred to him or her or by paying the value of the property as computed under s. 861.03. Failure of a surviving spouse to seek contribution from a person liable for contribution is not a transfer of property

and does not result in a gift from the surviving spouse to the person liable for contribution. Satisfaction of the election of the augmented marital property estate under this section may not adversely affect the interest of a bona fide purchaser under s. 766.57 (1) and (2).

NOTE: Clarifies that failure of a surviving spouse to seek contribution from a person who is liable for contribution as a result of an election of the augmented marital property estate by the surviving spouse does not result in a gift from the surviving spouse to the person liable for contribution. See, also, SECTION 48 and the NOTE thereto.

SECTION 42. 861.31 (4) of the statutes is amended to read:

861.31 (4) The court may direct that the allowance be charged against income or principal, either as an advance or otherwise, but in no event may an allowance for support of minor children of the decedent be charged against the income or principal interest of the surviving spouse. The court may direct that the allowance for support of the surviving spouse, not including any allowance for support of minor children, be applied against any right of the surviving spouse to elect under ss. 861.02 (1) and 861.03.

NOTE: In some circumstances, it may be appropriate to apply a surviving spouse's allowance under s. 861.31 (allowance during administration of the estate) against the deferred marital property and augmented marital property estate elections. However, unless the court expressly directs such application, the allowance is not applied against the elections. [Compare s. 861.02 (2) (d) 1., which prohibits an allowance under s. 861.31 from being used to satisfy a nonholding spouse's deferred marital property election against certain business property subject to a s. 857.015 directive ("statutory buy-sell"), if the allowance is made before the nonholding spouse's interest is satisfied.]

SECTION 43. 861.33 (1) (a) 1. of the statutes is amended to read:

861.33 (1) (a) 1. ~~Decedent's wearing~~ Wearing apparel and jewelry held for personal use by the decedent or the surviving spouse;

NOTE: Clarifies that the selection of wearing apparel and jewelry by a surviving spouse under s. 861.33 (selection of certain personal property by surviving spouse) extends not only to decedent's wearing apparel and jewelry, but also to the decedent's marital property interest in wearing apparel and jewelry used by the surviving spouse.

SECTION 44. 861.35 (3) of the statutes is amended to read:

861.35 (3) In making an allowance under this section, the court shall consider the effect on claims under s. 859.25 and shall balance the needs of the spouse or minor child against the nature of the creditors' claims in setting the amount allowed hereunder. The court shall also consider the size of the estate, other resources available for support, the existing standard of living and any other factors it considers relevant. The court may direct that the allowance to the surviving spouse, not including any allowance for the support and education of minor children, be applied against any right of the surviving spouse to elect under ss. 861.02 (1) and 861.03.

NOTE: In some circumstances, it may be appropriate to apply a surviving spouse's allowance under s. 861.35 (special allowance for support) against the deferred marital property and augmented marital property estate elections. However, unless the court expressly directs such application, the allowance is not applied against the elections. [Compare s. 861.02 (2) (d) 3., which prohibits an allowance under s. 861.35 from being used to satisfy a nonholding spouse's deferred marital property election against certain business property subject to a s. 857.015 directive ("statutory buy-sell"), if the allowance is made before the nonholding spouse's interest is satisfied.]

SECTION 45. 867.046 (1) of the statutes is renumbered 867.046 (1m) and amended to read:

867.046 (1m) UPON DEATH; GENERALLY. If a domiciliary of this state dies who immediately prior to death had an interest in property in this state, including an interest in survivorship marital property, or if a person not domiciled in this state dies having an interest in property in this state, including an interest in survivorship marital property, upon petition of the decedent's spouse or a designated person, trust or other entity having an interest in any property passing by nontestamentary disposition under s. 766.58 (3) (f) upon petition of a beneficiary of a marital property agreement to the court of the county of domicile of the decedent or, if the decedent was not domiciled in this state, of any county where the property is situated, the court shall issue a certificate under the seal of the court. The certificate shall set forth the fact of the death of the decedent, the termination or transfer of the decedent's interest in the property, the interest of the petitioner in the property and any other facts essential to a determination of the rights of persons interested. The certificate is prima facie evidence of the facts recited, and if the certificate relates to an interest in real property or to a debt secured by an interest in real property, the petitioner shall record a certified copy or duplicate original of the certificate in the office of the register of deeds in each county in this state in which the real property is located.

NOTE: See the treatment of s. 867.046 (1) by SECTION 46 and the NOTE thereto.

SECTION 46. 867.046 (1) of the statutes is created to read:

867.046 (1) DEFINITIONS. In this section:

(a) "Beneficiary of a marital property agreement" means a designated person, trust or other entity having an interest in property passing by nontestamentary disposition under s. 766.58 (3) (f).

(b) "Survivorship marital property" means property held under s. 766.60 (5) (a).

NOTE: The new definitions are intended to clarify that the summary procedures in s. 867.046 apply not only to a designated person, trust or other entity having an interest in any property passing by nontestamentary disposition under a marital property agreement, but also to any other interest of the decedent's spouse in the decedent's property. Specific reference to survivorship marital property is not intended to limit the scope of the section, but to alert practitioners and other interested persons that, among the interests which can be con-

firmed under this section, is the surviving spouse's interest in survivorship marital property.

SECTION 47d. 867.046 (2) (intro.) of the statutes, as affected by 1991 Wisconsin Act (Senate Bill 342), is amended to read:

867.046 (2) UPON DEATH; INTEREST IN PROPERTY. (intro.) As an alternative to sub. (1) (1m), upon the death of any person having an interest in any real property, a vendor's interest in a land contract, or a mortgagee's interest in a mortgage, including an interest in survivorship marital property, the decedent's spouse or a designated person, trust or other entity having an interest in any property passing by nontestamentary disposition under s. 766.58 (3) (f) beneficiary of a marital property agreement may obtain evidence of the termination of that interest of the decedent and confirmation of the petitioner's interest in the property by providing to the register of deeds of the county in which the property is located the certified death certificate for the decedent and, on applications supplied by the register of deeds for that purpose, all of the following information:

SECTION 47f. 867.046 (2) (a) and (2m) of the statutes are amended to read:

867.046 (2) (a) The name, residence and post-office addresses of the decedent and the surviving person applicant.

(2m) THIRD-PARTY CONFIRMATION. If the personal representative, decedent's spouse or a designated person, trust or other entity having an interest in any property passing by nontestamentary disposition under s. 766.58 (3) (f) beneficiary of a marital property agreement does not commence proceedings to confirm an interest under this section or s. 863.27 or 865.201 within 90 days after the decedent's death, any interested person may petition or apply under this section.

SECTION 47m. 867.046 (3) of the statutes, as affected by 1991 Wisconsin Act (Senate Bill 342), is amended to read:

867.046 (3) COMPLETION OF APPLICATION. The register of deeds or other person authorized under s. 706.06 or 706.07 shall complete a statement at the foot of the application, declaring that the person applicant or, if the applicant is not an individual, a representative of the applicant appeared before him or her and verified, under oath, the correctness of the information required by sub. (2).

NOTE: See the treatment of s. 867.046 (1) by SECTION 46 and the NOTE thereto. In addition to use of the new definitions, editorial changes are made.

SECTION 48. Nonstatutory provisions; certain transfers not subject to gift tax. The failure of a surviving spouse to elect deferred marital property as authorized under section 861.02 (1) of the statutes or the failure of a surviving spouse to seek contribution from a person liable for contribution under section 861.09 (2) of the

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statutes is not a transfer of property and is not subject to tax under subchapter IV of chapter 72, 1989 stats.

NOTE: Clarifies that failure of a surviving spouse to elect deferred marital property or to seek contribution from a person liable for contribution as a result of an election by the surviving spouse of the augmented marital property estate is not a transfer of property and, therefore, is not subject to the state gift tax which was repealed effective January 1, 1992. See, also, the treatment of s. 861.02 (1) by SECTION 35 and the treatment of s. 861.09 (2) by SECTION 41, and the NOTES thereto.

SECTION 49. Initial applicability. (1) The treatment of sections 766.58 (3) (f) and 767.266 of the statutes first applies to judgments of annulment, divorce or legal separation which occur on the effective date of this subsection.

(2) The treatment of section 766.58 (7) (a) of the statutes first applies to deaths of a nonemployee spouse which occur on the effective date of this subsection.

(3) The treatment of section 766.58 (7) (b) of the statutes first applies to deaths of a noninsured spouse which

occur on the effective date of this subsection.

NOTE: Subsection (1) states the initial applicability of the provisions of the draft that provide that a "Washington will" provision in a marital property agreement is revoked, as a matter of law, upon a judgment of annulment, divorce or legal separation, unless the judgment provides otherwise. See the treatment of ss. 766.58 (3) (f) and 767.266 by SECTIONS 14 and 31, respectively.

Subsection (2) states the initial applicability of the provision of the draft that retains, unless the marital property agreement expressly provides otherwise, the terminable interest rule for a deferred employment benefit when a marital property agreement classifies the benefit as marital property. See the treatment of s. 766.58 (7) (a) by SECTION 15.

Subsection (3) states the initial applicability of the provision of the draft that retains, unless the marital property agreement expressly provides otherwise, the valuation rule of s. 766.61 (7) when a marital property agreement classifies as marital property the noninsured spouse's interest in a life insurance policy that designates the other spouse as the owner and insured. See the treatment of s. 766.58 (7) (b) by SECTION 15.