

1985 Senate Bill 150

Date of enactment: **October 22, 1985**  
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## 1985 Wisconsin Act 37

AN ACT *to repeal* 766.01 (14), 766.58 (6) (c) 2, 766.70 (7), 766.70 (8) (a) and (b), 766.70 (9), 766.75 (intro.) and (1), 766.75 (4), 766.77 (2), 766.90, 767.255 (5e) and 859.25 (3); *to renumber* 409.203 (2) to (4), 425.106 (2) and (3), 766.001, 766.17, 766.55 (2) (c), 766.56 (5) (b), 766.58 (6) (c) 3, 766.60 (5), 803.04 (3) and 815.18 (30); *to renumber and amend* 766.01 (9), 766.53 (1), 766.53 (2), 766.56 (5) (a), 766.60 (4), 766.70 (8) (c), 766.75 (3), 766.77 (title), 766.77 (1), 858.01 and 880.173; *to consolidate, renumber and amend* 766.01 (10) (intro.), (a), (b), (c) and (d); *to amend* subchapter II (title) of chapter 861, 59.51 (18), 71.01 (1g), 71.09 (6r) (d), 71.09 (7) (a) 6, 7 and 8, 71.09 (7m), 71.10 (10) (f), 71.54, 178.21 (3) (e), 700.17 (title) and (1), 701.20 (5) (b) 1, 766.001 (title), 766.01 (12), 766.31 (3), 766.31 (4), 766.31 (6), 766.31 (7) (a), 766.31 (7) (d) and (e), 766.31 (8), 766.31 (10), 766.51 (1) (intro.), 766.51 (4), 766.55 (1), 766.55 (2m), 766.55 (3), 766.55 (4m), 766.56 (2) (c), 766.57 (2),

766.57 (3), 766.58 (1), 766.58 (3) (intro.), 766.58 (3) (f), 766.58 (6) (c) 1, 766.58 (8) and (9) (b), 766.61 (3) (c), 766.61 (3) (f) and (4), 766.62 (2), 766.63 (2) (intro.) and (b), 766.70 (title) and (1), 766.70 (2) and (3) (intro.) and (a), 766.70 (5), 766.73, 766.97 (2), 811.03 (1) (intro.), 812.01 (1), 815.56, 852.01 (1) (a) 2, 853.15 (1), 853.40 (2) (a), 857.01, 858.01 (title), 859.13 (1), 859.25 (title), 859.33, 861.01 (1), 861.41 (3), 863.27, 865.201, 867.046 (title), (1) and (2) (intro.) and (h) 1 and 2, 867.046 (5) and 880.173 (title); *to repeal and recreate* 138.20 (1m), 766.31 (5), 766.51 (1m), 766.56 (1), 766.56 (2) (a), 766.56 (2) (b), 766.56 (4), 766.58 (12), 766.61 (3) (e), 766.70 (4) and 859.18; and *to create* 409.203 (2), 409.402 (9), 425.106 (2), 766.001 (2), 766.01 (2m) and (2r), 766.01 (9) (b), 766.17 (2), 766.31 (7p), 766.51 (8), 766.51 (9), 766.55 (2) (c) 2, 766.55 (2) (cm), 766.55 (6), 766.55 (7), 766.55 (8), 766.555, 766.56 (2) (d), 766.56 (3) (a), 766.565, 766.58 (13), 766.58 (14), 766.585, 766.587, 766.59, 766.60 (4) (b), 766.60 (5) (b) and (c), 766.70 (6) (b) and (c), 766.70 (8), 767.05 (7), 803.04 (3), 803.045, 806.15 (4), 811.001, 812.02 (2e), 815.18 (30) (b), 851.055, 851.06, 851.35, 858.01 (2), 859.01 (4), 861.03 to 861.13, 861.20, 867.046 (2m), 880.173 (2) and 893.135 of the statutes, *relating to implementation of the marital property act and granting rule-making authority.*

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

PREFATORY NOTE: 1985 Senate Bill 150, as introduced by the legislative council, contained explanatory NOTES prepared by the legislative council staff. The legislature, in passing Senate Bill 150, made a number of changes to the original proposal. Therefore, some of the original explanatory NOTES are no longer accurate or are now incomplete.

Prior to enrollment, the legislative council staff reviewed the original NOTES and identified those NOTES, or portions of NOTES, to original Senate Bill 150 that remain accurate, despite the revisions to the original proposal. These NOTES have been retained in the enrolled bill. In addition, the retained explanatory NOTES indicate:

1. Where a NOTE or part of a NOTE has been deleted because it no longer accurately reflects the provisions of the enrolled bill.
2. Where a NOTE, while accurate as stated, does not reflect additional changes to the provision to which the NOTE applies.

In addition, the NOTES contain nonsubstantive cross-reference changes for the convenience of the reader.

If a substantive provision is followed by no NOTE at all, it can generally be assumed that the provision was added after introduction of Senate Bill 150.

Reference in the NOTES to the "special committee" is to the legislative council's special committee on marital property implementation, which developed 1985 Senate Bill 150.

SECTION 1m. 59.51 (18) of the statutes is amended to read:

59.51 (18) Record and index marital property agreements under s. 766.58 and statements and revocations under s. 766.59.

SECTION 2m. 71.01 (1g) of the statutes, as created by 1985 Wisconsin Act 29, is amended to read:

71.01 (1g) MARITAL PROPERTY AGREEMENTS. The department of revenue shall notify a taxpayer whose return is under audit that a marital property agreement under s. 766.58 or unilateral statement under ch. 766 is effective for tax purposes for any period during which both spouses are domiciled in this state only if it is filed with the department before any assessment resulting from the audit is issued. A marital property agreement under s. 766.58 or unilateral statement under ch. 766 does not affect the determination of the income that is taxable by this state, or of the person who is required to report taxable income to this state, during the period that one or both spouses are not

domiciled in this state or if it was not filed with the department before an assessment was issued.

SECTION 3m. 71.09 (6r) (d) of the statutes, as created by 1985 Wisconsin Act 29, is amended to read:

71.09 (6r) (d) With respect to persons who change their domicile into or from this state during the taxable year and nonresident persons, the credit under this ~~section~~ subsection shall be limited to the fraction of the amount so determined that Wisconsin adjusted gross income is of federal adjusted gross income. In this paragraph, for married persons filing separately "adjusted gross income" means the separate adjusted gross income of each spouse and for married persons filing jointly "adjusted gross income" means the total adjusted gross income of both spouses. If a person and that person's spouse are not both domiciled in this state during the entire taxable year, their ~~personal exemptions credit under this subsection~~ personal exemption credit under this subsection on a joint return ~~are is~~ determined by multiplying the ~~personal exemption credit under this subsection~~ that would be available to each of them if they were both domiciled in this state during the entire taxable year by a fraction the numerator of which is their joint Wisconsin adjusted gross income and the denominator of which is their joint federal adjusted gross income.

SECTION 4m. 71.09 (7) (a) 6, 7 and 8 of the statutes, as affected by 1985 Wisconsin Act 29, are amended to read:

71.09 (7) (a) 6. "Income" means the sum of adjusted gross income as defined in s. 71.02 (2) (i), maintenance payments, support money, cash public assistance and general relief (not including credit granted under this subsection), the gross amount of any pension or annuity (including railroad retirement benefits, all payments received under the federal social security act and veterans disability pensions), nontaxable interest received from the federal government or any of its instrumentalities, worker's compensation, unemployment compensation, the gross amount of "loss of time" insurance and compensation and other cash benefits received from the United States for past or present service in the armed forces, and scholarship and fellowship gifts or income, all regardless of the fact that they may be excluded from adjusted gross income as defined in s. 71.02 (2) (i). "Income" also includes the following amounts that are not included

in adjusted gross income: capital gains, gain on the sale of a personal residence excluded under section 121 of the internal revenue code, dividends, contributions to individual retirement accounts under section 219 of the internal revenue code (except rollover contributions), intangible drilling costs, depletion allowances and the amount by which the value of a share of stock at the time a qualified or restricted stock option is exercised exceeds the option price. Depreciation deducted in determining Wisconsin adjusted gross income as defined in s. 71.02 (2) (i) shall be added to "income". "Income" does not include gifts from natural persons, cash reimbursement payments made under title XX of the federal social security act, or surplus food or other relief in kind supplied by a governmental agency. "Income" does not include the gain on the sale of a personal residence deferred under section 1034 of the internal revenue code or nonrecognized gain from involuntary conversions under section 1033 of the internal revenue code. A marital property agreement ~~under s. 766.58~~ or unilateral statement under ch. 766 has no effect in computing "income" for a person whose homestead is not the same as the homestead of that person's spouse.

7. "Property taxes accrued" means property taxes, exclusive of special assessments, delinquent interest and charges for service, levied on a claimant's homestead in 1964 or any calendar year thereafter under ch. 70, less the tax credit, if any, afforded in respect of such property by s. 79.10 (3) to (5). If a homestead is owned by 2 or more persons or entities as joint tenants or tenants in common and one or more such persons or entities is not a member of the claimant's household, "property taxes accrued" is that part of property taxes levied on such homestead (reduced by the tax credit under s. 79.10 (3) to (5)) as reflects the ownership percentage of the claimant and the claimant's household. A marital property agreement ~~under s. 766.58~~ or unilateral statement under ch. 766 has no effect in computing "property taxes accrued" for a person whose homestead is not the same as the homestead of that person's spouse. For purposes of this paragraph property taxes are "levied" when the tax roll is delivered to the local treasurer with the warrant for collection. If a homestead is sold during the calendar year of the levy the "property taxes accrued" for the seller and buyer shall be the amount of the tax levy prorated to each in the closing agreement pertaining to the sale of the homestead or, if not so provided for in the closing agreement, the tax levy shall be prorated between seller and buyer in proportion to months of their respective ownership, provided that the seller and buyer occupy the homestead during the periods of their respective ownership. If a household owns and occupies 2 or more homesteads in the same calendar year "property taxes accrued" shall be the sum of the prorated taxes attributable to the household for each of such homesteads. If the household owns and occupies the homestead for part of the calendar year and rents a homestead for part of the calendar year, it may

include both the proration of taxes on the homestead owned and "rent constituting property taxes accrued" with respect to the months the homestead is rented, in computing the amount of the claim under pars. (gn) to (grm). If a homestead is an integral part of a multipurpose or multidwelling building, property taxes accrued are the percentage of the property taxes accrued on that part of the multipurpose or multidwelling building occupied by the household as a principal residence plus that same percentage of the property taxes accrued on as much of the land surrounding it, not exceeding one acre, that is reasonably necessary for use of the multipurpose or multidwelling building as a principal residence, except as the limitations of par. (h) apply. If the homestead is part of a farm, "property taxes accrued" are the property taxes accrued on up to 120 acres of land contiguous to the claimant's principal residence and include the property taxes accrued on all improvements to real property located on such land, except as the limitations of par. (h) apply. For claims for 1967 and subsequent years, monthly parking permit fees collected under s. 66.058 (3) (c) shall be considered property taxes.

8. "Rent constituting property taxes accrued" means 25% of the gross rent actually paid in cash or its equivalent in 1964 or any subsequent calendar year by a claimant and his or her household solely for the right of occupancy of their Wisconsin homestead in such calendar year, and which rent constitutes the basis, in the succeeding calendar year, of a claim for relief under this section by such claimant. A marital property agreement ~~under s. 766.58~~ or unilateral statement under ch. 766 has no effect in computing "rent constituting property taxes accrued" for a person whose homestead is not the same as the homestead of that person's spouse.

SECTION 5m. 71.09 (7m) of the statutes, as affected by 1985 Wisconsin Act 29, is amended to read:

71.09 (7m) Married persons filing a joint return may claim as a credit against, but not to exceed the amount of, Wisconsin net income taxes otherwise due, an amount equal to 2.5% of the earned income of the spouse with the lower earned income, but not more than \$450. In this subsection, "earned income" means wages, salaries, tips, other employe compensation and net earnings from self-employment allocable to Wisconsin under s. 71.07. Earned income is computed notwithstanding the fact that each spouse owns an undivided one-half interest in the whole of the marital property. A marital property agreement ~~under s. 766.58~~ or unilateral statement under ch. 766 transferring income between spouses has no effect in computing earned income under this subsection. Earned income is reduced by any amount of net loss from self-employment. Earned income does not include amounts received as a pension or annuity or income to which section 871 (a) of the internal revenue code applies.

SECTION 6m. 71.10 (10) (f) of the statutes, as affected by 1985 Wisconsin Act 29, is amended to read:

71.10 (10) (f) Every claim for refund or credit of income or surtaxes shall be filed with the department of revenue and signed by the person or, in the case of joint returns, by both persons who filed the return on which the claim is based and shall set forth specifically and explain in detail the reasons for and the basis of the claim. After the claim has been filed it shall be considered and acted upon in the same manner as are additional assessments made under s. 71.11 (16) and (20). No marital property agreement ~~under s. 766.58~~ or unilateral statement under ch. 766 affects claims for refund or credit under this subsection.

SECTION 7m. 71.54 of the statutes, as created by 1985 Wisconsin Act 29, is amended to read:

**71.54 One-time property tax and rent credit.** For taxable year 1986, a claimant may claim as a credit against, but not to exceed the amount of, Wisconsin net income taxes due, 7.9% of the claimant's property taxes and rent constituting property taxes, as calculated under s. 71.53 (1) and (5), 1983 stats., up to \$2,000 of property taxes and rent constituting property taxes. For an unmarried person or a married person filing a separate return who is a part-year resident of this state, the credit under this section is limited to that fraction of the amount determined under this section that Wisconsin adjusted gross income is of federal adjusted gross income. No credit is allowed under this ~~subsection~~ section for unmarried persons or married persons filing separate returns who are nonresidents of this state. ~~If both spouses are one spouse is not domiciled in this state during the entire taxable year, the credit on a joint return is determined by multiplying the Wisconsin property tax and rent credit that would be available to them if both spouses were domiciled in this state during the entire taxable year by a fraction the numerator of which is their joint Wisconsin adjusted gross income and the denominator of which is their joint federal adjusted gross income. No credit is allowed under this section on a joint return if both spouses are nonresidents of this state.~~

SECTION 61. 138.20 (1m) of the statutes is repealed and recreated to read:

138.20 (1m) SPOUSAL CREDIT. A violation of s. 766.56 (1) is a violation of sub. (1).

NOTE: Reconciles an ambiguity regarding what violations of s. 766.56 subject creditors to s. 138.20, relating to discrimination in granting credit or loans (which imposes a fine of up to \$1,000). Section 138.20 (1m) implies that any violation of s. 766.56 subjects creditors to s. 138.20. However, in Act 186, s. 138.20 is cross-referenced only in sub. (1) of s. 766.56, implying that the penalty in s. 138.20 applies only to violation of the requirement concerning what a creditor must consider in evaluating a spouse's creditworthiness. The special committee concluded that it is consistent with the intent of Act 186 to limit the penalty to violations of s. 766.56 (1) (which has been revised — see SECTION 100).

SECTION 62. 178.21 (3) (e) of the statutes is amended to read:

178.21 (3) (e) A partner's right in specific partnership property is not subject to elective rights under s. 861.02 or 861.03 of a surviving spouse or to allowances to a surviving spouses spouse, heirs, or next of kin.

NOTE: Amends a provision of the uniform partnership act to reflect provisions of this bill providing for a surviving spouse's rights of election against marital property and the augmented marital property estate. Act 186 repealed reference to "dower" in this provision; for consistency of treatment, it appears appropriate to refer to the new elective rights.

SECTION 62m. 409.203 (2) to (4) of the statutes are renumbered 409.203 (3) to (5).

SECTION 62p. 409.203 (2) of the statutes is created to read:

409.203 (2) A security agreement signed by one spouse is signed by the debtor under this section if that spouse acting alone has the right under s. 766.51 to manage and control the collateral, unless a marital property agreement or court decree which is binding on the secured party under s. 766.55 (4m) or 766.56 (2) (c) provides otherwise.

SECTION 62r. 409.402 (9) of the statutes is created to read:

409.402 (9) A financing statement signed by one spouse is signed by the debtor under this section if that spouse acting alone has the right under s. 766.51 to manage and control the collateral, unless a marital property agreement or court decree which is binding on the secured party under s. 766.55 (4m) or 766.56 (2) (c) provides otherwise.

SECTION 63. 425.106 (2) and (3) of the statutes are renumbered 425.106 (3) and (4).

SECTION 64. 425.106 (2) of the statutes is created to read:

425.106 (2) With respect to process against marital property in satisfaction of a judgment for an obligation described under s. 766.55 (2) (b) arising from a consumer credit transaction, each spouse is entitled to and may claim the exemptions under sub. (1). Each spouse is entitled to one exemption under sub. (1) (c). That exemption is limited to the specified maximum dollar amount, which may be combined with the other spouse's exemption in the same property or applied to different property included under the same exemption.

NOTE: Clarifies, for purposes of the Wisconsin consumer act, the exemptions which spouses may claim in connection with process against marital property in satisfaction of a judgment for an obligation in the interest of the marriage or family. The language parallels that created by SECTION 158 [s. 815.18 (30) (b)], which relates to exemptions from execution generally.

SECTION 65. 700.17 (title) and (1) of the statutes are amended to read:

**700.17 (title) Classification and characteristics of certain concurrent interests.** (1) CLASSIFICATION OF CONCURRENT INTERESTS. Interests in property may be owned concurrently by 2 or more persons as joint tenants or as tenants in common. A joint tenancy or tenancy in common established exclusively between

spouses after the determination date is classified as provided under s. 766.60 (4) (b).

NOTE: Under s. 766.60 (4) (b), an attempt to establish a joint tenancy or tenancy in common exclusively between spouses after January 1, 1986, creates survivorship marital property or marital property, respectively. See SECTION 124 [s. 766.60 (4) (b)].

SECTION 65m. 701.20 (5) (b) 1 of the statutes is amended to read:

701.20 (5) (b) 1. To legatees and devisees of specific property other than money, the income from the property bequeathed or devised to them less the following recurrent and other ordinary expenses attributable to the specific property: property taxes (excluding taxes prorated to the date of death), interest (excluding interest accrued to the date of death), income taxes (excluding taxes on income in respect of a decedent, capital gains and any other income taxes chargeable against principal) which accrue during the period of administration, ordinary repairs, and other expenses of management and operation of the property. For the purpose of this subdivision, property elected by a surviving spouse under s. 861.02 is a bequest or devise to the surviving spouse.

SECTION 66. 766.001 (title) of the statutes is amended to read:

**766.001 (title) Liberal construction; intent.**

SECTION 67. 766.001 of the statutes is renumbered 766.001 (1).

SECTION 68. 766.001 (2) of the statutes is created to read:

766.001 (2) It is the intent of the legislature that marital property is a form of community property.

NOTE: Expressly states that it is the intent of the legislature that marital property is a form of community property. The special committee concluded that an express statement of that intent is important for purposes of the application of other law, such as federal tax law, federal law relating to equal access to credit and federal law relating to deferred employment benefits.

SECTION 69. 766.01 (2m) and (2r) of the statutes are created to read:

766.01 (2m) (a) Except as provided in pars. (b) and (c), "credit" means the right granted by a creditor to defer payment of a debt, incur debt and defer its payment or purchase property or services and defer payment for the property or services.

(b) If used in connection with a transaction governed under chs. 421 to 427, "credit" has the meaning specified in s. 421.301 (14).

(c) Paragraph (a) does not apply to s. 766.56 (2) (c) and (d).

(2r) (a) Except as provided in pars. (b) and (c), "creditor" means a person that regularly extends credit.

(b) If used in connection with a transaction governed under chs. 421 to 427, "creditor" has the meaning specified in s. 421.301 (16).

(c) Paragraph (a) does not apply to s. 766.55 (3) to (4m), 766.56 (2) (c) and (d) or 766.61 (4).

NOTE: See, especially, SECTIONS 85 [s. 766.51 (1m)], 99 [s. 766.555], 100 [s. 766.56 (1)], 102 [s. 766.56 (2) (b)], 105 [s. 766.56 (3) (a)] and 107 [s. 766.56 (3) (b)] for use of the defined terms.

In the provisions to which the defined terms do not apply [ss. 766.55 (3) to (4m), 766.56 (2) (c) and (d) and 766.61 (4)], the terms are used in a broad sense and applying the defined terms to those provisions may inappropriately limit the provisions' scope.

SECTION 70. 766.01 (9) of the statutes is renumbered 766.01 (9) (a) and amended to read:

766.01 (9) (a) Property Except as provided in par. (b), property is "held" by a person only if a document of title to the property is registered, recorded or filed in a public office in the name of the person or a writing that customarily operates as a document of title to the type of property is issued for the property in the person's name.

SECTION 71. 766.01 (9) (b) of the statutes is created to read:

766.01 (9) (b) An account is "held" by the person who, by the terms of the account, has a present right, subject to request, to payment from the account other than as an agent. Accounts that are so "held" include accounts under s. 705.01 (1) and brokerage accounts.

NOTE: The special committee concluded that accounts, such as ch. 705 accounts and brokerage accounts, appear not to be included in the general definition of property "held" by a person and that accounts should be included in the definition.

SECTION 72. 766.01 (10) (intro.), (a), (b), (c) and (d) of the statutes are consolidated, renumbered 766.01 (10) and amended to read:

766.01 (10) "Income" means any of the following: ~~(a) Any wages, salary, commission, bonus, gratuity, payment in kind, deferred employment benefit or salaries, commissions, bonuses, gratuities, payments in kind, deferred employment benefits, proceeds, other than death benefits, of any health, accident or disability insurance policy or of any plan, fund, program or other arrangement providing benefits similar to those forms of insurance.~~ ~~(b) An, other economic benefit benefits~~ having value attributable to the effort of a spouse. ~~(c) Dividends, dividends, dividends on life insurance and annuity contracts to the extent that the aggregate of the dividends exceeds the aggregate premiums paid,~~ interest ~~or,~~ income distributed from trusts. ~~(d) Net and estates, and net rents and other net returns attributable to investment, rental, licensing or other use of property, unless attributable to a return of capital or to appreciation.~~

NOTE: Restores UMPA language, correcting an inadvertent change in substance from UMPA. Act 186, by dividing the definition of "income" into paragraphs, changed the UMPA definition by: (1) limiting reference to dividends and interest to dividends and interest from trusts; and (2) limiting application of the qualifying clause, "unless attributable to a return of capital or to appreciation", to net rents and other net returns attributable to investment, rental, licensing or other use of property.

The words "and estates" are added to clarify that "income" includes income from estates, in addition to trusts. The word "distributed" is added to clarify that income from trusts and

estates does not become "income", for purposes of ch. 766, until distributed.

[The NOTE is accurate as stated, but does not reflect changes made in the course of legislative consideration.]

SECTION 72m. 766.01 (12) of the statutes is amended to read:

766.01 (12) "Marital property agreement" means an agreement that complies with s. 766.58, 766.585 or 766.587.

SECTION 73. 766.01 (14) of the statutes is repealed.

NOTE: Repeals as unnecessary the definition of "presumption" and a "presumed" fact. See s. 903.01.

SECTION 74. 766.17 of the statutes is renumbered 766.17 (1).

SECTION 75. 766.17 (2) of the statutes is created to read:

766.17 (2) Section 859.18 (6) governs the effect of a marital property agreement upon property available for satisfaction of obligations after the death of a spouse.

NOTE: See SECTION 169 [s. 859.18].

SECTION 76. 766.31 (3) of the statutes is amended to read:

766.31 (3) Each spouse has a present undivided ~~50%~~ one-half interest in each item of marital property, but the marital property interest of the nonemployee spouse in a deferred employment benefit plan terminates at the death of the nonemployee spouse if he or she predeceases the employe spouse.

NOTE: Substitutes "one-half" for "50%" for consistency with UMPA.

Expressly states, for clarity, that the interest of a spouse in marital property is in each item of marital property, not in the aggregate.

SECTION 77. 766.31 (4) of the statutes is amended to read:

766.31 (4) ~~Income~~ Except as provided under subs. (7) (a), (7p) and (10), income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property.

SECTION 78. 766.31 (5) of the statutes is repealed and recreated to read:

766.31 (5) The transfer of property to a trust does not by itself change the classification of the property.

NOTE: Replaces language in Act 186 providing that "marital property transferred to a trust remains marital property". Because the latter provision raised many questions, the special committee consulted members of the UMPA drafting committee. According to the reporter for the committee, attorney William Cantwell, the new language reflects the intent of the UMPA drafting committee. Under the new language, the mere transfer of marital property to a trust does not change the classification of the property transferred.

SECTION 79. 766.31 (6) of the statutes is amended to read:

766.31 (6) Property owned ~~by a spouse~~ at a marriage ~~after the determination date~~ which occurs after 12:01 a.m. on January 1, 1986, is individual property

of the owning spouse if, at the marriage, the spouse has a marital domicile in this state.

NOTE: Clarifies when property owned by a spouse at the time of marriage is individual property. Under UMPA and Act 186, "property owned by a spouse at a marriage after the determination date is individual property". However, reference to a marriage "after the determination date" is inconsistent with the definition of "determination date" under s. 766.01 (5). The new language more accurately reflects when property owned by a spouse at the time of marriage is individual property: when the marriage occurs after 12:01 a.m., January 1, 1986, if at the time of marriage the spouse has a marital domicile in Wisconsin. The Act makes no attempt to so classify property owned by a spouse at a marriage which occurs after 12:01 a.m., January 1, 1986, if the spouse has a marital domicile in another state; if the spouse later establishes a Wisconsin marital domicile, that property is property that is not individual or marital property.

SECTION 80. 766.31 (7) (a) of the statutes is amended to read:

766.31 (7) (a) By gift during lifetime or by a disposition at death by a 3rd person to that spouse and not to both spouses. A distribution of principal or income from a trust created by a 3rd person to one spouse is the individual property of that spouse unless the trust provides otherwise.

NOTE: Clarifies that a distribution of either principal or income from a trust created by a 3rd person to one spouse is individual property of that spouse. Clarifies, also, that the trust may provide otherwise.

SECTION 81. 766.31 (7) (d) and (e) of the statutes are amended to read:

766.31 (7) (d) By a decree, marital property agreement, ~~written consent~~ or reclassification under sub. (10) designating it as the individual property of the spouse.

(e) As a recovery for damage to property under s. 766.70, except as specifically provided otherwise in a decree, or marital property agreement ~~or written consent~~.

NOTE: Eliminates written consent as a substitute for a marital property agreement in 2 situations. The special committee concluded, after consultation with members of the UMPA drafting committee, that reference to "written consent" in both UMPA and Act 186 is inappropriate in several instances. "Written consent" is defined as "a document signed by a person against whose interests it is sought to be enforced" [s. 766.01 (16)]. Therefore, a written consent is different from, and something less than, a marital property agreement. The special committee concluded that, except in limited circumstances, a written consent should not be used as a substitute for a marital property agreement. Two of the instances for which a written consent should not be used are in sub. (7) (d) and (e). See, also, SECTIONS 128 [s. 766.62 (2)] and 142 [s. 766.75].

Reference to "written consent" is retained in s. 766.55 (4), relating to written consents signed by creditors diminishing the rights of creditors, and s. 766.61 (3) (e), relating to written consent by a spouse concerning a 3rd-party beneficiary of insurance policy proceeds.

SECTION 81m. 766.31 (7p) of the statutes is created to read:

766.31 (7p) Income attributable to all or specified property other than marital property, with respect to which a spouse has executed under s. 766.59 a state-

ment unilaterally designating that income as his or her individual property, is individual property.

SECTION 82. 766.31 (8) of the statutes is amended to read:

766.31 (8) 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.

NOTE: Expressly states what the special committee concluded is implicit in UMPA and Act 186. An exception to the rule is when spouses attempt to establish a joint tenancy or tenancy in common exclusively between themselves with predetermination date property. See SECTION 124 [s. 766.60 (4) (b)].

SECTION 83. 766.31 (10) of the statutes is amended to read:

766.31 (10) Spouses may reclassify their property by gift ~~or~~ marital property agreement, written consent under s. 766.61 (3) (e) or unilateral statement under s. 766.59. 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: Clarifies that the income from an interspousal gift, the principal of which the donee spouse intends at the time the gift is made to be the individual property of the donee spouse, is also the individual property of the donee spouse unless a contrary intent of the donor spouse is established. The special committee concluded that the provision reflects what, in most instances, a donor spouse intends with respect to the classification of income from such property. The special committee also concluded that it is important to allow the donor spouse to implement a contrary intent.

SECTION 84. 766.51 (1) (intro.) of the statutes is amended to read:

766.51 (1) (intro.) ~~Except as provided in sub. (1m),~~ A spouse acting alone may manage and control:

NOTE: Deletes reference to sub. (1m) because sub. (1m) is not an exception to the rule of sub. (1).

SECTION 85. 766.51 (1m) of the statutes is repealed and recreated to read:

766.51 (1m) (a) Notwithstanding any provision in this section except par. (b), for the purpose of obtaining an extension of credit for an obligation described under s. 766.55 (2) (b), a spouse acting alone may manage and control all of the marital property.

(b) Unless the spouse acting alone may otherwise under this section manage and control the property, the right to manage and control marital property under this subsection does not include the right to manage and control marital property described in s. 766.70 (3) (a) to (d) or the right to assign, create a security interest in, mortgage or otherwise encumber marital property.

NOTE: Clarifies the special exception to the marital property management and control rules when a spouse is seeking an extension of credit. (See SECTION 69 [s. 766.01 (2m)] for the definition of "credit".) The revised language clarifies: (1) that the provision on management and control of marital property for credit purposes only applies to obligations incurred in the interest of the marriage or the family [i.e., those obligations described in s. 766.55 (2) (b)]; and (2) that the management and control right under the provision extends only to obtaining unsecured credit and to extensions of credit secured by purchase money security interests. The language permits a spouse to grant a purchase money security interest because, in most transactions, the property purchased will either be nontitled property or property titled in the name of the purchasing spouse.

The provision is included to clarify that each spouse has management and control of marital property, subject to the stated limitations, for purposes of the application of s. 202.7 (d) (3) [see, particularly, sub. (d) (3) (i)] of Regulation B [12 CFR 202.7 (d) (3)], promulgated under the equal credit opportunity act [15 USC 1601 et seq.]. That section of Regulation B provides:

202.7 (d) (3) If a married applicant requests unsecured credit and resides in a community property State or if the property upon which the applicant is relying is located in such a State, a creditor may require the signature of the spouse on any instrument necessary or reasonably believed by the creditor to be necessary, under applicable State law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable State law denied the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.

SECTION 85m. 766.51 (4) of the statutes is amended to read:

766.51 (4) The right to manage and control marital property permits gifts of that property ~~only to the extent provided in s. 766.53,~~ subject to remedies under this chapter.

SECTION 86. 766.51 (8) of the statutes is created to read:

766.51 (8) This section does not affect s. 706.02 (1) (f).

NOTE: Clarifies that the management and control rules of ch. 766 do not affect the statutory requirements relating to participation by both spouses in conveyances alienating certain interests in homesteads.

SECTION 87. 766.51 (9) of the statutes is created to read:

766.51 (9) If an executory contract for the sale of property is entered into by a person having the right of management and control of the property, the rights of all persons then having or thereafter acquiring an interest in the property under this chapter are subject to the terms of the executory contract. This subsection applies to contracts entered into before or after the determination date.

NOTE: Clarifies that the classification of property subject to certain executory contracts (like a buy-sell agreement) does not affect the performance of the contract. Any rights of the nonparty spouse in the property sold attach to the proceeds of the sale; the sale itself is not affected by the rights of the non-

party spouse in the property. Note that the provision applies regardless of which spouse dies first.

While the provision appears to be implicit in Act 186, the special committee concluded that the prevalence and importance of buy-sell agreements warrant specific statutory treatment.

SECTION 88. 766.53 (1) of the statutes is renumbered 766.53 and amended to read:

**766.53 Gifts of marital property to 3rd persons.** 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~~ \$1,000 in a calendar year, or a larger amount if, when made, the gift is reasonable in amount considering the economic position of the spouses. Any other gift of marital property to a 3rd person is subject to ~~sub. (2) s. 766.70 (6)~~ unless both spouses act together in making the gift. Under this section and for the purpose of s. 766.70 (6) (a), in the case of a gift of marital property by a spouse to a 3rd person in which the donor spouse has retained an interest, the gift shall be valued at the full value of the entire transfer of marital property, regardless of any retained interest or interest donated to the other spouse. For purposes of this section only, a gift of a life insurance policy by a spouse to a 3rd person shall be valued at the amount payable under the policy if the insured died at the time the gift was made.

NOTE: The special committee concluded that, for the purpose of determining the application of the gift rule, the value of a gift of marital property by a spouse to a 3rd person where the donor spouse has retained an interest should be the value of the entire transfer of marital property, valued at the time of transfer. The committee recognized special problems presented by these transfers of marital property with respect to analyzing what the value of the gift is and what remedies are and should be available.

Note that, by making these transfers subject to the gift remedy, the other spouse may in effect void the transfer by bringing an action to recover "the property" rather than a compensatory judgment. See SECTION 89 [s. 766.70 (6) (a)].

[The NOTE is accurate as stated, but does not reflect changes made in the course of legislative consideration.]

SECTION 89. 766.53 (2) of the statutes is renumbered 766.70 (6) (a) and amended to read:

766.70 (6) (a) If Except as provided in pars. (b) and (c), if a gift of marital property during marriage by a spouse does not comply with ~~sub. (1) s. 766.53~~, the other spouse may bring an action to recover the property or a compensatory judgment equal to the amount by which the gift exceeded the limit under ~~sub. (1) s. 766.53~~. The other spouse may bring the action against the donating spouse, the gift recipient or both. The other spouse must commence the action within the ~~earlier~~ earliest of either one year after he or she has notice of the gift or ~~3 years after the gift~~, one year after a dissolution or within the time for filing claims under s. 859.05 after the death of either spouse. If the recovery occurs during marriage, it is marital property. If the recovery occurs after a dissolution or the death of either spouse, ~~it~~ the recovery is limited to 50% of the

value of the gift and is individual property recovery that would have been available if the recovery had occurred during marriage.

NOTE: Clarifies that if the recovery occurs after a dissolution or the death of either spouse, the recovery is limited to 50% of the recovery that would have been available if the recovery had occurred during marriage.

Revises the statute of limitations for the gift remedy by eliminating the 3-year statute of limitations and retaining the one-year "discovery" statute of limitations. Specific limitations periods are also provided following dissolution or death. Thus, a spouse must commence an action under the provision within one year after he or she has notice of or, has reason to know of, the gift (or one year after a dissolution or, after the death of either spouse, within the time for filing claims against the decedent's estate). The special committee concluded that the 3-year statute of limitations failed to provide sufficient protection to the nondonor spouse for those gifts regarding which the nondonor spouse would have no opportunity to know or reason to know that a gift had been made.

SECTION 89p. 766.55 (1) of the statutes is amended to read:

766.55 (1) An obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or the family. A statement separately signed by the obligated or incurring spouse at or before the time the obligation is incurred stating that the obligation is or will be incurred in the interest of the marriage or the family is conclusive evidence that the obligation to which the statement refers is an obligation in the interest of the marriage or family, except that the existence of that statement does not affect any interspousal right or remedy.

SECTION 90. 766.55 (2) (c) of the statutes is renumbered 766.55 (2) (c) 1.

SECTION 91. 766.55 (2) (c) 2 of the statutes is created to read:

766.55 (2) (c) 2. An obligation incurred by a spouse before, on or after January 1, 1986, that is attributable to an obligation arising before January 1, 1986, or to an act or omission occurring before January 1, 1986, may be satisfied only from property of that spouse that is not marital property and from that part of marital property which would have been the property of that spouse but for the enactment of this chapter.

NOTE: Corrects an apparent oversight in both UMPA and Act 186. Neither act expressly addresses the satisfaction of an obligation incurred by a spouse, regardless of when incurred, that is attributable to an obligation arising before January 1, 1986, or to an act or omission occurring before January 1, 1986.

SECTION 92. 766.55 (2) (cm) of the statutes is created to read:

766.55 (2) (cm) An obligation incurred by a spouse during marriage, resulting from a tort committed by the spouse during marriage, may be satisfied from the property of that spouse that is not marital property and from that spouse's interest in marital property.

NOTE: Provides that a tort obligation incurred by a spouse during marriage may be satisfied from the property of that spouse that is not marital property and from that spouse's interest in marital property. Under UMPA and Act 186, if a



tort obligation is incurred in the interest of the marriage or family, all of the marital property is subject to satisfaction of the tort obligation. The new provision limits the marital property available for satisfaction of such an obligation to the tortfeasor spouse's interest in marital property; there is no effective way, by marital property agreement, that spouses may limit the exposure of marital property for tort obligations incurred in the interest of the marriage or family because tort creditors will not have notice of the agreement at the time the tort occurs. The special committee concluded that it is appropriate to provide such a limitation by operation of law. It is the understanding of the special committee that a similar amendment to the UMPA will be proposed.

SECTION 93. 766.55 (2m) of the statutes is amended to read:

766.55 (2m) Unless the dissolution decree of annulment, legal separation or divorce or any amendment to the decree so provides, no income of a nonincurring spouse is available for satisfaction of an obligation under sub. (2) (b) after entry of the decree. Marital property assigned to each spouse under that decree is available for satisfaction of such an obligation to the extent of the value of the marital property at the date of the decree. If a dissolution decree provides that the nonincurring spouse is responsible for satisfaction of the obligation, the obligation may be satisfied as if both spouses had incurred the obligation.

NOTE: Permits a creditor to proceed against the spouse assigned responsibility for satisfaction of an obligation under a dissolution decree, whether or not the spouse incurred the obligation. Under current law, the creditor's only direct remedy is against the spouse who incurred the obligation, even if the court judgment makes the nonincurring spouse responsible for the obligation. The new provision is, in part, a recognition of the limitations in the subsection on what property is available to a creditor following dissolution of a marriage.

SECTION 94. 766.55 (3) of the statutes is amended to read:

766.55 (3) This chapter does not alter the relationship between spouses and their creditors with respect to any property or obligation in existence on the determination date. An obligation of a guarantor, surety or indemnitor arising after the determination date under a guaranty or contract of indemnity or surety executed before the determination date is an obligation in existence on the determination date.

NOTE: Clarifies that, with respect to guarantees or contracts of indemnity or surety executed prior to the determination date, an obligation covered under the guaranty or contract arising after the determination date is, for purposes of ch. 766, an obligation in existence on the determination date.

SECTION 95. 766.55 (4m) of the statutes is amended to read:

766.55 (4m) No Except as provided under s. 766.56 (2) (c), no provision of a marital property agreement or of a decree under s. 766.70 adversely affects the interest of a creditor unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred or, in the case of an open-end plan, as defined under s. 766.555 (1) (a), when the plan was entered into. If a creditor obtains actual knowledge of a provision of a marital property agreement or decree after an obligation is incurred or an

open-end plan is entered into, the provision does not adversely affect the interest of the creditor with respect to that obligation or plan, including any renewal, extension, modification or use of the obligation or plan. The effect of this subsection may not be varied by a marital property agreement or a decree. This subsection does not affect the application of ch. 706.

NOTE: Clarifies that a decree issued under the remedy section does not adversely affect the interest of a creditor unless the creditor had actual knowledge of the provision when the obligation to the creditor was incurred (which, in the case of open-end credit, is considered to be at the time the plan was entered into).

Clarifies that the subsection does not affect the application of ch. 706, which deals, among other things, with the effect of recording interests in real property.

Cross-references, for convenience and clarity, the exception to the "actual knowledge" rule found in s. 766.56 (2) (c) [SECTION 103].

SECTION 96. 766.55 (6) of the statutes is created to read:

766.55 (6) Subsections (2) and (2m) and s. 859.18 do not affect the satisfaction of an obligation of a spouse from collateral or other security for that obligation.

NOTE: Emphasizes that the satisfaction-of-obligations provisions of ss. 766.55 and 859.18 do not affect the satisfaction of secured obligations.

SECTION 97. 766.55 (7) of the statutes is created to read:

766.55 (7) Property available under this chapter to satisfy an obligation of a spouse is available regardless of whether the property is located in this state.

NOTE: Adds a subsection providing that property available under ch. 766 to satisfy an obligation of a spouse is available regardless of whether the property is located in Wisconsin. The special committee acknowledges that recognition of the provision may be subject to the laws of other jurisdictions, but concluded the provision may aid creditors attempting to satisfy obligations covered by ch. 766 in other jurisdictions.

SECTION 98. 766.55 (8) of the statutes is created to read:

766.55 (8) After the death of a spouse, property is available for satisfaction of obligations as provided in s. 859.18.

NOTE: See SECTION 169 [s. 859.18].

SECTION 99. 766.555 of the statutes is created to read:

**766.555 Obligations of spouses under open-end plans.** (1) In this section:

(a) "Open-end plan" means credit extended on an account pursuant to a plan under which the creditor may permit a spouse to make purchases or obtain loans, from time to time, directly from the creditor or indirectly by use of a credit card, check or other device, as the plan may provide.

(b) "Open-end plan" includes only those open-end plans entered into by a person whose spouse is not a party to the account.

(2) (a) This subsection applies to spouses for whom the determination date is 12:01 a.m. on January 1, 1986.

(b) Unless additional property is available under par. (c), an obligation incurred by a spouse on or after January 1, 1986, under an open-end plan entered into by that spouse before January 1, 1986, may be satisfied only from property of that spouse that is not marital property and from that part of marital property that would have been the property of that spouse but for the enactment of this chapter.

(c) 1. An obligation described under s. 766.55 (2) (b) incurred by a spouse on or after January 1, 1986, under an open-end plan entered into by that spouse before January 1, 1986, may be satisfied only from property of that spouse that is available under par. (b) and, if the creditor gives written notice complying with this paragraph to both spouses prior to the date the obligation is incurred, from all marital property.

2. The notice under subd. 1 shall describe the nature of the open-end plan and state that an obligation described under s. 766.55 (2) (b) that is incurred under the open-end plan may be satisfied from all marital property of the spouses, including the income of both spouses, and from the property of the incurring spouse that is not marital property.

3. The notice under subd. 1 is considered given on the date it is mailed by the creditor.

4. The notice under subd. 1 may be enclosed in an envelope addressed to the incurring spouse at the last-known address of that spouse appearing on the records of the creditor if a statement appears on the face of the envelope alerting both spouses that the envelope contains important information for both spouses.

(3) (a) This subsection applies to persons for whom the determination date is after 12:01 a.m., January 1, 1986.

(b) Except as provided under par. (c), an obligation incurred by a spouse after the determination date for that spouse, under an open-end plan entered into by that spouse before that determination date, may be satisfied only from all property of that spouse that is not marital property and from that part of marital property which would have been the property of that spouse but for the enactment of this chapter.

(c) An obligation described under s. 766.55 (2) (b) incurred by a spouse after the determination date for that spouse under an open-end plan entered into by that spouse before that determination date may be satisfied from all marital property and all other property of the incurring spouse.

NOTE: Clarifies what property is available for satisfaction of obligations incurred by a spouse under an open-end credit plan entered into by that spouse prior to the last to occur of: (1) marriage; (2) 12:01 a.m. on the date of establishment of a marital domicile in the state; (3) 12:01 a.m. on January 1, 1986. These open-end plans are sometimes referred to as "straddle accounts". The section does not apply to plans to which both spouses are parties because the joint and several

liability aspects of such accounts make it unnecessary to specify what property of the spouses is available to satisfy obligations incurred under the plan.

Subsection (2) applies to an open-end plan entered into before January 1, 1986, whether or not the person who entered into the plan was married at the time, if that person is married and has a marital domicile in Wisconsin on 12:01 a.m., January 1, 1986. If an obligation other than one in the interest of marriage or family is incurred under the plan on or after January 1, 1986, the obligation may be satisfied from property of the incurring spouse that is not marital property and from that part of marital property that would have been the property of that spouse but for the enactment of ch. 766. [The last sentence of this paragraph in the original NOTE has been deleted because it failed to reflect changes made in the course of legislative consideration.]

Subsection (3) applies to open-end plans:

1. Entered into on or after January 1, 1986, and before marriage; or

2. Entered into before establishment of a marital domicile in Wisconsin, whether or not the person who enters into the plan is married at the time.

With respect to these open-end plans, an obligation other than an obligation in the interest of the marriage or family, incurred after marriage or establishment of marital domicile in Wisconsin, whichever is applicable, may be satisfied from all property of the incurring spouse that is not marital property and from that part of marital property which would have been the property of that spouse but for the enactment of ch. 766. If the obligation is in the interest of the marriage or family, it may be satisfied from all marital property and all other property of the incurring spouse.

Subsection (3) does not have a notice requirement corresponding to the notice requirement under sub. (2) because there is no practical way for a creditor to routinely give such a notice under the circumstances addressed by sub. (3). In contrast, under sub. (2), it is anticipated that creditors will give a one-time notice to all Wisconsin residents with existing open-end plans.

SECTION 100. 766.56 (1) of the statutes is repealed and recreated to read:

766.56 (1) If a spouse applies for credit that will result in an obligation described under s. 766.55 (2) (b), the creditor, in evaluating the spouse's creditworthiness, shall consider all marital property available under s. 766.55 (2) (b) to satisfy the obligation in the same manner that the creditor, in evaluating the creditworthiness of an unmarried credit applicant, considers the property of an unmarried credit applicant available to satisfy the obligation.

NOTE: Clarifies what a creditor is required to consider in evaluating the creditworthiness of a spouse who applies for credit that will result in an obligation in the interest of the marriage or family. The repealed provision requires the creditor to "consider the applicant spouse's rights of management and control of marital property under s. 766.51 (1m) in the same manner that the credit grantor evaluates creditworthiness based upon an applicant's rights of management and control of his or her other property". The new language requires the creditor, instead, to consider all marital property available to satisfy the obligation in the same manner that the creditor, in evaluating the creditworthiness of an unmarried credit applicant, considers the property of an unmarried credit applicant available to satisfy the obligation. The special committee concluded that the new language more accurately reflects the intended requirement. The new language also includes definitions for "credit" and "creditor" (see SECTION 69 [s. 766.01 (2m) and (2r)]) and clarifies that the provision only applies to

applications for credit that will result in an obligation in the interest of the marriage or family.

SECTION 101. 766.56 (2) (a) of the statutes is repealed and recreated to read:

766.56 (2) (a) The recording, under s. 59.51 (18), of a marital property agreement or a unilateral statement or revocation under s. 766.59 does not constitute actual or constructive notice to 3rd parties. This paragraph does not affect the application of ch. 706.

NOTE: Clarifies that the provision does not affect the application of ch. 706 which, among other things, deals with the effect of recording interests in real property.

SECTION 102. 766.56 (2) (b) of the statutes is repealed and recreated to read:

766.56 (2) (b) A creditor shall include in every written application for an extension of credit that is governed by chs. 421 to 427 a notice that no provision of a marital property agreement, a unilateral statement under s. 766.59 or a court decree under s. 766.70 adversely affects the interest of the creditor unless the creditor, prior to the time the credit is granted, is furnished a copy of the agreement, statement or decree or has actual knowledge of the adverse provision when the obligation to the creditor is incurred. The notice requirement under this paragraph does not apply to renewals, extensions or modifications or the use of an open-end credit plan.

NOTE: Repeals the provision of Act 186 that permits a creditor to inquire as to whether a credit applicant is married or legally separated (this part of the repealed provision is relocated, see SECTION 104 [s. 766.56 (2) (d)]) and that requires the creditor to inquire as to whether there exists any document which affects or alters the ownership or management and control rights to marital property. Substituted is a notice requirement regarding the effect on creditors of marital property agreements and court decrees under the remedies section that is to be included on written credit applications for extensions of credit governed by the Wisconsin consumer act. The special committee concluded that, generally, the burden should be on the parties to a marital property agreement to make 3rd parties aware of the terms of the agreement. However, the special committee concluded it is worthwhile, where it will be relatively easy for creditors to do so, to give the notice required under the new language. Reference to a "court decree under s. 766.70" in the notice requirement reflects the amendment of s. 766.55 (4m) [SECTION 95].

[The NOTE is accurate as stated, but does not reflect changes made in the course of legislative consideration.]

SECTION 103. 766.56 (2) (c) of the statutes is amended to read:

766.56 (2) (c) If the applicant spouse applying for credit in any credit transaction discloses the existence of a currently effective ~~document~~ marital property agreement or a decree issued under s. 766.70 and provides a copy of it to the creditor prior to the time credit is granted or, in the case of an open-end plan, as defined under s. 766.555 (1) (a), prior to the time the open-end plan is entered into, the creditor is bound by any property classification, characterization of an obligation, or management and control right contained in the ~~document~~ agreement or decree. If a spouse discloses the existence of an agreement or decree after credit is granted or an open-end plan is

entered into, the creditor is not bound under this paragraph by the agreement or decree with respect to that obligation or open-end plan, including any renewals, extensions, modifications or use of the obligation or open-end plan.

NOTE: Amended to reflect the changes to s. 766.56 (2) (b) [SECTION 102].

SECTION 104. 766.56 (2) (d) of the statutes is created to read:

766.56 (2) (d) When a person applies for credit, the creditor may inquire as to whether the person is married, unmarried or separated, under a decree of legal separation.

NOTE: Relocates a provision of s. 766.56 (2) (b).

[The NOTE is accurate as stated, but does not reflect changes made in the course of legislative consideration.]

SECTION 105. 766.56 (3) (a) of the statutes is created to read:

766.56 (3) (a) In this subsection, "extends credit" means that an open-end credit plan, as defined under s. 421.301 (27), is established after the determination date, or that credit other than open-end credit is extended after the determination date. The term does not include renewals, extensions, modifications or the use of an open-end credit plan. This subsection does not apply to an open-end credit plan described under s. 766.555 (2) or (3).

NOTE: See the NOTE to SECTION 107 [s. 766.56 (3) (b)].

SECTION 106. 766.56 (4) of the statutes is repealed and recreated to read:

766.56 (4) (a) Any financial organization or any other credit-granting commercial institution that violates sub. (1) is subject to the penalties under s. 138.20.

(b) Except as provided in par. (c), a creditor that fails to give notice under sub. (2) (b) is liable to each applicant spouse in the amount of \$25. Except as provided in par. (c), a creditor that fails to give notice under sub. (3) is liable to the nonapplicant spouse in the amount of \$25.

(c) A creditor is not subject to a penalty under par. (b) if the creditor shows by a preponderance of the evidence that failure to give notice was unintentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

NOTE: Repeals the provision permitting a spouse who is extended credit that results in an obligation in the interest of the marriage or family to direct the creditor to extend the credit in the spouse's name or, if the creditor regularly extends credit in the names of both spouses to a marriage, in the names of both spouses. The special committee concluded that the situation to which the provision appears primarily to be addressed — creditors extending credit in the husband's name when the wife is the applicant spouse and is creditworthy in her own right — will not occur.

The recreated provision:

1. Relocates the penalty provision found in the last sentence of s. 766.56 (1).
2. Provides penalties for creditors who fail to give notice, under s. 766.56 (2) (b), of the effect of marital property agreements or court decrees under s. 766.70 and for creditors who

fail, under s. 766.56 (3), to give notice to a nonapplicant spouse. The provision also gives creditors a defense, based on bona fide error, for failure to give notice.

SECTION 107. 766.56 (5) (a) of the statutes is renumbered 766.56 (3) (b) and amended to read:

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

NOTE: This SECTION and SECTION 105 [s. 766.56 (3) (a)] clarify and refine the requirement that a creditor who extends credit to a spouse that may result in an obligation in the interest of the marriage or family give notice to the nonapplicant spouse, by:

1. Making the requirement applicable only to credit transactions governed under the Wisconsin consumer act.
2. Making the requirement applicable only to Wisconsin consumer act transactions that: (a) establish an open-end credit plan after the determination date; or (b) extend credit other than open-end credit after the determination date.

The changes are intended to clarify that the notice requirement under this provision does not apply to incidental creditors or, generally, to existing credit plans. See SECTION 99 [s. 766.555] for notice requirements under certain other open-end plans.

SECTION 108. 766.56 (5) (b) of the statutes is renumbered 766.56 (3) (c).

SECTION 109. 766.565 of the statutes is created to read:

**766.565 Relationship to consumer act.** (1) In this section, "open-end credit plan" has the meaning given under s. 421.301 (27). The term includes only those plans governed by chs. 421 to 427.

(2) Except as provided under sub. (6), this section does not impose any additional or separate notice requirements on a creditor.

(3) The spouse of a person who incurs an obligation described under s. 766.55 (2) (b) and governed by chs. 421 to 427 may exercise rights and remedies available to the incurring spouse under chs. 421 to 427.

(4) Section 422.305 does not apply to the spouse of a person who incurs an obligation described under s. 766.55 (2) (b) unless that spouse also signs the writing

evidencing the credit transaction or a separate guarantee or similar instrument and unless the other requirements of s. 422.305 are met.

(5) The spouse of a person who establishes an open-end credit plan that may result in an obligation described under s. 766.55 (2) (b) may terminate the plan by giving written notice of termination to the creditor. A writing evidencing an open-end credit plan may include a provision that authorizes the creditor to declare the account balance due and payable upon receipt of notice of termination, notwithstanding s. 425.103 or 425.105. Notice of termination does not affect the liability of the incurring spouse or the availability of the incurring spouse's interest in marital property or other property of that spouse to satisfy obligations incurred under the open-end credit plan, both before and after the notice of termination. Subject to the limits under s. 422.4155 (1), the terminating spouse's interest in marital property continues to be available under s. 766.55 (2) (b) to satisfy obligations incurred in the interest of the marriage or family both before and after notice of the termination. A creditor may consider in its evaluation of subsequent applications for credit the fact that a prior open-end credit plan offered by the creditor and entered into by the applicant spouse has been terminated under this subsection.

(6) Written notice to a spouse under s. 422.415 (2) (a) or (c) concerning an increase in the rate of finance charge is not effective with respect to the interest of the nonincurring spouse in marital property unless notice is given to both spouses. Notice is considered given on the date it is mailed by the creditor. The notice may be enclosed in an envelope addressed to the incurring spouse at the last-known address of that spouse appearing on the records of the creditor if a statement appears on the face of the envelope alerting the spouses that the envelope contains important information for both spouses.

(7) With respect to consumer credit transactions, the commissioner of banking may promulgate rules to interpret this chapter and chs. 421 to 427, consistent with the purposes and policies of this chapter and chs. 421 to 427.

NOTE: Harmonizes Act 186 with the Wisconsin consumer act, chs. 421 to 427.

Subsection (3) clarifies that the spouse of a person who incurs an obligation in the interest of the marriage or family in a transaction governed under the Wisconsin consumer act "stands in the shoes of" the applicant spouse insofar as rights and remedies under the Wisconsin consumer act are concerned.

Subsection (4) clarifies that s. 422.305 does not apply to the spouse of a person who incurs an obligation in the interest of the marriage or family unless that spouse also signs the writing evidencing the credit transaction or a separate guaranty or similar instrument and unless the other requirements of s. 422.305 are met. Section 422.305 provides that no person is obligated to assume personal liability for payment of an obligation arising out of a consumer credit transaction unless the person, in addition to signing the writing evidencing the consumer credit transaction or a separate guaranty or similar

instrument, either receives a copy of each instrument, document, agreement and contract which is signed by the customer and which evidences the customer's obligation to pay, or signs and receives at the time of signing a separate instrument in substantially the form specified under s. 422.305.

Subsection (5) permits the spouse of a person who establishes an open-end credit plan under the Wisconsin consumer act that may result in an obligation in the interest of the marriage or family to terminate the plan by giving written notice of termination to the creditor. Currently, under the Wisconsin consumer act, a person personally obligated under an open-end credit plan may terminate his or her liability for future extensions of credit under the plan by giving notice to the creditor [s. 422.4155]. Subsection (5) supplements that provision by permitting a spouse who is not a party to an open-end credit plan to terminate the plan itself when that spouse's interest in marital property may be subject to satisfaction of obligations incurred by the other spouse under the plan.

Subsection (5) also contains the following related provisions:

1. The writing evidencing an open-end credit plan may include a provision which authorizes the creditor to declare the account balance due and payable upon receipt of notice of termination.

2. Notice of termination does not affect the liability of the incurring spouse or the availability of the incurring spouse's interest in marital property or other property to satisfy obligations incurred under the plan both before and after notice of termination.

3. Subject to the limits under s. 422.4155 (1), the terminating spouse's interest in marital property continues to be available under s. 766.55 (2) (b) to satisfy obligations incurred in the interest of the marriage or family both before and after notice of the termination. The limits under s. 422.4155 (1) referred to are: (a) the terminating spouse's liability for future obligations incurred under s. 766.55 (2) (b) continues as to loans extended to, or purchases made by, the other spouse under the plan for 15 business days after the creditor's receipt of the termination notice; but (b) the terminating spouse's liability may not exceed the greater of the requested and contracted credit limit under the plan or the balance outstanding under the plan on receipt of the termination notice, plus \$500.

4. A creditor may consider in its evaluation of subsequent applications for credit the fact that a prior open-end credit plan offered by the creditor and entered into by the applicant spouse has been terminated under sub. (5).

Subsection (6) provides that written notice to a spouse under the Wisconsin consumer act concerning an increase in the rate of finance charge is not effective with respect to the interest of the nonincurring spouse in marital property unless notice is given to both spouses, as provided under the subsection.

Subsection (7) permits the commissioner of banking to promulgate rules to further interpret ch. 766 and the Wisconsin consumer act, consistent with the purposes and policies of ch. 766 and the Wisconsin consumer act. It is anticipated that additional issues concerning the relationship of the marital property act and the Wisconsin consumer act will arise. It was the consensus of the special committee that any additional issues are best resolved by rule. It is anticipated that the ad hoc group that currently advises the commissioner of banking regarding rules promulgated under the Wisconsin consumer act will perform the same role with respect to rules promulgated under this subsection.

SECTION 110. 766.57 (2) of the statutes is amended to read:

766.57 (2) Notice of the existence of a marital property agreement, a marriage or a ~~dissolution~~ the termination

of a marriage does not affect the status of a purchaser as a bona fide purchaser.

NOTE: Restores language of UMPA which was inadvertently changed by Act 186. Reference to "dissolution" does not include termination of a marriage by the death of a spouse [s. 766.01 (7)]. UMPA clearly intends to protect bona fide purchasers who have notice of the termination, by death or otherwise, of a marriage.

SECTION 111. 766.57 (3) of the statutes is amended to read:

766.57 (3) Marital property purchased by a bona fide purchaser from a spouse having the right to manage and control the property under s. 766.51 is acquired free of any claim of the other spouse and of any claim asserted through or under the other spouse. The effect of this subsection may not be varied by a marital property agreement.

NOTE: Expressly states what is implicit in UMPA and Act 186.

SECTION 112. 766.58 (1) of the statutes is amended to read:

766.58 (1) A marital property agreement shall be a document signed by both spouses. ~~It~~ Only the spouses may be parties to a marital property agreement. A marital property agreement is enforceable without consideration.

NOTE: Clarifies that marital property agreements under s. 766.58 are agreements exclusively between the spouses, with no 3rd party.

SECTION 113. 766.58 (3) (intro.) of the statutes is amended to read:

766.58 (3) (intro.) Except as provided in ss. 766.15, 766.55 (4m) ~~and~~, 766.57 (3) ~~and~~ 859.18 (6), and in sub. (2), in a marital property agreement spouses may agree with respect to any of the following:

NOTE: See SECTION 169.

SECTION 114. 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 disposition. 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: Permits, unless the marital property agreement expressly provides otherwise and except to the extent property is held in trust, a surviving spouse to unilaterally amend a marital property agreement that provides for the nontestamentary disposition of property at the death of the 2nd spouse to die. The special committee concluded that the possibility of unintended hardship because of changed circumstances when the surviving spouse survives the deceased spouse for a substantial period warrants permitting unilateral amendment of the agreement unless the agreement expressly

provides otherwise and, to protect trusts, except to the extent that property is held in trust.

SECTION 115. 766.58 (6) (c) 1 of the statutes is amended to read:

766.58 (6) (c) 1. Did not receive fair and reasonable disclosure, under the circumstances, of the other spouse's property or financial obligations; and

NOTE: See the NOTE to SECTION 116 [s. 766.58 (6) (c) 2].

SECTION 116. 766.58 (6) (c) 2 of the statutes is repealed.

NOTE: Repeals language intended to establish a minimum disclosure requirement for enforceability of marital property agreements. The repealed language provided that one of the necessary criteria for establishing unenforceability of a marital property agreement was that the spouse against whom enforcement is sought prove that he or she:

"Did not voluntarily and expressly waive in a written consent any right to disclosure of the other spouse's property or financial obligations beyond that actually provided, or did waive the right to disclosure of the general categories of the other spouse's assets at approximate fair market value less general categories of the other spouse's liabilities at approximate fair market value."

The special committee concluded that the repealed language is unclear and unduly complex. Further, the special committee concluded that, while it may be desirable to establish a minimum disclosure requirement, it is difficult to establish a minimum requirement that is not excessive under some circumstances. Therefore, the provision is repealed.

The enforceability provisions continue to require fair and reasonable disclosure of the other spouse's property or financial obligations. See SECTION 115 [s. 766.58 (6) (c) 1]. The disclosure required for an enforceable marital property agreement will depend on the circumstances of each case. Under some circumstances it is possible that no disclosure will be required for an enforceable agreement.

SECTION 117. 766.58 (6) (c) 3 of the statutes is renumbered 766.58 (6) (c) 2.

SECTION 117m. 766.58 (8) and (9) (b) of the statutes are amended to read:

766.58 (8) The issue of whether a marital property agreement is unconscionable is for the court to decide as a matter of law. In the event that legal counsel is retained in connection with a marital property agreement the fact that ~~each party to a marital property agreement is not represented by independent both parties are represented by one counsel or that one party is represented by counsel and the other party is not represented by counsel~~ does not by itself make a marital property agreement unconscionable or otherwise affect its enforceability, ~~if each spouse waived independent representation in writing.~~

(9) (b) If a marital property agreement modifies or eliminates spousal support so as to make one spouse eligible for public assistance ~~upon or after at the time of dissolution of the marriage or termination of the marriage by death~~, the court may require the other spouse or the other spouse's estate to provide support necessary to avoid that eligibility, notwithstanding the marital property agreement.

NOTE: Restores UMPA language regarding the point at which eligibility for public assistance triggers the provision,

i.e., "at the time of" dissolution, rather than "upon or after" dissolution.

Revises the provision so that it also applies at the termination of a marriage by the death of a spouse. See s. 861.35, regarding a court's authority to order the decedent spouse's estate to provide support to the surviving spouse.

SECTION 119. 766.58 (12) of the statutes is repealed and recreated to read:

766.58 (12) (a) A provision of a document signed before the determination date by spouses or unmarried persons who subsequently married each other, which provision affects the property of either of them and is enforceable by either of them without reference to this chapter, is not affected by this chapter except as provided otherwise in a marital property agreement made after the determination date.

(b) If a provision or an amendment to a provision in a document described under par. (a) is intended to negate, apply or modify any right or obligation which may be acquired under 1983 Wisconsin Act 186, 1985 Wisconsin Act .... (this act) or a community property system, the provision or amendment is enforceable after the determination date if the document was enforceable when executed or, if it is executed after April 4, 1984, either was enforceable when executed or would be enforceable if it were executed after the determination date.

(c) This subsection does not affect a marital property agreement executed under s. 766.585.

NOTE: Restores language of UMPA with the exception that the subsection applies to documents signed before the "determination date", rather than only to those signed before the "effective date". UMPA, by referencing only documents signed before the effective date, appears to be in error. Restoration of UMPA language, with the exception of the noted change, is not intended to change the substance of the provision. The special committee concluded that the language of Act 186, while different in style, is identical in substance to the UMPA language. The latter is restored because the Act 186 language was the source of a number of questions.

[The NOTE is accurate as stated, but does reflect changes made in the course of legislative consideration.]

SECTION 120. 766.58 (13) of the statutes is created to read:

766.58 (13) (a) With respect to a provision of a marital property agreement that is effective upon or after dissolution or termination by death of the marriage, any statute of limitations applicable to enforcement of the provision is tolled until dissolution or termination by death of the marriage, respectively.

(b) After the death of a spouse, no action concerning a marital property agreement may be brought later than 6 months after the inventory is filed under s. 858.01. If an amended inventory is filed, the action may be brought within 6 months after the filing of the amended inventory if the action relates to information contained in the amended inventory that was not contained in a previous inventory.

(c) The court may extend the 6-month period under par. (b) for cause if a motion for extension is made within the applicable 6-month period.

NOTE: The special committee concluded that, in order to avoid the potentially disruptive effect of compelling litigation between spouses during marriage in order to escape the running of any applicable statute of limitations, any applicable limitations period should be tolled during the marriage of the parties to a marital property agreement with regard to provisions of the agreement that are effective upon or after dissolution or termination of the marriage. Note, however, that equitable defenses limiting the time for enforcement, such as laches and estoppel, will still be available to either party. The provision is based on section 8 of the uniform premarital agreement act, but is not as broad in scope as that section.

The special committee also concluded that after the death of a spouse the period for enforcing marital property agreements should be limited. The provision thus limits the time for bringing an action concerning a marital property agreement after the death of a spouse and triggers the period with the filing of the inventory.

SECTION 121. 766.58 (14) of the statutes is created to read:

766.58 (14) Limitations on the effect of marital property agreements for state income tax purposes are set forth in ch. 71.

NOTE: Cross-references limitations in ch. 71 on the effect of marital property agreements for state income tax purposes. [The remainder of this paragraph in the original NOTE has been deleted because it failed to reflect changes made in the course of legislative consideration.]

SECTION 122. 766.585 of the statutes is created to read:

**766.585 Marital property agreements before determination date.** (1) After April 4, 1984, and before their determination date, spouses or unmarried persons who subsequently marry each other may execute a marital property agreement under s. 766.58, which is intended to apply only after their determination date, to the same extent that persons may execute a marital property agreement under s. 766.58 after their determination date. The marital property agreement does not apply before the persons' determination date. Upon application, the marital property agreement has the same effect as if executed after the persons' determination date.

(2) Notwithstanding the execution of the marital property agreement before the persons' determination date and notwithstanding the January 1, 1986 and 1985 Wisconsin Act .... (this act), the law in effect on the date when the marital property agreement applies, not on the date of execution of the marital property agreement, applies to the execution and enforceability or other legal effect of the marital property agreement.

(3) A document executed by spouses or unmarried persons who subsequently marry each other which is intended to apply in whole or in part before their determination date is governed by s. 766.58 (12).

NOTE: Clarifies that marital property agreements under s. 766.58 may be executed before the determination date to take effect on the determination date. The special committee concluded that the clarification is a particularly important transition provision.

SECTION 122m. 766.587 of the statutes is created to read:

**766.587 Statutory individual property classification agreement.** (1) **GENERALLY.** (a) Spouses may execute a statutory individual property classification agreement under this section to classify all the property of the spouses, including property presently owned and property acquired in the future but before the agreement terminates, as the individual property of the owner. Ownership of the property of the spouses is determined as if it were December 31, 1985. Except as provided in this section, s. 766.58 applies to an agreement under this section. Persons intending to marry each other may execute an agreement as if married, but the agreement becomes effective only upon their marriage. The form of the agreement is set forth in sub. (7).

(b) 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 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.

(2) **EXECUTION.** An agreement under this section is executed when signed by both spouses.

(3) **EFFECTIVE PERIOD.** (a) An agreement under this section may be executed on or after January 1, 1986. If executed before January 1, 1986, it is effective on January 1, 1986, or upon the marriage of the parties, whichever is later. If executed on or after January 1, 1986, it is effective when executed or upon the marriage of the parties, whichever is later.

(b) An agreement under this section terminates on January 1, 1987. Termination does not affect the classification of property acquired before termination. Property acquired after termination is classified as provided under this chapter.

(4) **ENFORCEABILITY.** An agreement under this section is enforceable without the disclosure of a spouse's property or financial obligations to the other spouse.

(5) **EFFECT ON SUPPORT AND AT DIVORCE.** An agreement under this section does not affect the duty of support that spouses have to each other or the determination of property division under s. 767.255 or of maintenance payments under s. 767.26.

(6) **RIGHTS OF SURVIVING SPOUSE.** Notwithstanding the fact that an agreement under this section is in effect at, or has terminated before, the death of a spouse who is a party to the agreement, the surviving spouse may elect under ss. 861.02 and 861.03. For the purpose of the election, in addition to the property described in s. 851.055, property acquired during marriage and after the determination date which would have been marital property but for the agreement is deferred marital property.

(7) **STATUTORY INDIVIDUAL PROPERTY CLASSIFICATION AGREEMENT FORM.** The following is the form for a

statutory individual property classification agreement under this section:

NOTICE TO PERSONS  
WHO SIGN THIS AGREEMENT:

1. EFFECTIVE JANUARY 1, 1986, A NEW PROPERTY LAW, KNOWN AS THE MARITAL PROPERTY SYSTEM, GOVERNS THE PROPERTY RIGHTS OF MARRIED PERSONS IN WISCONSIN. UNDER THE MARITAL PROPERTY SYSTEM, EACH SPOUSE HAS A 50% OWNERSHIP INTEREST IN PROPERTY ACQUIRED DURING MARRIAGE DUE TO THE EFFORTS OF EITHER OR BOTH SPOUSES, SUCH AS WAGES, DEFERRED EMPLOYMENT BENEFITS, LIFE INSURANCE, INCOME FROM PROPERTY AND CERTAIN APPRECIATION OF PROPERTY. BY ENTERING INTO THIS AGREEMENT, YOU HAVE AGREED TO RELINQUISH YOUR RIGHTS TO AN AUTOMATIC OWNERSHIP INTEREST IN SUCH PROPERTY ACQUIRED DURING 1986.

2. CLASSIFICATION BY THIS AGREEMENT OF YOUR AND YOUR SPOUSE'S PROPERTY AS THE INDIVIDUAL PROPERTY OF THE OWNER MAY AFFECT YOUR ACCESS TO CREDIT, THE ACCUMULATION OF AND THE MANAGEMENT AND CONTROL OF PROPERTY BY YOU DURING YOUR MARRIAGE AND THE AMOUNT OF PROPERTY YOU HAVE TO DISPOSE OF AT YOUR DEATH.

3. THIS AGREEMENT TERMINATES ON JANUARY 1, 1987. IF YOU WISH TO CHANGE THIS AGREEMENT BEFORE JANUARY 1, 1987, OR IF YOU WISH TO CONTINUE TO CLASSIFY YOUR PROPERTY AS PROVIDED IN THIS AGREEMENT AFTER IT TERMINATES ON JANUARY 1, 1987, YOU MAY DO SO BY EXECUTING A NEW MARITAL PROPERTY AGREEMENT THAT COMPLIES WITH SECTION 766.58, WISCONSIN STATUTES.

4. THIS AGREEMENT DOES NOT AFFECT RIGHTS AT DIVORCE.

5. IN GENERAL, THIS AGREEMENT IS NOT BINDING ON CREDITORS UNLESS THE CREDITOR IS FURNISHED A COPY OF THE AGREEMENT BEFORE CREDIT IS EXTENDED. IN ADDITION, THIRD PARTIES OTHER THAN CREDITORS MIGHT NOT BE BOUND BY THIS AGREEMENT UNLESS THEY HAVE ACTUAL KNOWLEDGE OF THE TERMS OF THE AGREEMENT.

6. THIS AGREEMENT MAY AFFECT YOUR TAXES.

7. THIS AGREEMENT MAY AFFECT ANY PREVIOUS MARRIAGE AGREEMENT ENTERED INTO BY YOU AND YOUR SPOUSE.

8. THIS AGREEMENT DOES NOT ALTER THE LEGAL DUTY OF SUPPORT THAT

SPOUSES HAVE TO EACH OTHER OR THAT A SPOUSE HAS TO HIS OR HER CHILDREN.

9. BOTH SPOUSES MUST SIGN THIS AGREEMENT. IF SIGNED BEFORE JANUARY 1, 1986, IT IS EFFECTIVE ON JANUARY 1, 1986, OR THE DATE THE PARTIES MARRY, WHICHEVER IS LATER. IF SIGNED ON OR AFTER JANUARY 1, 1986, IT IS EFFECTIVE ON THE DATE SIGNED OR THE DATE THE PARTIES MARRY, WHICHEVER IS LATER.

STATUTORY INDIVIDUAL  
PROPERTY CLASSIFICATION  
AGREEMENT

(Pursuant to Section 766.587, Wisconsin Statutes)

This agreement is made and entered into by .... and ...., (husband and wife) (who intend to marry) (strike one).

The parties to this agreement agree to classify all their property, including property owned by them now and property acquired before January 1, 1987, as the individual property of the owning spouse, and agree that ownership of their property shall be determined as if it were December 31, 1985.

This agreement terminates on January 1, 1987.

Signature .... Date ....

Print Name

Here: ....

Address: ....

Signature .... Date ....

Print Name

Here: ....

Address: ....

[NOTE: Each spouse should retain a copy of the agreement for himself or herself.]

(8) OTHER MEANS OF CLASSIFICATION. This section is not the exclusive means by which spouses may, before January 1, 1987, classify their property as the individual property of the owner.

SECTION 122r. 766.59 of the statutes is created to read:

**766.59 Unilateral statement; income from individual property.** (1) A spouse may unilaterally execute a written statement which classifies the income attributable to all or certain of that spouse's property other than marital property as individual property.

(2) (a) The statement is executed when signed by the executing spouse and acknowledged by a notary. If executed before January 1, 1986, the statement is effective on January 1, 1986, or at a later time if provided otherwise in the statement. If executed on or after January 1, 1986, the statement is effective when executed or at a later time if provided otherwise in the statement.

(b) Within 5 days after the statement is signed, the executing spouse shall notify the other spouse of the statement's contents by personally delivering a copy to the other spouse or by sending a copy by certified mail to the other spouse's last-known address. Failure



to give notice is a breach of the duty of good faith imposed by s. 766.15.

(c) The executing spouse may record the statement in the county register of deeds office under s. 59.51 (18).

(3) Any income of the property designated in the statement which accrues on or after the date the statement becomes effective and before a revocation under sub. (4) is individual property. However, a statement only affects income accrued during the marriage during which the statement was executed.

(4) A statement may be revoked in writing by the executing spouse. The revoking spouse shall notify the other spouse of the revocation by personally delivering a copy to the other spouse or by sending a copy by certified mail to the other spouse's last-known address. The revoking spouse may record the revocation in the county register of deeds office under s. 59.51 (18).

(5) With respect to its effect on 3rd parties, a statement or a revocation shall be treated as if it were a marital property agreement.

SECTION 123. 766.60 (4) of the statutes is renumbered 766.60 (4) (a) and amended to read:

766.60 (4) (a) Spouses may hold property in any other form permitted by law, including but not limited to a concurrent form or a form that provides survivorship ownership. Except as provided in par. (b) and except with respect to any remedy a spouse has under this chapter, whether a tenancy in common or joint tenancy was created before or after the determination date, to the extent the incidents of the tenancy in common or joint tenancy conflict with or differ from the incidents of property classification under this chapter, the incidents of the tenancy in common or of the joint tenancy, including the incident of survivorship, control.

NOTE: Clarifies that the holding of property in tenancy in common or joint tenancy does not affect the incidents of the tenancy in common or joint tenancy, including the incident of survivorship. The provision applies to: (1) existing tenancies in common and joint tenancies exclusively between spouses; (2) existing tenancies in common and joint tenancies in which at least one spouse is a tenant; and (3) tenancies in common and joint tenancies created after the determination date in which at least one spouse and a 3rd party are tenants. Thus, to the extent that the incidents of such tenancies in common and joint tenancies conflict with or differ from the incidents of property classification under ch. 766, the incidents of the tenancies in common and joint tenancies control, regardless of the classification of the property (although any remedy a spouse may have under ch. 766 in connection with the tenancy in common or joint tenancy is unaffected by the rule).

This clarification is in response to concern about the effect of Act 186 on existing joint tenancies in which at least one spouse is a tenant. The special committee concluded there was no intent in Act 186 to alter the nonprobate survivorship aspect of these joint tenancies (or the other joint tenancies covered by the provision) or any of the other incidents of these joint tenancies (e.g., unilateral severance), regardless of the classification of the property held in joint tenancy.

See SECTION 124 [s. 766.60 (4) (b)] regarding attempts to establish joint tenancies and tenancies in common exclusively between spouses on or after January 1, 1986.

SECTION 124. 766.60 (4) (b) of the statutes is created to read:

766.60 (4) (b) 1. Except as provided in subd. 2:

a. 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 under sub. (5).

b. 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.

2. A joint tenancy or tenancy in common exclusively between spouses which is given to the spouses by a 3rd party after the determination date is survivorship marital property or marital property, respectively, unless the donor provides otherwise.

NOTE: Classifies as survivorship marital property any property regarding which it was intended to establish a joint tenancy exclusively between spouses on or after January 1, 1986 (or, more precisely, after the determination date), and classifies as marital property any property regarding which it was intended to establish a tenancy in common exclusively between spouses on or after January 1, 1986 (or, again, after the determination date). This property is so classified for simplicity and because the classification arguably represents what most spouses will intend when they attempt to establish a joint tenancy or tenancy in common after the Act 186 is in effect. 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. [This paragraph of the NOTE is accurate as stated, but does not reflect changes made in the course of legislative consideration.]

It appears that the most significant difference between joint tenancy and survivorship marital property, other than the treatment of basis at the death of a spouse, is that a joint tenant may unilaterally destroy the right of survivorship (for example, by conveying his or her interest in the joint tenancy). In contrast, the ability of a spouse to unilaterally destroy the right of survivorship in survivorship marital property depends, first, on the form in which the property is held (see s. 766.60 (5)) and, 2nd, on whether the entire item is transferred (if only a portion of survivorship marital property is transferred by a spouse, the remaining portion is still survivorship marital property).

SECTION 125. 766.60 (5) of the statutes is renumbered 766.60 (5) (a).

SECTION 126. 766.60 (5) (b) and (c) of the statutes are created to read:

766.60 (5) (b) A real estate mortgage, a security interest under ch. 409 or a lien under s. 71.13 (3) (b) or 72.86 (2) or ch. 49 or 779 on or against the interest of a spouse in survivorship marital property does not defeat the right of survivorship on the death of the spouse. The surviving spouse takes the interest of the deceased spouse subject to the mortgage, security interest or lien.

(c) A judgment lien on the interest of a spouse in survivorship marital property does not defeat the right of survivorship on the death of the spouse. If execu-

tion on the judgment lien was issued before the spouse's death the surviving spouse takes the interest of the deceased spouse subject to the lien. If execution on the judgment lien was not issued before the spouse's death, the surviving spouse takes the interest of the deceased spouse free of the judgment lien, unless the judgment lien is on the interests of both spouses in the survivorship marital property and all of the property of the spouses was available under s. 766.55 to satisfy the obligation for which the judgment was rendered.

NOTE: Makes the effect of the specified mortgages, security interests and liens on survivorship marital property identical to their effect on joint tenancies under s. 700.24. The rule relating to the effect of a judgment lien on the interest of a spouse in survivorship marital property is the special committee's interpretation of the application of *Northern State Bank v. Toal*, 69 Wis. 2d 50 (1975), to survivorship marital property.

SECTION 126m. 766.61 (3) (c) of the statutes is amended to read:

766.61 (3) (c) The ownership interest and proceeds of a policy ~~issued during marriage~~ which designates the spouse of the insured as the owner are individual property of its owner, regardless of the classification of property used to pay premiums on the policy.

SECTION 127. 766.61 (3) (e) of the statutes is repealed and recreated 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 spouses'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.

NOTE: Restores UMPA language and revises the UMPA provision by expressly providing that a written consent may relinquish a portion of a spouse's interest, not just the entire interest, in the ownership interest or proceeds or both of an insurance policy. Also, a spouse's interest in the property used to pay premiums on the policy is made an interest that may be relinquished, in whole or in part, by such a consent. In addition, a new rule is created providing that unless the consent expressly provides otherwise a written consent by a spouse to the designation of another person as the beneficiary of the proceeds of an insurance policy is revocable and is effective only with respect to the beneficiary named in the consent. [This paragraph of the NOTE is accurate as stated,

but does not reflect changes made in the course of legislative consideration.]

The special committee concluded that the revisions introduce a desirable level of flexibility with regard to these written consents and provide a desirable element of protection for spouses who execute them.

SECTION 127g. 766.61 (3) (f) and (4) of the statutes are amended to read:

766.61 (3) (f) ~~Unless the spouses provide otherwise in a marital property agreement, designation~~ Designation of a trust as the beneficiary of the proceeds of a policy with a marital property component does not by itself reclassify that component.

(4) This section does not affect a creditor's interest in the ownership interest or proceeds of a policy assigned to the creditor as security or payable to the creditor ~~as security~~.

SECTION 128. 766.62 (2) of the statutes is amended to read:

766.62 (2) A deferred employment benefit attributable to employment of a spouse occurring during marriage 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 ~~the multiplication of 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. Unless provided otherwise in a decree, ~~or marital property agreement or written consent~~, a mixed property deferred employment benefit shall be valued as of a dissolution or an employe spouse's death.

NOTE: Removes what the special committee concluded is an inappropriate reference to "written consent". The special committee concluded that there is no overriding reason to permit a written consent to address the issue of valuation of a mixed property deferred employment benefit. See the NOTE to SECTION 81 [s. 766.31 (7) (d) and (e)].

SECTION 129. 766.63 (2) (intro.) and (b) of the statutes are amended to read:

766.63 (2) (intro.) Application by one spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity or managerial activity to either spouse's ~~individual~~ individual property other than marital property creates marital property attributable to that application if both of the following apply:

(b) Substantial appreciation of the ~~individual~~ property results from the application.

NOTE: Clarifies that the appreciation rule applies to either spouse's property other than marital property, rather than solely to either spouse's individual property. The clarification is significant since it expands the pool of property to which the appreciation rule applies. According to members of the UMPA drafting committee, reference to "individual property" in UMPA is in error; it was intended that the rule apply to all of the spouse's property other than marital property, not just individual property.

SECTION 130. 766.70 (title) and (1) of the statutes are amended to read:

**766.70 (title) Remedies.** (1) A spouse has a claim against the other spouse for breach of the duty of good faith imposed by s. 766.15 resulting in damage to the claimant spouse's ~~present undivided 50% interest in marital property.~~ Except as otherwise provided in ~~s. 766.53 (2) sub. (6),~~ no spouse may commence an action under this subsection later than 3 6 years after acquiring actual knowledge of the facts giving rise to the claim.

NOTE: Revises the general statute of limitations applicable to remedies for consistency with the limitations period under the general statute of limitations applicable to marital property agreements (although the latter statute of limitations does not include a discovery rule). See s. 893.43.

[The NOTE is accurate as stated, but does not reflect changes made in the course of legislative consideration.]

SECTION 131. 766.70 (2) and (3) (intro.) and (a) of the statutes are amended to read:

766.70 (2) A Upon request of a spouse, a court may order an accounting of the spouses' property and obligations and may determine rights of ownership in, beneficial enjoyment of or access to marital property and the classification of all property of the spouses.

(3) (intro.) A Upon request of a spouse, a court may order the name of a the spouse added to marital property or to a document evidencing ownership of marital property held in the name of the other spouse alone except with respect to any of the following:

(a) An interest in a partnership or joint venture held by the other spouse as a general partner or as a participant.

NOTE: Clarifies that the remedies are available only to spouses (not to 3rd parties).

Adds interests in joint ventures to the types of property not subject to the add-a-name remedy. The special committee concluded that joint ventures are sufficiently similar to partnerships to warrant including joint ventures in the property excluded from the remedy.

SECTION 132. 766.70 (4) of the statutes is repealed and recreated to read:

766.70 (4) (a) If marital property has been or is likely to be substantially injured by the other spouse's gross mismanagement, waste or absence, upon request of a spouse a court may order any of the following:

1. A temporary or permanent limitation or termination of any of the other spouse's management and control rights in marital property.

2. A change in classification of marital property.

3. A division of the obligations of the spouses existing on the date of the request, after considering the classification of the obligation under s. 766.55 and the factors specified under ss. 767.255 and 767.26.

4. That all obligations incurred after the court order are the obligations of the incurring spouse and that the other spouse is not liable for, and his or her property is not available to satisfy, the obligations.

5. That any property acquired by either spouse after the court order is the individual property of the acquiring spouse.

(b) The court may make any order under this subsection subject to any equitable condition.

(c) This subsection does not apply to property described in sub. (3) (a), (b) and (e).

NOTE: Reorganized for improved clarity.

The limitation in the repealed provision stating that the remedy does not apply to property described under s. 766.70 (3) (a) to (e), relating to certain marital property interests in business property, is narrowed in the recreated provision. The limitation in the recreated provision does not apply to assets of an unincorporated business, s. 766.70 (3) (c), or to the assets of certain closely held corporations, s. 766.70 (3) (d). This property will thus be subject to the remedy.

Reference to appointment of a conservator or guardian is not continued in the recreated remedy because those procedures are available under ch. 880.

SECTION 133. 766.70 (5) of the statutes is amended to read:

766.70 (5) When marital property is levied upon for satisfaction of used to satisfy an obligation other than an obligation under s. 766.55 (2) (a) or (b), the nonobligated spouse may request the court to order that he or she receive as individual property marital property equal in value to that portion taken to meet the marital property used to satisfy the obligations of the obligated spouse, subject to the rights of any 3rd party who relied upon the availability of the marital property to satisfy any obligation under s. 766.55 (2) (a) or (b) and subject to equitable considerations. No person may bring an action under this subsection later than one year after the date of levy obligation is satisfied.

NOTE: The remedy is expanded to cover any situation when marital property is used to satisfy an obligation covered by the remedy, not just when marital property is levied on for satisfaction of such obligations. The provision also is narrowed to except marital property used to satisfy spousal and child support obligations under s. 766.55 (2) (a) from the remedy.

SECTION 134. 766.70 (6) (b) and (c) of the statutes are created to read:

766.70 (6) (b) 1. If a transfer of marital property to a 3rd person during marriage by a spouse acting alone becomes a completed gift upon the death of the spouse or if an arrangement during marriage involving marital property by a spouse acting alone is intended to be and becomes a gift to a 3rd person upon the death of the spouse, the surviving spouse may bring an action against the gift recipient to recover one-half of the gift of marital property. The surviving spouse may not commence an action under this paragraph later than one year after the death of the decedent spouse.

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. The 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.

(c) 1. If a spouse acting alone makes a gift of marital property to a 3rd person during marriage in the

form of a joint tenancy and the spouse and the 3rd person are joint tenants with respect to that property, the other spouse has a right of reimbursement against the donor spouse or the gift recipient or both with respect to that portion of the gift representing the quotient resulting from dividing the number of joint tenants other than the donor spouse by the total number of joint tenants, including the donor spouse. The other spouse must commence the action within the earliest of one year after he or she has notice of the gift, one year after a dissolution or one year after the death of either spouse.

2. If the gift of marital property under subd. 1 remains in the form of a joint tenancy, at the death of the tenant spouse the surviving spouse has a right of reimbursement against the decedent spouse's estate or the gift recipient or both with respect to one-half of that portion of the joint tenancy representing the quotient resulting from dividing one by the total number of joint tenants immediately before the death of the tenant spouse, valued at the date of death. The surviving spouse may not commence the action later than one year after the death of the decedent spouse. If the spouse entitled to a right of reimbursement under this subdivision predeceases the tenant spouse, the action may not be commenced later than one year after the decedent's death. The portion subject to the right of reimbursement in such an action is the same as if the tenant spouse had predeceased the spouse with the right of reimbursement, but is valued at the date of death of the spouse with the right of reimbursement.

NOTE: Clarifies, in par. (b), the remedy available for certain gifts that occur at the death of a spouse. The provision is intended to include transfers and arrangements such as ch. 705 payable-on-death accounts, revocable trusts, life insurance and certain bonds. The "safe harbor" concept that applies to gifts of marital property during marriage is not used in this provision because at death a spouse may not will more than his or her share of marital property; the surviving spouse, therefore, should be able to recover one-half of the gift of marital property when the gift occurs at the death of the donor spouse.

Clarifies, in par. (c), the remedies available if a spouse makes a gift of marital property to a 3rd person during marriage in the form of a joint tenancy. The provision reflects distinct remedies for the gift:

1. When the gift is made, only a fractional portion of the gift of marital property is available to the nondonor spouse, because the donor spouse still retains an interest in the property which is severable.

2. At the death of the donor spouse, a fractional share of the joint tenancy is also recoverable, representing the decedent's severable interest immediately before death, valued at the date of death.

Valuing the 2nd right of reimbursement at the date of death ensures that any marital property appreciation of, and marital property income that has been reinvested in, the joint tenancy will be reflected in the recovery.

The remedy under the provision is stated in terms of a "right of reimbursement" so that the joint tenancy itself is not disrupted.

SECTION 135. 766.70 (7) of the statutes is repealed.

NOTE: Repealed as unnecessary in light of the remedy created by SECTION 134 [s. 766.70 (6) (b)].

SECTION 136. 766.70 (8) (a) and (b) of the statutes are repealed.

NOTE: Repealed as unnecessary in light of the remedy created by SECTION 134 [s. 766.70 (6) (b)].

SECTION 137. 766.70 (8) (c) of the statutes is renumbered 766.70 (7) and amended to read:

766.70 (7) ~~Within~~ After the date of death within 90 days after the earlier of either the receipt of the inventory listing any life insurance policy or deferred employment benefit plan covered by s. 766.61 or 766.62, or the discovery of the existence of such a policy or plan, the surviving spouse may purchase the decedent's interest in the policy or plan from the decedent's estate at the interest's fair market value at the date of death, if all or part of the policy or plan is included in the decedent spouse's estate.

SECTION 138. 766.70 (8) of the statutes is created to read:

766.70 (8) Except as provided in sub. (6) and ss. 766.55 (4m), 766.56 (2) (c) and 766.57, no decree issued under this section may adversely affect the interest of a 3rd party.

NOTE: Clarifies that, subject to the exceptions noted, decrees issued under the remedy section may not adversely affect the interest of 3rd parties.

SECTION 139. 766.70 (9) of the statutes is repealed.

NOTE: Repealed as unnecessary in light of the remedy created by SECTION 134 [s. 766.70 (6) (b) and (c)].

SECTION 140. 766.73 of the statutes is amended to read:

**766.73 Invalid marriages.** If a marriage is invalidated by a decree, a court may apply so much of this chapter to the property of the parties to the invalid marriage as is necessary to avoid an inequitable result. This section does not apply if s. 767.255 applies to the action to invalidate the marriage.

NOTE: Clarifies that the provision does not apply if the existing statute, s. 767.255, relating to property division upon annulment, divorce or legal separation applies to the action to invalidate the marriage. It is not clear under current law whether a marriage may be voided in Wisconsin by means other than annulment. If it can, then s. 766.73 will apply to the action. If the action to void is an annulment action, s. 767.255 will apply.

SECTION 141. 766.75 (intro.) and (1) of the statutes are repealed.

NOTE: Repeals the provision of Act 186, which is also contained in UMPA, stating: "In 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."

The repealed language raised questions about the effect of Act 186 on s. 767.255, relating to property division at divorce, annulment or legal separation. The special committee concluded that neither UMPA nor Act 186, by including the repealed language, intends to affect existing law that applies to property division at dissolution of a marriage. See the comment to UMPA, section 17. The special committee con-

cluded, therefore, that, while the repealed provision may have some conceptual and psychological value, it should be repealed to avoid any confusion about whether ch. 766 affects the court's equitable powers to divide the property of spouses under s. 767.255.

SECTION 142. 766.75 (3) of the statutes is renumbered 766.75 and amended to read:

**766.75 (title) Treatment of certain property at dissolution.** After a dissolution each former spouse owns an undivided ~~50%~~ **one-half** interest in the former marital property as a tenant in common, except as provided otherwise in a decree ~~or written consent or an agreement entered into by the former spouses after dissolution.~~

NOTE: Removes what the special committee concluded is an inappropriate reference to "written consent". [The last sentence of this paragraph in the original NOTE has been deleted because it failed to reflect changes made in the course of legislative consideration.]

The provision also recognizes that former spouses may affect their interest in former marital property by post-dissolution agreement. [The last sentence of this paragraph in the original NOTE has been deleted because it failed to reflect changes made in the course of legislative consideration.]

SECTION 143. 766.75 (4) of the statutes is repealed.

NOTE: Repeals the Act 186 provision permitting the court, in an action for legal separation, to set forth in the judgment the extent to which property acquired by spouses after the legal separation is marital property and the responsibility of each spouse for obligations incurred after the legal separation.

SECTION 144. 766.77 (title) of the statutes is renumbered 861.02 (title) and amended to read:

**861.02 (title) Election of deferred marital property.**

SECTION 145. 766.77 (1) of the statutes is renumbered 861.02 and amended to read:

861.02 ~~Except as provided in sub. (2) In addition to the right to elect under s. 861.03 and unless barred under s. 861.13, at the death of a spouse domiciled whose marital domicile is in this state all 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 was acquired during marriage and before the determination 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 is subject to administration, reduced by any of that property used to satisfy obligations for which the property is available under s. 859.18.~~

NOTE: Clarifies that "deferred marital property" owned at the death of a spouse is that deferred marital property which is includable in the decedent spouse's probate estate.

Specifying that deferred marital property owned by a spouse at his or her death is that which is includable in the probate estate is a conventional way to define that property and has the advantage of simplicity. A surviving spouse is protected with respect to certain transfers of deferred marital property by electing against the augmented marital property estate. See SECTION 174 [s. 861.03].

Provides that the right to deferred marital property is elective rather than automatic as in UMPA and Act 186. The right to deferred marital property is made elective because it

will ease probate administration and because it provides more flexibility for estate planning.

Clarifies that the election is against deferred marital property remaining after spousal obligations have been satisfied from that property.

SECTION 146. 766.77 (2) of the statutes is repealed.

SECTION 147. 766.90 of the statutes is repealed.

NOTE: Repeals as unnecessary or duplicative: (1) provisions specifying that property held in existing joint tenancies, tenancies in common and joint accounts is subject to the various classification, income and appreciation rules in ch. 766; and (2) provisions expressly preserving existing buy-sell agreements, guarantees and contracts of indemnity or surety.

There is no need to expressly state, as did sub. (1) of the repealed section, the application of ch. 766 to existing joint tenancies, tenancies in common and joint accounts, particularly in light of the clarification contained in SECTION 123 [s. 766.60 (4) (a)].

There is also no need to expressly preserve existing buy-sell agreements, as in sub. (2) of the repealed section, in light of the treatment of existing buy-sell agreements in SECTION 87 [s. 766.51 (9)].

Finally, there is no need to expressly preserve existing guarantees and contracts of indemnity or surety as in sub. (3) of the repealed section. The special committee found that the repealed language preserving these agreements raised questions concerning the meaning and effect of the provisions. The special committee concluded that general principles of law, including law relating to the nonimpairment of the obligation of contract and to retroactivity, should be relied on together with ch. 766 to determine the effect of that chapter on these agreements.

SECTION 148. 766.97 (2) of the statutes is amended to read:

766.97 (2) Nothing in this chapter revives the common law disabilities on a woman's right to own, manage, inherit, transfer or receive gifts of property in her own name, to enter into contracts in her own name or to institute civil actions in her own name. Except as otherwise provided in this chapter and in other sections of the statutes controlling marital property or ~~the individual~~ property of spouses that is not marital property, either spouse has the right to own and exclusively manage his or her ~~individual~~ property that is not marital property, enter into contracts with 3rd parties or with his or her spouse, institute and defend civil actions in his or her name and maintain an action against his or her spouse for damages resulting from that spouse's intentional act or negligence.

NOTE: Substitutes a broader class of property, "property that is not marital property", for "individual property". The substitution reflects the existence under Act 186 of property that is neither marital nor individual. Because during marriage this property is generally treated under the Act as if it were individual property, there appears to be no change in the substance of s. 766.97 (2) resulting from the substitution of the broader class of property. The substitution is made for purposes of clarity and consistency.

SECTION 149. 767.05 (7) of the statutes is created to read:

**767.05 (7) ACTIONS FOR CERTAIN INTERSPOUSAL REMEDIES.** If a spouse has begun an action against the other spouse under s. 766.70 and either or both spouses subsequently bring an action under this chap-

ter for divorce, annulment or legal separation, the actions may be consolidated by the court exercising jurisdiction under this chapter. If the actions are consolidated, to the extent the procedural and substantive requirements of this chapter conflict with the requirements under s. 766.70, this chapter controls. No action under s. 766.70 may be brought by a spouse against the other spouse while an action for divorce, annulment or legal separation is pending under this chapter.

**NOTE:** Permits consolidation of the s. 766.70 (remedies) and ch. 767 (divorce, annulment or legal separation) actions for economy and coordination of the proceedings.

Prohibits the commencement of an interspousal remedy action under s. 766.70 while a divorce, annulment or legal separation action is pending. This is consistent with the basic intent of Act 186 not to alter current Wisconsin divorce law.

**SECTION 150.** 767.255 (5e) of the statutes is repealed.

**NOTE:** Repeals the provision of Act 186 which adds a new factor for the court to consider when dividing property on other than an equal basis in a divorce proceeding. The new language would have permitted the court to consider "whether equity requires reimbursement of one spouse by the other because of certain transactions during the marriage".

The special committee concluded that, while the repealed language was intended to permit the court to consider economic mismanagement of a spouse, under current law economic mismanagement is an appropriate factor for the court to consider in dividing property at divorce. Section 767.255 (3) and (12); *Anstutz v. Anstutz*, 112 Wis. 2d 10, 331 N.W. 2d 844, Ct. App. (1983). Therefore, the provision is repealed.

**SECTION 151.** 803.04 (3) of the statutes is renumbered 803.04 (4).

**SECTION 152.** 803.04 (3) of the statutes is created to read:

**803.04 (3) ACTIONS AFFECTING MARITAL PROPERTY.** In an action affecting the interest of a spouse in marital property, as defined under ch. 766, a spouse who is not a real party in interest or a party described under s. 803.03 may join in or be joined in the action.

**NOTE:** In an action affecting the interest of a spouse in marital property, if a spouse is not already a real party in interest or a necessary party, this provision authorizes the spouse to be a permissive party, whether plaintiff or defendant. The provision is intended to clarify that, at the initial stages of an action affecting a spouse's interest in marital property, both spouses may sue or both spouses may be sued. The provision does not affect the court's authority to drop or add parties "at any stage of the action and on such terms as are just". See s. 803.06 (1).

It is recognized by the special committee that it may be desirable to deal more specifically in the statutes with the issue of when a spouse is a proper party plaintiff or defendant in an action affecting marital property. However, the special committee concluded that ch. 766 and the current rules of civil procedure provide general guidance in this regard. More detailed rules, if necessary, are best left to future legislation.

**SECTION 153.** 803.045 of the statutes is created to read:

**803.045 Actions to satisfy spousal obligations.** (1) Except as provided in sub. (2), when a creditor commences an action on an obligation described in s.

766.55 (2), the creditor may proceed against the obligated spouse, the incurring spouse or both spouses.

(2) In an action on an obligation described in s. 766.55 (2) (a) or (b), a creditor may proceed against the spouse who is not the obligated spouse or the incurring spouse if the creditor cannot obtain jurisdiction in the action over the obligated spouse or the incurring spouse.

(3) After obtaining a judgment, a creditor may proceed against either or both spouses to reach marital property available for satisfaction of the judgment.

(4) This section does not affect the property available under s. 766.55 (2) to satisfy the obligation.

**NOTE:** [The NOTE has been deleted because it failed to reflect changes made in the course of legislative consideration.]

**SECTION 153m.** 806.15 (4) of the statutes is created to read:

**806.15 (4)** A lien under this section does not attach to property that is held, as defined in s. 766.01 (9), by a person who is the spouse or former spouse of a judgment debtor and that is not held by the judgment debtor, unless the spouse of the judgment debtor is a named defendant in the action for which judgment is rendered, the obligation is determined an obligation described in s. 766.55 (2) and any of the following applies:

(a) With respect to property held by the spouse of the judgment debtor when the judgment is docketed, the property is expressly determined available under s. 766.55 to satisfy the obligation.

(b) The property is acquired after the judgment is docketed.

**SECTION 154.** 811.001 of the statutes is created to read:

**811.001 Definitions.** In this chapter:

(1) "Defendant" includes the spouse or former spouse of the defendant if the action against the defendant is in connection with an obligation described under s. 766.55 (2).

(2) "Property of his debtor" and "property of the defendant" include the marital property interest of the spouse or former spouse of the debtor or defendant if the action against the debtor or defendant is in connection with an obligation described under s. 766.55 (2).

**NOTE:** The definitions are intended to integrate ch. 811, relating to attachment, with ch. 766, relating to marital property. Integration is necessary because satisfaction of obligations of spouses under s. 766.55 does not necessarily depend on personal liability but, rather, on what property is available to satisfy the obligation. Thus, the definitions reflect that a creditor may have reason to attach marital property in which a spouse has an interest even though the spouse is not personally liable to the creditor.

**SECTION 155.** 811.03 (1) (intro.) of the statutes is amended to read:

**811.03 (1) ON CONTRACT OR JUDGMENT.** (intro.) Before any writ of attachment shall be executed the plaintiff or some one in the plaintiff's behalf shall make and annex thereto an affidavit setting forth spe-

cific factual allegations to show that the defendant is indebted, or that property of the defendant is available, to the plaintiff in a sum exceeding \$50 specifying the amount above all setoffs, and that the same is due upon contract or upon a judgment and that the affiant knows or has good reason to believe either:

NOTE: Reflects the debt-satisfaction provisions of s. 766.55. See SECTION 154 [s. 811.001].

SECTION 156. 812.01 (1) of the statutes is amended to read:

812.01 (1) Any creditor may proceed against any person who is indebted to or has any property in his or her possession or under his or her control belonging to such creditor's debtor or which is subject to satisfaction of an obligation described under s. 766.55 (2), as prescribed in this chapter. "Plaintiff" as used in this chapter includes a judgment creditor and "defendant", a judgment debtor or the spouse or former spouse of a judgment debtor if the judgment is rendered in connection with an obligation described under s. 766.55 (2).

NOTE: Integrates ch. 812, relating to garnishment, with ch. 766, relating to marital property. Revision of ch. 812 is necessary because satisfaction of obligations under s. 766.55 does not necessarily depend on personal liability but, rather, on what property is available to satisfy the obligation.

The revisions to s. 812.01 (1) reflect that when marital property is available to satisfy an obligation under s. 766.55 (2) the creditor may wish to satisfy the obligation by garnishing the marital property of the nonincurring spouse. For example, a creditor may wish to satisfy an obligation under s. 766.55 (2) (b) by bringing a garnishment action against the wages of the nonincurring spouse. Because all marital property is available to satisfy such an obligation, the wages of the nonincurring spouse are clearly available to the creditor. (Because the nonemployee spouse arguably has no management and control rights in the employee spouse's wages at the point of garnishment, it appears that the creditor may proceed against the wage-earning spouse to garnish his or her wages without joining the nonemployee spouse.) See, also, SECTION 153 [s. 803.045].

The special committee considered amending s. 812.02 (1) to clarify that an action for garnishment may be brought at any time after an execution upon a judgment, rendered in connection with an obligation described under s. 766.55 (2), is issuable. However, the special committee concluded that current s. 812.02 (1) (b), which permits commencement of a garnishment action after an execution upon an *in personam* judgment is issuable, covers the situation; an *in personam* judgment does not necessarily imply personal liability.

SECTION 156m. 812.02 (2e) of the statutes is created to read:

812.02 (2e) A plaintiff may not commence any garnishment action affecting the property of a spouse who is not a defendant in the principal action unless the spouse is a defendant in the garnishment action.

SECTION 157. 815.18 (30) of the statutes is renumbered 815.18 (30) (a).

SECTION 158. 815.18 (30) (b) of the statutes is created to read:

815.18 (30) (b) With respect to any provisional or final process issued from any court, or to any proceedings in aid of that process, to enforce against marital property an obligation described under s. 766.55 (2)

(b), each spouse is entitled to and may claim the exemptions under this section. Unless provided otherwise by law, if the property exempt under this section is limited to a specified maximum dollar amount, each spouse is entitled to one exemption. That exemption is limited to the specified maximum dollar amount, which may be combined with the other spouse's exemption in the same property or applied to different property included under the same exemption. The exemption under sub. (15) may not be combined with the other spouse's exemption under sub. (15) and applied to the same property.

NOTE: Clarifies, for purposes of determining what property is exempt from execution, the exemptions which spouses may claim in connection with process to enforce against marital property an obligation in the interest of the marriage or family. The provision appears to be a reasonable interpretation of exemptions allowed under current law when spouses are jointly and severally liable for an obligation and, the special committee concluded, the provision is a reasonable way to treat exemptions of spouses when all marital property is available to satisfy an obligation. The exemption referred to in the last sentence of the provision, which may not be combined with the other spouse's exemption and applied to the same property, is the income exemption under s. 815.18 (15).

See SECTION 64 [s. 425.106 (2)] for a similar provision applying to exemptions under the Wisconsin consumer act.

SECTION 159. 815.56 of the statutes is amended to read:

**815.56 (title) Sheriff's deed; grantee if purchaser dead.** In case the person who would be entitled to a deed of real estate sold on execution ~~shall die previous to dies before~~ the delivery of such that deed the sheriff shall execute a deed to the person's executors or administrators. The real estate so conveyed shall be held in trust for the use of the heirs or devisees of ~~such the deceased person, subject to the surviving spouse's right to elect under ss. 861.02 and 861.03,~~ but may be sold for the payment of debts in the same manner as lands ~~whereof of which~~ the person died seized.

NOTE: Amended to reflect the surviving spouse's rights of election against deferred marital property and the augmented deferred marital property estate. Act 186 deleted reference in this provision to the real estate being "subject to the dower of the surviving spouse". Therefore, it appears appropriate to similarly reference the surviving spouse's rights of election created in this bill.

SECTION 159m. 851.055 of the statutes is created to read:

**851.055 Deferred marital property.** "Deferred marital property" means property acquired during marriage and before the determination date which would have been marital property under ch. 766 if acquired after the determination date.

SECTION 159q. 851.06 of the statutes is created to read:

**851.06 Determination date.** "Determination date" has the meaning given under s. 766.01 (5).

SECTION 159w. 851.35 of the statutes is created to read:

**851.35 Classification; how determined.** In chs. 851 to 882, classification of the property of a decedent

spouse and surviving spouse is determined under ch. 766.

SECTION 160. 852.01 (1) (a) 2 of the statutes is amended to read:

852.01 (1) (a) 2. If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the individual property estate that portion of the decedent's net estate not disposed of by will consisting of decedent's property other than marital property and other than property described under s. 861.02.

NOTE: Clarifies what decedent's "individual property estate" means for purposes of determining a surviving spouse's share under the intestacy law when there are surviving issue, one or more of whom are not the issue of the surviving spouse. Without the clarification, the individual property estate arguably would consist only of property of the decedent spouse in the net estate actually classified as individual property under ch. 766, rather than all property of the decedent in the net estate other than marital or deferred marital property.

SECTION 161. 853.15 (1) of the statutes is amended to read:

853.15 (1) NECESSITY FOR ELECTION. If Unless the will provides otherwise, if a will gives a bequest or devise to one beneficiary and also clearly purports to give to another beneficiary a property interest which does not pass under the will but belongs to the first beneficiary by right of ownership, survivorship, beneficiary designation, election under s. 861.02 or otherwise, the first beneficiary must elect either to take under the will and transfer his or her property interest in accordance with the will, or to retain his or her property interest and not take under the will. If he the beneficiary elects not to take under the will, unless the will provides otherwise the bequest or devise given him or her under the will is to be assigned by the court to the other beneficiary in lieu of the property interest which does not pass under the will. But this This section does not require an election in any case where if the property interest belongs to the first beneficiary by reason of transfer or beneficiary designation made by the decedent after the execution of the will.

NOTE: Clarifies that the equitable election statute applies when a will clearly purports to give to one beneficiary a property interest which belongs to the surviving spouse by right of election against deferred marital property.

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION 162. 853.40 (2) (a) of the statutes is amended to read:

853.40 (2) (a) *In general.* A person who is an heir, person succeeding to a disclaimed intestate interest, beneficiary under a will, person succeeding to a disclaimed interest created by will, donee of a power created by will, appointee under a power exercised by will, or taker in default under a power created by will ~~or person succeeding to an interest under s. 766.77,~~ may disclaim any property or interest in property, including contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer under this section.

NOTE: Amended to reflect that the surviving spouse's right to deferred marital property under s. 766.77 (renumbered s. 861.02 by this bill) is elective, rather than automatic.

SECTION 163. 857.01 of the statutes is amended to read:

**857.01 (title) Ownership in personal representative; management and control.** Upon his or her letters being issued by the court, the personal representative ~~has title to~~ succeeds to the interest of the decedent in all property of the decedent. The personal representative or surviving spouse may petition the court for an order determining the classification of property under ch. 766, and for other equitable relief necessary for management and control of the marital property during the administration of the estate. The court may make any decree under ch. 766, including a decree that the property be titled in accordance with its classification, to assist the personal representative or surviving spouse in managing and controlling the marital property and the decedent's property other than marital property during administration of the estate. During administration, the management and control rules under s. 766.51 apply to the property of a decedent spouse which is subject to administration and to the property of the surviving spouse. With regard to property subject to the election of the surviving spouse under s. 861.02, the personal representative may manage and control the property while the property is subject to administration. The personal representative shall determine when, during administration, property shall be distributed to satisfy an election under s. 861.02.

NOTE: Permits the surviving spouse, in addition to the personal representative, to ask the court to determine the classification of property under ch. 766 and for other relief necessary for management and control of the spouses' former marital property during the administration of the decedent's probate estate.

Clarifies that during administration of a spouse's estate, the management and control rules under ch. 766 apply to the property of the decedent spouse which is subject to administration and to the property of the surviving spouse. Also clarifies the personal representative's control over the decedent's deferred marital property, which is subject to election by the surviving spouse.

[The last paragraph of the original NOTE has been deleted because it failed to reflect changes made in the course of legislative consideration.]

SECTION 164. 858.01 (title) of the statutes is amended to read:

**858.01 (title) Personal representative files; presumptions.**

SECTION 165. 858.01 of the statutes is renumbered 858.01 (1) and amended to read:

858.01 (1) Except as provided by s. 865.11, the personal representative, within a reasonable time but no later than 6 months after appointment unless the court has by order extended or shortened the time, shall file an inventory of all property owned by the decedent. The inventory when filed shall show, as of the date of the decedent's death, the value of all property, its clas-



~~sification under ch. 766~~ what property is marital property and the type and amount of any existing obligation relating to any item of property. If a special administrator or personal representative has filed an inventory, no personal representative who is later appointed need file a further inventory unless additional property is found or the court orders otherwise.

SECTION 166. 858.01 (2) of the statutes is created to read:

858.01 (2) If the presumption under s. 766.31 (2) is overcome, the property is presumed deferred marital property.

NOTE: [The first paragraph of the original NOTE has been deleted because it failed to reflect changes made in the course of legislative consideration.]

In addition, it provides that if the marital property presumption is overcome, the property is then presumed "deferred marital property" under s. 861.02. The 2nd part of this 2-stage presumption is relevant to the deferred marital property election under s. 861.02 and the election against the augmented marital property estate under s. 861.03. See SECTIONS 145 [s. 861.02] and 174 [s. 861.03, *et seq.*].

It is recognized that proof sufficient to overcome the first presumption also may overcome the 2nd. For example, in overcoming the first presumption, it may be proved that the property in question is individual property. This proof will necessarily overcome the 2nd presumption. The special committee concluded, nonetheless, that it is important to provide for both presumptions.

SECTION 167. 859.01 (4) of the statutes is created to read:

859.01 (4) Failure of a claimant to timely file a claim against a decedent's estate does not bar the claimant from satisfying the claim from property, other than the decedent's estate, available under s. 859.18.

NOTE: Clarifies that failure of a claimant to timely file a claim against a decedent's estate does not alone bar the claimant from satisfying the claim from other property, if available under s. 859.18. See SECTION 169.

SECTION 168. 859.13 (1) of the statutes is amended to read:

859.13 (1) **GENERAL REQUIREMENTS.** No claim shall be allowed unless it is in writing, describes the nature and amount thereof, if ascertainable, and is sworn to by the claimant or someone for ~~him~~ the claimant that the amount is justly due, or if not yet due, when it will or may become due, that no payments have been made thereon which are not credited, and that there are no offsets to the knowledge of the affiant, except as therein stated. If the claim is one for which property is available under s. 859.18, the claim shall describe which classification under s. 766.55 (2) is applicable to the claim. The claim shall also show the post-office address of the claimant. The presumption under s. 766.55 (1) applies to the classification of claims for which property is available under s. 859.18.

NOTE: Requires a claimant against a decedent spouse's estate to describe which classification under s. 766.55 (2) is applicable to the claim, if the claim is one for which property is available under s. 859.18, relating to satisfaction of obligations at the death of a spouse.

Clarifies that the presumption under s. 766.55 (1) that an obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or family, applies to the classification of claims against a decedent spouse's estate for which property is available under s. 859.18.

SECTION 169. 859.18 of the statutes is repealed and recreated to read:

**859.18 Satisfaction of obligations at death of a spouse.** (1) In this section:

(a) "Credit" means the right granted by a creditor to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for the property or services.

(b) "Creditor" means a person who regularly extends credit.

(2) At the death of a spouse, property, including the proceeds of or property exchanged for that property, that but for the death of the spouse would have been available under s. 766.55 (2) for satisfaction of an obligation continues to be available for satisfaction, except as provided in subs. (3) to (5).

(3) Unless the obligation resulted from an extension of credit or from a tax obligation to this state, upon the death of a spouse who was the only obligated spouse under s. 766.55 (2) (a) or the only incurring spouse under s. 766.55 (2) (b) to (d):

(a) No income of the surviving spouse is available for satisfaction of an obligation described under s. 766.55 (2).

(b) Marital property of the surviving spouse, if otherwise available for satisfaction of an obligation described under s. 766.55 (2), is available to the extent of the value of the marital property at the death of the decedent spouse.

(4) (a) If the decedent spouse was the only obligated spouse under s. 766.55 (2) (a) or the only incurring spouse under s. 766.55 (2) (b) to (d), the following property is not available for satisfaction of the obligation:

1. Survivorship marital property, except as provided in s. 766.60 (5) (b) and (c)

2. Joint tenancy property in which the decedent spouse was a tenant, subject to any judgment lien on which execution was issued before the spouse's death.

3. Deferred employment benefits arising from the decedent spouse's employment.

4. Proceeds of a life insurance policy insuring the life of the decedent spouse, if the proceeds are not payable to the decedent's estate and not assigned to the creditor as security or payable to the creditor.

(b) If the surviving spouse is the only obligated spouse under s. 766.55 (2) (a) or the only incurring spouse under s. 766.55 (2) (b) to (d), the following property transferred to a person other than the surviving spouse is not available for satisfaction:

1. The decedent's interest in joint tenancy property, subject to any judgment lien on which execution was issued before the decedent's death.

2. Deferred employment benefits arising from the employment of the decedent spouse.

3. The proceeds of a life insurance policy insuring the life of the decedent spouse, if the proceeds are not payable to the decedent's estate and not assigned to the creditor as security or payable to the creditor.

(5) If otherwise available under this section to satisfy an obligation under s. 766.55 (2):

(a) The availability of a trust described under s. 701.07 (3) is subject to s. 701.07 (3).

(b) The availability of a spendthrift trust described under s. 701.06 is subject to s. 701.06.

(c) The availability of an account governed under ch. 705 is subject to s. 705.07.

(6) A marital property agreement, as defined under s. 766.01 (12), may not affect property available under this section for satisfaction.

NOTE: Clarifies and revises the provision of Act 186 relating to what property is available to satisfy obligations at the death of a spouse. Under Act 186, claims filed against the estate of a decedent spouse are to be classified as marital obligations or other than marital obligations. Marital obligations are those described under s. 766.55 (2) (a) or (b). Nonmarital obligations are those described under s. 766.55 (2) (c) or (d). If a marital obligation, the obligation is payable out of all marital property; if a nonmarital obligation, it is payable out of the decedent's property other than marital property and out of the decedent's interest in marital property, in that order.

The above-described provision of Act 186 is repealed. In its place are substituted 2 rules:

1. If the obligation was incurred as a result of an extension of credit by a person who regularly extends credit (or as a result of a state of Wisconsin tax obligation), property that would have been available during marriage for satisfaction of an obligation (including income of the surviving spouse) generally continues to be available for satisfaction.

2. For other types of obligations, incurred by the decedent spouse, the rule stated above in paragraph 1 also applies except that no income of the surviving spouse is available to satisfy the obligation and marital property of the surviving spouse is available only to the extent of its value at the death of the decedent spouse. This additional limitation is parallel to the rule after divorce under s. 766.55 (2m).

Obligations resulting from extensions of credit by persons who regularly extend credit are not subject to the additional property-availability limitations that apply to other obligations because of the requirement under s. 766.56 (1), regarding what property a creditor is to consider in evaluating a spouse's creditworthiness, and because of the consensual nature of those obligations. (The special committee concluded, however, that this rationale does not support repeal of

the limitation under s. 766.55 (2m) that applies to these obligations at divorce because termination of a marriage by dissolution and termination by death are distinguishable with respect to what property should be available to satisfy spousal obligations.)

General exceptions, applicable to all obligations, to the property-availability rule are when the property consists of:

1. Joint tenancy property;

2. Survivorship marital property;

3. Deferred employment benefits arising from the employment of the decedent spouse; or

4. The proceeds of a life insurance policy insuring the life of the decedent spouse, not payable to decedent's estate and not assigned or payable to the creditor as security.

The manner in which the exceptions affect property available for various obligations under s. 766.55 (2) is specifically set forth in s. 859.18. Note that it is not to be implied from the text of the statute that a statement that certain property is not available at the death of a spouse to satisfy an obligation necessarily means that it was available during marriage. For purposes of economy, the language has been drafted in general terms and should be interpreted as excepting from satisfaction of obligations only that property that otherwise would have been available for satisfaction. The provision addresses only the situations in which one spouse is the obligated or incurring spouse because, if both spouses are obligated or have incurred the obligation, the joint and several liability aspects make it unnecessary to specify what property is available to satisfy the obligation. A chart generally outlining the property available for satisfaction of obligations at the death of a spouse is set forth at the end of this NOTE.

In deciding what property should be available to satisfy an obligation at the death of a spouse, the special committee first looked to whether the property is available under current law. Thus, joint tenancy, deferred employment benefits and insurance were made exceptions to the general rule of availability and certain trusts and accounts are available subject to the limitations under existing law. The special committee also recommended that survivorship marital property not be generally available because survivorship marital property is similar to joint tenancy (and, after the determination date, joint tenancies established exclusively between spouses are survivorship marital property, see SECTION 124 [s. 766.60 (4) (b)]). To balance the latter exclusion from the pool of property available to creditors, the special committee concluded that a marital property agreement should not be able to affect the property available for satisfaction of an obligation at the death of a spouse. In practice, the latter rule may not be as significant as it initially appears because if marital property agreements could affect property available to satisfy obligations at the death of a spouse, a creditor would only be bound by agreement if the creditor had actual knowledge of the relevant term of the agreement; if the creditor had actual knowledge, it is likely that the amount of credit extended would be reduced.

**Property subject to satisfaction of spousal obligations at death of a spouse\***

	**Support or Marital Obligation [s. 766.55 (2) (a) and (b)]	Individual Obligation [s. 766.55 (2) (d)]	Premarital Obligation (includes pre-Act obligation) [s. 766.55 (2) (c)]
A. <u>Property Available at Death of Incurring Spouse (Nonincurring Spouse Survives)</u>	Decedent spouse's probate estate.***	All probate estate (includ- ing 100% of decedent's deferred marital property).	Same.

Property of decedent spouse transferred by nontestamentary disposition.	<ol style="list-style-type: none"> <li>1) Revocable trust to the extent available under s. 701.07 (3);</li> <li>2) Spendthrift trust to the extent available under s. 701.06 (6);</li> <li>3) Ch. 705 accounts to the extent available under s. 705.07;</li> <li>4) Property transferred by disposition-at-death provision in marital property agreement</li> </ol> <p>[Not available: 1) Survivorship marital property; 2) Joint tenancy; 3) Deferred employment benefits; 4) Insurance.]</p> <p>Interest in former marital property (unless interest in survivorship marital property, joint tenancy, deferred employment benefits or insurance).</p>	Same.	Same.
Surviving spouse's property.		None.	None.
<b>B. <u>Property Available at Death of Nonincurring Spouse (Incurring Spouse Survives)</u></b>			
Decedent spouse's probate estate.**	Marital property. [Decedent's deferred marital property not available except to extent surviving spouse elects and then available from surviving spouse.]	None.	Interest in marital property representing property that would have been the property of the incurring spouse but for the marriage.
Property of decedent spouse transferred by nontestamentary disposition.	<ol style="list-style-type: none"> <li>1) If transferred to surviving spouse, available.</li> <li>2) If transferred to 3rd party, marital property component of following: <ol style="list-style-type: none"> <li>a) Revocable trust to extent available under s. 701.07 (3);</li> <li>b) Spendthrift trust to extent available under s. 701.06 (6);</li> <li>c) Ch. 705 accounts to extent available under s. 705.07;</li> <li>d) Property transferred by disposition-at-death provision in marital property agreement.</li> </ol> </li> </ol>	<ol style="list-style-type: none"> <li>1) Same.</li> <li>2) If transferred to 3rd party, surviving spouse's marital property interest in following: <ol style="list-style-type: none"> <li>a) Revocable trust to extent available under s. 701.07 (3);</li> <li>b) Spendthrift trust to extent available under s. 701.06 (6);</li> <li>c) Ch. 705 accounts to extent available under s. 705.07;</li> <li>d) Property transferred by disposition-at-death provision in marital property agreement.</li> </ol> </li> </ol>	<ol style="list-style-type: none"> <li>1) Same.</li> <li>2) If transferred to 3rd party, marital property component of following representing property that would have been property of incurring spouse but for the marriage: <ol style="list-style-type: none"> <li>a) Revocable trust to extent available under s. 701.07 (3);</li> <li>b) Spendthrift trust to extent available under s. 701.06 (6);</li> <li>c) Ch. 705 accounts to extent available under s. 705.07;</li> <li>d) Property transferred by disposition-at-death provision in marital property agreement.</li> </ol> </li> </ol>
Surviving spouse's property.	All (including interest in decedent's deferred marital property, if elected).	Same.	Same.

\* Does not address property available to satisfy tort obligations under new s. 766.55 (2) (cm).  
\*\* Assumes obligated spouse under s. 766.55 (2) (a) is the incurring spouse.  
\*\*\* Probate estate consists of decedent spouse's: (1) interest in marital property; (2) individual property; and (3) other property (including 100% of decedent's deferred marital property). Does not include decedent spouse's property transferred by nontestamentary disposition.

SECTION 170. 859.25 (title) of the statutes is amended to read:

**859.25 (title) Priority of payment of claims and allowances.**

SECTION 171. 859.25 (3) of the statutes is repealed.

NOTE: Repeals the provision of Act 186 setting forth special rules for setting the priority of and apportioning payment of various claims, expenses and allowances against a decedent spouse's estate. The special committee concluded that current law adequately addresses those matters. See, also, SECTION 169 [s. 859.18].

SECTION 172. 859.33 of the statutes is amended to read:

**859.33 Contest of claims; procedure.** (1) HOW CONTEST INITIATED. The following persons may contest a claim ~~or the consequences of a classification under s. 859.18~~, or assert an offset or counterclaim in court: the personal representative, a guardian ad litem or a person interested who has the approval of the court. They may do so only by mailing a copy of the objection, offset or counterclaim to the claimant or personally serving the same upon the claimant and filing the same with the court. The objection, offset or counterclaim may be served at any time prior to entry of judgment on the claim, but if a copy of the claim has been served under s. 859.01 (2) upon the personal representative or the attorney for the estate, the objection, offset or counterclaim shall be served upon or mailed to

the claimant and filed with the court within 60 days after the last date for filing claims. The personal representative shall not be obligated to assert any offset or counterclaim in court and may, if he or she deems it to be in the best interests of the estate, assert the offset or counterclaim in any separate action otherwise authorized by law outside the court proceedings. Any offset or counterclaim so asserted shall be deemed denied by the original claimant.

(2) PROCEDURE. If any claim, ~~classification consequences~~, offset or counterclaim is contested, the court may require the issues to be made definite, fix a date for pretrial conference and direct the manner in which pleadings, if any, shall be exchanged. The court shall set a time for trial upon its own motion or upon motion of any party.

NOTE: Reflects the repeal and recreation of s. 859.18 by this bill. Certain claims relating to obligations incurred by spouses will continue to be classified under the recreated provision. Removal of reference to "classification consequences" is not intended to imply that the classifications may not be contested; if the classification is disputed, it should be considered a contest of the claim for the purpose of s. 859.33.

SECTION 173. 861.01 (1) of the statutes is amended to read:

861.01 (1) (title) SURVIVING SPOUSE'S ONE-HALF INTEREST IN MARITAL PROPERTY. Upon the death of either spouse, the surviving spouse retains his or her undivided 50% one-half interest in each item of marital property. The surviving spouse's undivided one-half interest in each item of marital property is not subject to administration. Ownership and management and control rights are set forth under s. 857.01.

NOTE: Clarifies that the surviving spouse's interest in each item of marital property is not subject to general probate administration. The special committee concluded that so providing is consistent with the intent of Act 186 and that an express statement of the rule is desirable because of questions that have been raised concerning the issue.

It should also be noted that there is no intent either in Act 186 or in this bill to expand what is includable in a decedent spouse's probate estate. Therefore, property traditionally not included in a spouse's probate estate because the property is transferred by contract or by operation of law, e.g., joint tenancy with right of survivorship, insurance and payable-on-death accounts, will continue not to be included in the decedent spouse's probate estate, regardless of the classification of the property.

For consistency with UMPA, "50%" is changed to "one-half".

SECTION 174. 861.03 to 861.13 of the statutes are created to read:

**861.03 Election of augmented marital property estate.** In addition to the right to elect under s. 861.02, at the death of a spouse whose marital domicile is in this state the surviving spouse may, under s. 861.11, elect not more than one-half of the augmented marital property estate. The augmented marital property estate consists of the value of property described under s. 861.05. The amount elected is subject to reduction as provided under s. 861.07. The amount

elected shall be satisfied and apportioned as provided under s. 861.09.

NOTE: Limiting a surviving spouse's right of election against deferred marital property to that property includable in the decedent spouse's probate estate opens up the possibility that a spouse, deliberately or otherwise, may make arrangements to transfer his or her deferred marital property to others by means other than probate, thereby defeating the right of the surviving spouse to a share of the property. The special committee concluded that a means of protecting a surviving spouse with respect to transfers of deferred marital property that defeat the surviving spouse's right to elect against that property should be developed: (1) because of the repeal by Act 186 of the former one-third elective share; and (2) because for the years immediately following January 1, 1986 (effective date of Act 186), most property of spouses who have been married for a number of years before 1986 is likely to be deferred marital property rather than marital property.

In developing a means to protect the surviving spouse against certain transfers of deferred marital property, the special committee reviewed the augmented estate concept contained in the Uniform Probate Code ("UPC") [see ss. 2-201 to 2-207, UPC, Official 1982 Text]; the augmented, elective quasi-community property concept of Idaho [see ss. 15-2-201 to 15-2-207, Idaho Code (1984)]; and the treatment in California of certain transfers of quasi-community property [see California Probate Code Annotated (Deering, 1984), ss. 66, 101 and 102 of]. The special committee utilized aspects of all the concepts, but developed a means of protecting the surviving spouse tailored to mesh with Wisconsin marital property law.

In very general terms, the concept recommended by the special committee captures certain nonprobate transfers of deferred marital property to 3rd parties and permits the surviving spouse to elect not more than 50% of the value of that property. The amount elected by the surviving spouse is then subject to reduction to account for transfers of decedent's property to the surviving spouse. The amount remaining after the reduction is subject to satisfaction from certain transferees of the deferred marital property. The details of the concept are found in ss. 861.05 to 861.11, in this bill.

A comment to the section of the UPC defining the augmented estate may be instructive:

"The augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted. The proposed scheme should not complicate administration in well planned or routine cases, however, because the spouse's rights are freely releasable under s. 2-204 and because of the time limits in s. 2-205."

The general thrust of the comment applies as well to the augmented marital property estate concept in this bill. The surviving spouse's right of election may be barred by marital property agreement and, if not barred, it is unlikely to be asserted in most cases because the decedent spouse will have transferred sufficient property to the surviving spouse to eliminate any election.

**861.05 Transfers included in augmented marital property estate.** (1) In this section:

(a) "Bona fide purchaser" has the meaning given under s. 766.57.

(b) "Property transferred by the decedent spouse" includes contracts or other arrangements under which the property is payable to a person other than the surviving spouse or the decedent spouse's estate at the death of the decedent spouse.

(2) For the purpose of determining the augmented marital property estate under s. 861.03, a surviving spouse may include the value of the decedent spouse's

deferred marital property transferred by the decedent spouse without the consent of the surviving spouse to a person other than the surviving spouse or the decedent spouse's estate and other than a bona fide purchaser if any of the following applies:

(a) The decedent retained at the time of death the possession or enjoyment of or the right to income from the property.

(b) The decedent retained at the time of death a power alone or in conjunction with another person to amend, revoke or terminate the transfer or to consume, invade or dispose of the principal for the decedent's benefit.

(c) The decedent held the property at the time of death with a person other than the surviving spouse with the right of survivorship.

(d) The decedent retained at the time of death the right to make the property payable to a person other than the surviving spouse, including the right to designate a person other than the surviving spouse as the beneficiary of any life insurance, accident insurance, joint annuity, pension or similar arrangement.

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

(4) This section only applies to transfers on or after April 4, 1984, for which the instrument necessary to effect the transfer was executed by the decedent spouse on or after April 4, 1984, or transfers for which the instrument necessary to effect the transfer was executed by the decedent spouse before April 4, 1984, and the dispositive provisions were materially changed on or after April 4, 1984.

NOTE: Examples of the kinds of transfers included under sub. (2) (a) to (d) are:

1. Paragraph (a) - irrevocable trusts with a life interest retained;
2. Paragraph (b) - revocable trusts;
3. Paragraph (c) - joint tenancies; and
4. Paragraph (d) - life insurance.

Note that unlike the UPC augmented estate this provision applies to life insurance, accident insurance, joint annuities, pensions and other arrangements under which property is payable to a person other than the surviving spouse or the estate of the decedent spouse.

[The first sentence of this paragraph in the original NOTE has been deleted because it failed to reflect changes made in the course of legislative consideration.] The date of enactment [April 4, 1984] is used as the triggering date [in sub. (4)] because the special committee concluded that on that date spouses should be deemed to have at least constructive notice of the augmented marital property estate concept; under Act 186, it appeared that the right to deferred marital property under s. 766.77 applied to nonprobate as well as probate property.

**861.07 Property of surviving spouse charged against elective share of augmented marital property estate.** (1) In this section:

(a) "Property derived or received from the decedent" includes but is not limited to the following:

1. Property held at the time of the decedent's death by the decedent and the surviving spouse with the right of survivorship.

2. Property appointed to or for the spouse by the decedent's exercise of a general or special power of appointment.

(b) "Property derived or received from the decedent" does not include property acquired by the surviving spouse under s. 861.02.

(2) If there is an election of the augmented marital property estate by the surviving spouse under s. 861.03, the share elected shall be reduced by the value of the following property:

(a) Property of the decedent spouse transferred to or for the surviving spouse by will or under intestate succession.

(am) Property transferred to or for the surviving spouse at or because of the decedent's death, to the extent that the property was derived or received from the decedent by means other than testate or intestate succession without adequate consideration.

(b) Property owned by the surviving spouse at the decedent's death, to the extent that the property was derived or received from the decedent without adequate consideration.

(c) Property transferred by the surviving spouse to any person other than the decedent at any time during marriage, to the extent that the property was derived or received from the decedent without adequate consideration and to the extent that the property was transferred without the receipt of adequate consideration.

(2m) The amount of the reduction under sub. (2) shall be decreased by one-half the value of the property included in the reduction which is deferred marital property or which would have been deferred marital property if retained by the decedent, except property described in sub. (2r).

(2r) If property described under this section is a joint tenancy exclusively between spouses which is governed by ch. 700, one-half of the joint tenancy transfers to the donee spouse at the death of the decedent spouse and shall be valued as of that date.

(3) Property described under this section which is owned by the surviving spouse at the decedent's death, which is transferred to the surviving spouse at or because of the decedent's death or which is transferred to the surviving spouse by will or intestate succession is valued as of the date of the decedent's death. Property described under this section which has been transferred by the surviving spouse is valued at the time the transfer became irrevocable or at the decedent's death, whichever occurs first. 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:

(a) A mandatory income interest is valued in accordance with valuation tables designated by the department of revenue under ch. 72.

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

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

(d) A discretionary or any other beneficial interest or power is valued at zero.

(4) For the purpose of this section, the surviving spouse has the burden of proving that property owned by him or her at the decedent's death or property transferred by him or her during the marriage was not derived or received from the decedent.

NOTE: Reduces the augmented marital property estate to prevent the surviving spouse from having access to more than a "fair share" of the estate when the surviving spouse has derived property of the decedent to which the surviving spouse would not otherwise be entitled. [The remainder of this paragraph in the original NOTE has been deleted because it failed to reflect changes made in the course of legislative consideration.]

Subsection (4) puts the burden on the surviving spouse to prove that property owned by him or her at the decedent's death or property previously transferred by him or her during the marriage was not derived from the decedent spouse. The special committee concluded that the surviving spouse is in the best position to make that proof.

**861.09 Satisfaction and apportionment of augmented marital property estate.** (1) After a hearing, the court shall determine the amount remaining after reducing the surviving spouse's share of the augmented marital property estate under s. 861.07 and shall order that the amount be satisfied as provided in sub. (2).

(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. 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: While a hearing is required, the special committee assumed that a hearing can be waived if all interested persons consent.

**861.11 Procedure for electing.** (1) A surviving spouse who wishes to elect under s. 861.02 or 861.03 or

both shall, for each election, file a written instrument of election with the court in which the decedent's estate is being administered. The surviving spouse shall deliver a copy of the written instrument to any personal representative or special administrator of the decedent spouse. If no personal representative or special administrator has been appointed, the court shall appoint a special administrator under s. 867.07 (7).

(2) An election under s. 861.02 or 861.03 may be filed by a guardian on behalf of a spouse or by a guardian ad litem. A guardian or guardian ad litem may elect only if additional assets are needed for the reasonable support of the surviving spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse and any other assets available for the spouse's support. An election by a guardian ad litem is subject to the approval of the court having jurisdiction of the decedent spouse's estate.

(3) (a) Except as provided in pars. (b) and (c), no written election under sub. (1) may be filed or delivered later than 6 months after the date of the decedent spouse's death.

(b) If within 6 months after the date of the decedent spouse's death the surviving spouse files a petition for extension and notifies all interested parties, the court having jurisdiction of the decedent spouse's estate may extend the 6-month period for additional time as the court considers just, because of the filing of a petition for appointment of a guardian for an incompetent surviving spouse within the 6-month period, a contest of the will, a proceeding to obtain a judicial construction of the will or any other special circumstance justifying a delay in delivery of an election.

(c) If a will is admitted to probate later than 4 months after the date of the decedent spouse's death and if the surviving spouse files a petition for extension within 6 months after the date of admission, the court having jurisdiction over the decedent spouse's estate may extend the 6-month period for additional time as the court considers just.

(4) Within 3 months after filing an election, the surviving spouse shall commence a separate action in circuit court against any person who may be liable for contribution under s. 861.09.

(5) If the surviving spouse dies before filing a written election under sub. (1) or to approval by the court of an election filed by a guardian or guardian ad litem, the right to election ceases with death.

NOTE: Based on the procedure contained in s. 861.11, 1983 stats., for making an election of the one-third elective share (repealed by Act 186).

**861.13 Barring election of certain property at death.**

(1) (a) In this section, "property in joint names" means any property held or owned under any form of ownership with the right of survivorship, including survivorship marital property, property which passes to the surviving spouse as provided in s. 766.58 (3) (f),

property held in conventional joint tenancy, property held in cotenancy with a remainder to the survivor, a stock, bond or bank account in the name of 2 or more persons payable to the survivor, a U.S. government bond in coownership form or payable on death to a designated person and a share in a credit union or savings and loan association payable on death to a designated person or in joint form.

(b) The right of the surviving spouse to elect under s. 861.02 is barred if the surviving spouse receives at least one-half of the total of the following property, such property to be reduced by the amount of the federal estate tax payable by reason of such property:

1. The net estate.
2. A joint annuity furnished by the decedent.
3. Proceeds of a life insurance policy in which the decedent had an ownership interest at death.
4. A transfer within 2 years of death to the extent to which the decedent did not receive consideration in money or money's worth.
5. A transfer by the decedent during lifetime if the decedent retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate the transfer or to designate the beneficiary.
6. A payment from the decedent's employer, from a plan created by the employer or under a contract between the decedent and the decedent's employer, except for a worker's compensation or social security payment.
7. Property appointed by the decedent by will or by a deed executed within 2 years of death, whether the power is general or special, if the property is effectively appointed in favor of the surviving spouse.
8. Property in joint names of the decedent and one or more other persons except any property attributable to consideration furnished by any person other than the decedent.

(c) For the purpose of this subsection:

1. The surviving spouse receives any property with respect to which he or she is given all of the income and a general power to appoint the principal.
2. The surviving spouse receives life insurance proceeds settled by the decedent on option if the surviving spouse is entitled to the interest and has a general power to appoint the proceeds or to withdraw proceeds, or if the surviving spouse is entitled to an annuity for life or to instalments of the entire principal and interest for any period equal to or less than the normal life expectancy of the spouse.

(2) A surviving spouse who feloniously and intentionally killed the decedent spouse may not elect under s. 861.02 or 861.03. Section 852.01 (2m) (b) and (c) applies to this subsection.

NOTE: Subsection (1) is based on s. 861.07 (2), 1983 stats. (repealed by Act 186), which bars a surviving spouse's one-third elective share if the spouse receives one-half the probate and nonprobate assets of the decedent.

Subsection (2) is based on a concept that appears throughout the statutes. For example, see s. 853.11 (3m).

SECTION 175. Subchapter II (title) of chapter 861 of the statutes is amended to read:

CHAPTER 861  
SUBCHAPTER II  
OTHER RIGHTS, ALLOWANCES  
AND EXEMPTIONS

SECTION 176. 861.20 of the statutes is created to read:

**861.20 Surviving Spouse's right in nondomiciliary decedent's real property in this state.** (1) If a married person who does not have a marital domicile in this state dies and leaves a valid will disposing of real property in this state which is not the community property or marital property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in that property against the will of the decedent as if the property were located in the decedent's domicile at the decedent's death. The procedure of the decedent's domicile for electing against the will applies to such an election.

(2) If a married person who does not have a marital domicile in this state dies and has an interest in real property in this state that is not disposed of by will, the surviving spouse has the same right to the property under intestate succession as if the property were located in the decedent's domicile at decedent's death.

NOTE: The special committee concluded that the rule is desirable because the former right to elect against the will under s. 861.05, 1983 stats., is repealed effective January 1, 1986, and because the rule represents sound policy. If the decedent spouse is domiciled in another jurisdiction, there is no overriding reason why the location of the property in Wisconsin should be the determining factor as to what rights the surviving spouse has in the property.

Subsection (1) is based on s. 120 of the California probate code. Subsection (2) has been added to the California provision to address the situation of intestacy.

SECTION 177. 861.41 (3) of the statutes is amended to read:

861.41 (3) The assignment of property shall be applied against any right of the surviving spouse to take under the will or under the intestate succession law or to elect under ss. 861.02 and 861.03.

NOTE: Substitutes cross-references to election of deferred marital property and the augmented marital property estate for reference to the elective share under s. 861.05. The latter cross-reference was repealed by Act 186.

SECTION 178. 863.27 of the statutes is amended to read:

**863.27 Contents of final judgment.** In the final judgment the court shall approve the final account, designate the persons to whom assignment and distribution is being made and assign to each of them the property or proportions or parts of the estate or the amounts to which each is entitled. The findings of fact which support the judgment shall include a determination of the heirs of the decedent; facts showing that all jurisdictional requirements have been met; the date of death of the decedent and the decedent's testacy or intestacy; facts relating to the payment of state inheritance and estate tax, state income tax and claims and charges

against the estate; ~~and if. If immediately before death~~ the decedent ~~immediately prior to death~~ had an estate for life or an interest as a joint tenant in any property in regard to which a certificate of termination has not been issued; ~~under s. 867.04 or an interest in marital property for which a certificate has not been issued~~ under s. 865.201 or 867.046, the findings of fact which support the judgment shall set forth the termination of the life estate ~~or, the right of survivorship of any joint tenant or the decedent's interest in marital property~~ and, upon the petition of the decedent's spouse, the confirmation of the one-half interest held by the surviving spouse in marital property immediately before the death of the decedent spouse. In addition, the findings of fact shall, upon petition of a designated person, trust or other entity under s. 766.58 (3) (f), set forth the confirmation, of an interest in property passing by nontestamentary disposition under s. 766.58 (3) (f). Every tract of real property in which an interest is assigned or terminated shall be specifically described. If a fund is withheld from distribution for the payment of contingent claims, for meeting possible tax liability or for any other reasonable purpose, the judgment shall provide for the distribution of the fund if all or a part of it is not needed.

NOTE: Clarifies that the final probate judgment shall terminate the decedent spouse's interest in marital property if the interest has not already been terminated and confirm the surviving spouse's interest in the marital property immediately before the death of the decedent spouse.

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION 179. 865.201 of the statutes is amended to read:

**865.201 (title) Confirmation of interest in property.**

(1) As an alternative to s. 867.046 the personal representative may file with the probate registrar a verified statement describing property in which the decedent had ~~a an interest in marital property interest to which a right of survivorship was added by an agreement under s. 766.58 (3) (f) or 766.60 or in which any designated person, trust or other entity has an interest passing by nontestamentary disposition under s. 766.58 (3) (f), including the recording data, if any, of the document creating the interest in marital property and the any right of survivorship.~~ Valuations need not be set forth in the statement.

(2) Upon filing under sub. (1), the statement constitutes prima facie evidence of the facts recited and evidences ~~the termination of the decedent's interest and the confirmation of the surviving spouse's or the designated person's trust's or other entity's interest in the property listed, with the same effect as if a certificate had been issued by the court under s. 867.046.~~ If the statement describes an interest in real property or a debt secured by an interest in real property, the personal representative may file a certified copy or duplicate original of the statement in the office of the register of deeds in each county in this state in which real property is located.

NOTE: Extends the informal probate procedure, provided by Act 186, for the confirmation of a survivorship interest in marital property to any marital property interest of the surviving spouse immediately before the death of the decedent spouse.

[The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION 180. 867.046 (title), (1) and (2) (intro.) and (h) 1 and 2 of the statutes are amended to read:

**867.046 (title) Summary confirmation of interest in property.** (1) UPON DEATH; GENERALLY. If a domiciliary of this state dies who immediately prior to death had ~~a marital property an interest in property in this state,~~ or if a person not domiciled in this state dies having ~~a marital an interest in property in this state,~~ upon petition of ~~a person having a right of survivorship in the property because of an agreement under s. 766.58 (3) (f) or 766.60 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)~~ 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 of the decedent's interest in the marital 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.

(2) (title) UPON DEATH; REAL PROPERTY, VENDOR'S INTEREST, SAVINGS AND CHECKING ACCOUNTS, STOCKS AND BONDS. (intro.) As an alternative to sub. (1), upon the death of any person having ~~a marital property an interest in any real property, in a vendor's interest in a land contract,~~ or in any savings or checking account or any stock certificate or bond, ~~a surviving person having a right of survivorship in the property because of a marital property agreement under s. 766.58 (3) (f) or 766.60 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)~~ 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 ~~certified copies of the agreement and~~ the death certificate for the decedent and ~~by providing,~~ in triplicate, on applications supplied by the register of deeds for that purpose, all of the following information:

(h) 1. Recording data from the deed creating the ~~marital~~ property interest.



2. The deed creating the ~~marital~~ property interest, from which the register of deeds shall copy the recording data onto the application.

NOTE: [The NOTE has been deleted because it failed to reflect changes made in the course of legislative consideration.]

SECTION 181. 867.046 (2m) of the statutes is created to read:

867.046 (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) 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 under this section.

NOTE: Permits any interested person, such as a creditor or heir, to secure a summary confirmation of the survivor's interest in marital property if the survivor or a personal representative has not done so within 90 days after a decedent's death. [The NOTE is accurate as stated, but fails to reflect changes made in the course of legislative consideration.]

SECTION 181m. 867.046 (5) of the statutes is amended to read:

867.046 (5) (title) **RECORDING; TERMINATION OF PROPERTY INTEREST.** Upon the recording, the application constitutes prima facie evidence of the facts recited and constitutes the termination of the ~~marital~~ property interest, with the same force and effect as if issued by the court assigned to exercise probate jurisdiction for the county of domicile of the decedent under s. 867.04.

SECTION 182. 880.173 (title) of the statutes is amended to read:

**880.173 (title) Guardian of the estate of a married person.**

SECTION 183. 880.173 of the statutes is renumbered 880.173 (1) and amended to read:

880.173 (1) A guardian ~~or conservator~~ of the estate appointed under this chapter for a married person may exercise with the approval of the court, except as limited under s. 880.37, any management and control right over the marital property or property other than marital property and any right in the business affairs which the married person could exercise under ch. 766 if the person were not determined under s. 880.12 to be a proper subject for guardianship. Under this section, a guardian may consent to act together in or join in any transaction with that person's spouse for which consent or joinder of both spouses is required under ~~ch. 766~~ or may execute a marital property agreement with the other spouse, but may not make, amend or revoke a will.

SECTION 184. 880.173 (2) of the statutes is created to read:

SECTION 187. **Cross-reference changes.** In the sections of the statutes listed in Column A, the cross-references shown in Column B are changed to the cross-references shown in Column C:

880.173 (2) The powers under sub. (1) are in addition to powers otherwise provided for a guardian of the estate.

NOTE: Authorizes a guardian of the estate to exercise any ch. 766 management and control right and any right in business affairs which a spouse could exercise if the spouse were not subject to guardianship (except the power to make, amend or revoke a will), including the right to participate in transactions with the ward's spouse where consent or joinder of the spouse or spouses is necessary. Rights under s. 880.173 supplement those already possessed by a guardian of the estate of a spouse. Court approval is necessary for the guardian's activities under this section.

The provision is based primarily upon the permissible court orders set forth in Section 5-407 of the Uniform Probate Code and the California statutory provision for substituted judgment [Cal. (Guardianship and Conservatorship) Code s. 2580 (Deering 1984)]. However, the provision also is intended to authorize the exercise of the rights, powers, elections, remedies and other activities specifically set forth in Act 186 and this bill.

The authority provided under this section for the guardian of the estate of a spouse includes but is not limited to the powers of a conservator in administration set forth in Section 5-407 of the Uniform Probate Code, such as the power to: (1) make gifts of principal or income or both in trust or otherwise to likely beneficiaries of the married person's bounty; (2) convey or release contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or survivorship marital property; (3) exercise or release powers held by the married person as trustee, personal representative, custodian for minors, conservator or donee of a power of appointment; (4) enter into contracts, including marital property agreements; (5) create, for the benefit of the married person or others, revocable or irrevocable trusts of marital property and other than marital property which may extend beyond the period of guardianship or the life of the married person; (6) exercise options of the married person to purchase or exchange securities or other property; (7) exercise the rights of the married person to elect benefits or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow or to receive cash value in return for a surrender of rights under life insurance policies, plans or benefits, annuity policies, plans or benefits, mutual fund and other dividend investment plans, and deferred employment benefit plans; (8) exercise any right of the married person to an equitable election and elections in the deferred marital property and the augmented marital property of the married person's decedent spouse; (9) renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer, including the right to surrender the right to revoke a revocable trust; (10) file joint or separate income tax returns; (11) pursue remedies under s. 766.70 if appropriate; and (12) minimize current or prospective taxes or expenses of administration of the guardianship estate or of the estate upon the married person's death.

SECTION 185. 893.135 of the statutes is created to read:

**893.135 Tolling of statute of limitations for marital property agreements.** Any statute of limitations applicable to an action to enforce a marital property agreement executed under s. 766.58 is tolled as provided under s. 766.58 (13).

NOTE: See SECTION 120 [s. 766.58 (13)].

A	B	C
Statute Sections	Old Cross-References	New Cross-References
72.12 (3)	subch. II of ch. 861	subch. II of ch. 861, except s. 861.20
409.306 (3)	409.203 (3)	409.203 (4)
705.04 (4)	766.70 (7)	766.70 (6)
766.56 (3)(c), as renumbered	par. (a)	par. (b)
766.62 (3)	subs. (1) and (2)	sub. (1) or (2)
857.35	766.70 (8)	766.70 (6)
861.17 (1)(intro.) and (a) and (3)	ch. 852, this chapter and s. 766.77	ch. 852 and this chapter

**SECTION 188m. Initial applicability.** The treatment of sections 71.01 (1g), 71.09 (6r) (d), (7) (a) 6, 7 and 8 and (7m), 71.10 (10) (f) and 71.54 of the statutes by this act first applies to taxable year 1986.

**SECTION 190. Effective dates.** (1) Except as provided in subsection (2), this act takes effect on January 1, 1986.

(2) The treatment of section 766.585 of the statutes takes effect on the day after publication.

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