

PROPERLY DRAFTING MARITAL PROPERTY AGREEMENTS

I. Introduction

A. Marital property agreements are authorized by Wis. Stat. § 766.58.

- Marital Property: Each spouse owns one-half of the marital property.
- Individual Property: The spouse owns the entire interest.

B. Why have agreements for estate planning purposes?

C. Why have a pre-nuptial agreement?

II. Agreements

A. Opt-in Agreement.

1. *Generally:* An opt-in agreement classifies as marital property.

2. *Advantages.*

a. On the death of either spouse, the income tax basis of the interests of both spouses in all marital property is increased (or decreased) to the value on date of death. This double adjustment in basis can eliminate substantial potential capital gain in the entire estate on the death of either spouse. IRC Sec. 1014(b)(6), Rev. Rul. 66-283.

b. Equalizes estates thus facilitating planning for estate tax savings.

c. Provides certainty about disposition at death.

d. Can provide for non-probate distribution to a trust or spouse at death.

3. *Disadvantages.* An opt-in agreement will not preserve assets for someone other than the spouse.

- Marital property is creditor friendly
- **Caution:** Non-citizen spouses: When preparing an estate plan for non-citizen spouses, be careful about using an opt-in agreement. If the reclassification pursuant to the document results in a gift to the non-citizen spouse, there may be federal tax liability not sheltered by the marital deduction.

B. Opt-out Agreement

1. *Generally:* The opt-out agreement opts out of Wisconsin's marital property classification.
2. *Different Approaches:*
 - Statutory Terminable Individual Property under §766.589. This agreement is rigid and it can be terminated by the action of one party.
 - Adopt the common-law and statutory property ownership rules in effect on 12/31/1985.
 - Classify the property as the spouse's common-law solely owned property as if they were unmarried persons based on rules of title, acquisition or possession that are spelled out in the agreement.
 - Classify the spouse's property as their individual property based on rules of title, acquisition or possession that are spelled out in the agreement.
3. *Advantages:*
 - Maintain wealth existing at the time of remarriage for children of a prior marriage.
 - Protection in the event of divorce.
 - Limit to the extent possible creditor's ability to reach assets or income of one spouse.

4. *Disadvantages:*

- Losing the opportunity for full adjustment in basis that is available for both spouses interest in marital property at the death of one of them.
- Giving up rights to property held or acquired by the other spouse that would have been marital property but for the agreement.

C. Limited Marital Property Agreement or “Bullet Agreement.”

The limited marital property agreement is designed to classify one or more assets as marital property or individual property.

D. Comparison of Impact of Opt-out, Opt-in and Bullet:

	<u>Wilma</u>	<u>Fred</u>
Cash	\$100,000	\$50,000
Real Estate	\$1,000,000	0
IRA	\$500,000	\$500,000
Stock	\$500,000	\$50,000
Business	\$1,400,000	0
Total	\$3,500,000	\$550,000
Opt-Out	\$3,500,000	\$550,000
Opt-In	\$2,025,000	\$2,025,000
Bullet (Business)	\$2,725,000	\$1,325,000

III. **Overview of Requirements.**

A. Subject Matter. Wis. Stat. § 766.58(3).

1. *Property Rights and Obligations.* A marital property agreement may classify whether property is individual property or marital property in order to avoid classification and tracing problems when it is not clear marital property law determines ownership.

Caution: *Debts.* A marital property agreement does not bind third-party creditors unless those creditors have knowledge of the agreement before they extend credit.

2. *Management and Control.* The spouse having title to a particular marital property asset has management and control of that asset. An agreement may specify that the non-titled spouse has such rights.
3. *Disposition at Death.* The spouses may agree in the agreement how to dispose of certain property.
4. *Disposition Upon Divorce.* Subject to the provisions in ch. 767, a marital property agreement may address property division and maintenance rights in the event of divorce.
5. *Modification or Elimination of Spousal Support.* Spouses can enter into agreements regarding spousal support, but the agreement may not render a spouse eligible for public assistance at termination of the marriage nor may it result in the spouse having less than adequate support. Wis. Stat. § 766.58(9).
6. *Making of Will, Trust or Other Arrangements (Includes Contractual Terms).* An agreement may provide that one spouse will receive outright or in trust a portion of trust estate assets.

Caution: Consider how far to lock the spouses into an agreement in view of changing tax laws, family situations and possible future incapacity of the other spouse.
7. *Will Substitute Provisions.* The agreement may provide that upon the death of either spouse, any property will pass without probate to a designated person, trust, or entity by nontestamentary disposition.
8. *Choice of Law.* The agreement may include a choice of law *for construction of the agreement* rather than choice of law that will govern its enforceability.
9. *Other Matters Affecting Property.* The spouses may contract regarding any other matter that affects the property of either spouse and does not violate public policy or a statute imposing a criminal penalty.
10. *Death Issues to Consider With Prenuptial Agreements.*
 - Waive statutory rights at death.

- Retirement Assets. A prenuptial agreement may generally be effective to waive a spouse's rights to qualified retirement plans benefits upon divorce, but are usually ineffective at death to the extent that the plan is governed by ERISA. A prenuptial agreement may obligate a future spouse to sign such consent, but if the consent is not signed after the marriage, the prenuptial agreement has been found invalid under ERISA.
 - Estate Tax Portability. Portability allows spouses to share their unused federal estate tax exclusion amounts if the executor makes the election on the deceased spouse's federal estate tax return. A spouse may want to receive a contractual commitment that if the other spouse dies, his or her estate will file an estate tax return and elect to give the surviving spouse the available exemption.
11. *Personal Rights?* Can an agreement address personal rights and obligations such as child rearing or religion?
 12. *Limitations.* Limitations on the subject matter of a marital property agreement include:
 - a. Each spouse must act in good faith with respect to the other spouse's property. Wis. Stat. § 766.15(1).
 - b. No provision of a marital property agreement may adversely affect the creditor's interest unless the creditor has actual knowledge. Wis. Stat. § 766.55(4m).
 - c. A marital property agreement cannot adversely affect a child's right to support.
 - d. An agreement may not result in a spouse receiving less than necessary and adequate support. Wis. Stat. § 766.58(9)(a).

IV. **Requirements.** Wis. Stat. § 766.58(1).

A. Generally.

- Signed by both spouses (and only spouses: not 3rd parties).
- Enforceable without consideration.

- Witnesses and acknowledgement before notary not required (but recommended).
- Amended or revoked only by later signed agreement. Wis. Stat. § 766.58(4).
- MPA executed before marriage becomes effective upon marriage. Wis. Stat. § 766.58(5).

B. Legal Representation.

Wis. Stat. §766.58(8) states that that fact that both parties are represented by one counsel or one party is not represented does not “by itself” make a marital property agreement unconscionable.

V. **Enforceability.**

- A. Presumption that Agreement is Enforceable. Wisconsin law presumes that marital property agreements in general are enforceable, and the burden to show unenforceability is on the party challenging the agreement. *Gardner v. Gardner*, 190 Wis. 2d 216, 229-30 (Ct. App. 1994).
- B. Statutory Challenges. Under Wis. Stat. § 766.58(6), a marital property agreement is not enforceable if:

1. The agreement was unconscionable when it was made.

Note: In a divorce situation, Wisconsin is a “two looks” jurisdiction:

766.58(6)(a) requires a determination when the agreement is made.

767.61(3)(L) requires a determination of whether the agreement is inequitable at the time of divorce.

2. The spouse did not sign the agreement voluntarily.
 - Factors to consider with respect to voluntariness include whether each party had independent counsel, whether each party had adequate time to review the agreement; whether the parties understood the terms of the agreement and their effect and whether the parties understood their financial rights in the absence of an agreement. *See, Button v. Button*, 131 Wis. 2d 84, 95-96 (1986).

- Not just freedom from duress: consider bargaining positions, sophistication, presence of independent advice, timing of wedding, etc.
3. Before executing the agreement, the spouse did not receive fair and reasonable disclosure under the circumstances and did not have notice of the other spouse's property or financial obligations.
 - Courts do not always require specific disclosure to enforce an agreement. Spouses' independent knowledge of each other's financial status may substitute for fair and reasonable disclosure. *Schumacher v. Schumacher*, 131 Wis. 2d 332, 338 (1986). If the party's conduct demonstrates that specific knowledge of the other party's property and finances is not important, the agreement may not be defective if otherwise freely made. *Greenwald v. Greenwald*, 154 Wis. 2d 767, 782 (Ct. Ap. 1990).
 4. *Contract Defenses*. Ordinary contract defenses including incapacity, misrepresentation, duress, undue influence, mistake, impracticality of performance may be used to find a marital property agreement unenforceable.

VI. **Impact of Marital Property Agreement at Divorce.**

A. Generally.

1. Public policy favors enforceable prenuptial agreements, both with respect to property division and support.

In Wisconsin, premarital agreements 'are regarded with favor rather than disfavor' and 'there is nothing inherently suspicious or bad about such agreements.' [. . .] A premarital agreement is a binding contract, in writing, and as such, it is an affirmative act where the parties are intentionally relinquishing a known right. *Jones v. Estate of Jones*, 2002 WI 61, ¶ 17 (internal citations omitted).

Prenuptial agreements are, in the final analysis, an outgrowth of a couple's desire to opt out of the marital property system. This is a favored result because it encourages marriage where parties might otherwise be reluctant for fear of loss of property should the marriage

fail. Our courts should enforce the specific terms of the agreement if the circumstances at the time the marriage ends were what the parties foresaw at the time they entered into the prenuptial agreement. *Warren v. Warren*, 147 Wis. 2d 704, 709 (Ct. App. 1988).

2. Provisions in a marital property agreement dealing with divorce are subject to Wis. Stat. ch. 767's rules.

B. Property Division.

1. *Presumption.* Under Wis. Stat. § 767.61, the general presumption is that all marital property shall be divided equally between the parties.
2. *Gifts/Inheritances.* Generally, gifted and inherited property is not subject to division. Unless a court finds that the refusal to divide will result in a hardship for the spouse or children, a gift or inheritance from a person other than the other party is not subject to division. Wis. Stat. § 767.61(2).
 - Hardship involves a financial privation and requires something more than an inability to maintain the pre-divorce standard of living. *Grumbeck v. Grumbeck*. 296 Wis. 2d. 611, 617 (Ct. Ap. 2006).
 - While gifted property is not normally subject to division at divorce, if property has lost its character or identity through commingling with divisible property, then all the property is subject to division. *Friebel v. Friebel*, 181 Wis. 2d 285 (Ct. Ap. 1993). *Derr v. Derr*, 681 2005 WI App. 63, 280 Wis. 2d 681, 696 N.W.2d 170.
3. *Marital Property Agreement.* The presumptive equal division may be altered for a marital property agreement:

“Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution [. . .] *shall be binding upon the court* except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court *shall presume* any such agreement to be

equitable as to both parties.” Wis. Stat. § 767.61(3)(L)
(emphasis added).

4. Marital property classification governed by chapter 766 is generally a separate inquiry from equitable property distribution governed by ch. 767. *Steinmann v. Steinmann*, 309 Wis. 2d 29, 49 (2008).

C. Maintenance.

1. The maintenance statute provides that a marital property agreement is but one factor in a list of factors for the court to consider. Thus, the agreement is merely advisory to the divorce court rather than conclusive.

767.56 Maintenance. Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001 (1) (g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (a) The length of the marriage.
- (b) The age and physical and emotional health of the parties.
- (c) The division of property made under s. 767.61.
- (d) The educational level of each party at the time of marriage and at the time the action is commenced.
- (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (g) The tax consequences to each party.

(h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

(i) The contribution by one party to the education, training or increased earning power of the other.

(j) Such other factors as the court may in each individual case determine to be relevant. (Emphasis added).

2. *Support Requirement.* In contrast to “support” under Wis. Stat. § 766.58(9), support under the maintenance statute considers the feasibility of the person seeking maintenance to be self-supporting at the standard of living reasonably comparable to that enjoyed during the marriage. Wis. Stat. § 767.56(1c)(f). Support is not calculated at bare subsistence levels.

3. Parties with marital property agreements are not, as a matter of law, exempt from maintenance awards. Unless the agreement contains a waiver of maintenance rights as described in the provision of the maintenance statute that addresses marital property agreements, a court may conclude that a maintenance award is appropriate. *Steinmann v. Steinmann*, 309 Wis. 2d 29, 74 (2008).

D. Child Support. A marital property agreement may not adversely affect the right of a child to support. Wis. Stat. § 766.58(2).

E. Enforceability Upon Divorce.

1. An agreement regarding property division at the dissolution of a marriage is binding on the court unless the agreement is inequitable. The court must presume the agreement to be equitable. Wis. Stat. § 767.61(3)(L). The party challenging the marital property agreement in divorce has the burden to overcome the presumption that the agreement is equitable. *Gardner v. Gardner*, 190 Wis. 2d 216, 230 (Ct. Ap. 1994).

2. An agreement is equitable if all of the following are true:

- Each spouse made fair and reasonable disclosure to the other spouse regarding his or her financial status.
 - Each spouse entered into the agreement freely and voluntarily.
 - The substantive provisions of the agreement providing property upon divorce are fair to each party. *Gardner v. Gardner*, 190 Wis. 2d 216, 229 (Ct. App. 1994).
3. *What is Fair?* Fairness at enforcement is not a question of the specific distribution of the property or maintenance provisions. “The courts are instructed to enforce marital agreements if the circumstances at the time the marriage ends were what the parties foresaw at the time they entered into the agreement.” *Greenwald v. Greenwald*, 154 Wis. 2d 767, 787 (Ct. Ap. 1990). A party “will not be saved from an unwise agreement unless the circumstances of the parties at divorce were beyond the contemplation of the parties at the time the agreement was made.” *Warren*, 147 Wis. 2d 704, 708 (Ct. Ap. 1988). If there are significantly changed circumstances after execution of marital property division agreement and the agreement as applied at divorce no longer comports with reasonable expectations of the parties, the agreement which is fair at execution may be unfair to parties at divorce and thus may be unenforceable. *Greenwald* at 787.

F. Where Agreements Can be Attacked in Divorce.

1. *Total opt out on property - may not be equitable.*
 - a. If there is a dissolution of the Parties' marriage by divorce, annulment, legal separation, or other legal proceeding, each Party shall have the absolute right to retain all of his or her individual property, and such property shall not be subject to division pursuant to Wis. Stat. § 767.255 [now renumbered 767.61], **nor shall the value of such individual property be considered in dividing the Parties' other property interests.** The Parties specifically affirm that this Agreement is at this time a fair and equitable written agreement under Wis. Stat. § 767.255 relating to property division. If either Party files an action seeking dissolution of the marriage, the Parties intend that this Agreement shall be deemed equitable as to both of them at the time of its execution and at all times thereafter. (emphasis added).

[B and H. - 18 year marriage. No unforeseen events; 2 minor children; W: approx. \$1 million - passive; H: \$120,000 at time of entering into agreement]

Grumbeck v. Grumbeck, 2006 WI App 215, 296 Wis. 2d 611, 723 N.W.2d 778 (although a circuit court may consider substantial gifted assets when dividing the marital estate, it may not divide the marital estate to work a de facto splitting of those assets where there is no hardship. While substantial assets not subject to division by the court is a factor to be considered in departing from equal division of property under sub. (3), sub. (3) begins with the presumption that the marital estate should be evenly divided. Absent some special circumstances demonstrating that unfairness would result from equal division, the presumption should stand).

- b. E.g., Tracy K¹ - total opt out; no alimony; mid length marriage, 3 kids, one totally disabled.
- c. E.g., Bill R - total opt out; limited alimony; long term marriage (26 years), wife did not work during marriage, estate increased fivefold.

2. *Total opt -in for divorce?*

- a. "Now, therefore, based upon the above considerations, the parties hereto, on behalf of themselves, their heirs, successors and assigns, hereby covenant, promise and agree that the provisions of the 1983 Wisconsin Act 186 effective January 1, 1986, and all subsequent amendments thereto through this date, creating a system of marital property in Wisconsin, shall apply to their ***property and all of their property shall be considered marital property, except that to the extent necessary to carry out the provisions of their individual estate plans, including non-probate beneficiary designations, Wills and testamentary trusts, and only to that extent, will the property titled to one or the other of them individually remain individual property.*** The classification of an asset as the individual property of a party shall extend to income and realized and unrealized

¹ Names have been changed to protect parties' identities.

appreciation of the asset. Further, to the extent necessary to carry out the provisions of their individual estate plans, both parties waive any rights they may be entitled to under 1983 Wisconsin Act 186 or Chapter 766 Wis. Stats., as modified, and in existence at the execution of this agreement or as hereafter amended which waiver is expressly limited to apply only to the extent necessary to carry out their individual estate plans.

[2nd marriage for both; each with children from first marriage; 9 year marriage; H has substantial assets brought to the marriage; joint representation by estate planning attorney; cover letter to parties states: "Our recommendations concerning the Agreement will affect each of your interests in assets and income, both during your marriage, or in the event of a divorce, and at the time of the death of one or both of you."]

3. *Failure to Abide by Agreement During the Marriage.*

a. Contributions to accounts during marriage.

E.g., H agrees to contribute 50% of net wages into joint account. If earned income falls below X, H will contribute 100% of income to jointly owned accounts.

E.g., W shall create a "security fund" and shall contribute X to the security fund on or before each anniversary of the parties' date of marriage. . . W shall retain total management and investment control over the assets in said security fund. . . .²

[issue: what about offsets for H's financial obligations?]

E.g., The parties agree to contribute mutually to a common bank account from which common living expenses shall be paid. From the joint account, the parties shall pay all common household expenses such as food, entertainment, joint travel expenses, and all other reasonable and necessary

² Note: in this particular case, the drafting attorney for W sent a closing letter with explanation regarding the terms and effect of the agreement, but no mention was made of the obligation to contribute to the security fund.

expenses for the parties' joint maintenance. (The parties agree that 'all other reasonable and necessary expenses shall include clothing, medical expenses, entertainment, and automobile expenses.) In the event the homestead of the parties is owned exclusively by either party as his or her solely owned property, the other party shall not acquire any interest in said homestead as a result of the payments required by this section.

Brandt v. Brandt, 145 Wis. 2d 394, 415-16 (Ct. App. 1988) (when an agreement is “so long forgotten or ignored by the parties and their finances [were] managed to the satisfaction of all in the interim,” it is inequitable to enforce a prenuptial agreement).

Krejci v. Krejci, 2003 WI App 160, ¶ 22, citing *Brandt*, 145 Wis. 2d at 415. The point of these cases was not merely that the agreements were ignored, but that it would have been unfair to enforce them under the circumstances of the specific cases. “More importantly, the commingling of the parties’ assets and the resultant inability to trace makes a meaningful enforcement of the marital agreement impossible. A party’s request to enforce a marital agreement carries with it, we conclude, a concomitant responsibility to trace the property such that a reliable identification and valuation of the assets governed by the agreement can be made.” *Id.* at ¶ 22, citing *Brandt*, 145 Wis. 2d at 416.

4. *Transmutation. Gifts during marriage/re-titling from individual property to joint property.*

Steinmann v. Steinmann, 2008 WI 43, 309 Wis. 2d 29, 749 N.W.2d 145. (transferring individual property through deeds granting joint title created inference of donative intent; property becomes part of marital estate)

5. *Tracing*

E.g. The agreement prepared 23 years prior to divorce provides: “The parties want to preserve what they individually have brought to the marriage, approximately \$300,000 for H and \$50,000 for W.” There is a financial statement attached indicating generally what assets

comprise H's \$300,000, but H no longer owns any of these assets. What does \$300,000 mean?

The party requesting enforcement of marital agreement has responsibility to trace property such that reliable identification and valuation of assets governed by agreement can be made. *Brandt v. Brandt*, 145 Wis. 2d. 394, 416 (Ct. Ap. 1988).

Although spouse used individual property to purchase property, she then titled property as joint with spouse. When separate property presumed to be indivisible is transmuted through joint tenancy, it is effectively transferred to marital property and tracing does not cause property to revert back to its original separate property. *Steinmann v. Steinmann*, 309 Wis. 2d 29, 59 (2008).

6. *Financial Disclosure*

E.g. Financial sheet says "Value of Retirement Account based on Plan Document."

E.g. Prenuptial Agreement from 1992 lists H's "approximate value" of multiple real estate holdings. Divorce 20 years later. W now argues that the disclosures were wrong – that the values were overvalued. Nothing was attached to the disclosure statements – no financial statements or assessments, so there is no known basis for the values.

Financial Disclosure listed value of closely held stock as \$2,045,000 but included a footnote: "Value as shown represents book value. Market Value may be substantially higher." Spouse challenged agreement for lack of disclosure when market value shown to be \$18-20 million. Court upheld the agreement where attorney counseled spouse on valuation methods, spouse was content with disclosure based on attorney testimony, spouse's attorney made professional judgment not to appraise stock, and spouse's attorney advised spouse that agreement was not in her best interest and not to sign it. *Gardner v. Gardner*, 190 Wis. 2d 216, 229-30 (Ct. App. 1994).

7. *Drafting to Survive a Challenge*

a. *Process:*

- i. Give clients and attorneys sufficient time to negotiate!
- ii. Negotiate better terms. Strategize re: ability/perceived need to negotiate better terms.
- iii. Financial disclosure: more is better than less!
 - It is hard to go back 20 years to figure out values
 - Attach all back-up for values
 - Exchange 3 years of tax returns
 - Ask in writing that the other side let you know if they require any further financial disclosure.
 - Caution client in writing to maintain records sufficient to trace individual property, gifts and inheritances.

b. *Substance:*

- i. *Property:* Providing something to the non-owning spouse in the agreement as the years of marriage continue.

Lump sum v. percentage.

Percentage? - how defined; provide formula and example

Good examples attached

- ii. *Support during marriage clauses*

- (a) Identifying a plan

E.g.,: "the parties assume that L will seek and obtain full time employment. The parties desire that L should have the opportunity to save and invest that earned income to fund her children's

college education and to provide for her children's needs beyond what will be covered by child support paid by her children's father. To accomplish these ends, the parties agree as follows:

During the marriage, C will provide for typical and ordinary expenses of the parties' household from his salary and other compensation income.Typical and ordinary expenses of the parties' household will include food, clothing and shelter. C will also provide health insurance for himself and L.

L and C will open a joint account in both their names, without the right of survivorship, to which they both will contribute in such amounts and at such times as they may from time to time agree. This joint account, any interest or income accruing on this account, and any items purchased using funds from this joint account, shall be classified and owned as marital property."

(b) *Disability during marriage.*

Upon the physical or mental disability of either party, his or her solely owned property shall be spent for that party's maintenance until such property is exhausted, at which time the other party shall assume responsibility to the extent of his or her earnings and assets for the care and maintenance of the disabled party (during the marriage).

iii. *Maintenance:* unenforceable absolutes versus more realistic provision?

“Although each party recognizes that a divorce Court in the State of Wisconsin would maintain the jurisdiction to review maintenance, each party irrevocably waives the right to receive any maintenance or alimony from the other, whether

temporary or permanent, and whether during the pendency of an action affecting the family or upon judgment therein. A copy of this agreement shall be attached to any petition or complaint in an action affecting the family, and shall, by stipulation, be received in evidence in such action. Each of the parties hereto acknowledges and hereby agrees to be equitably stopped from raising an issue of maintenance or spousal support at any time hereafter. The equitable estoppel herein arises in consideration of the Solely Owned Property awarded to each party, regardless of value at any time.”

[H: Property at time of entering agreement: \$435K; W \$34K. Parties had two minor children at time of divorce. Income at time of divorce: H: \$100K; W: \$30K; Shared placement of the children.]

Versus:

e.g, maintenance waiver goes away after 5-15 years of marriage.

"This Section shall have no force and effect and shall be considered null and void after the Parties have been married for five full years. The parties intend that the laws of Wisconsin apply with respect to maintenance should either Party request a maintenance award in the event of the dissolution of their marriage after five full years."

- iv. *Joint property:* common to include residence as joint or marital survivorship property.

EXHIBIT A

767.61 - Property division.

(3) **PRESUMPTION OF EQUAL DIVISION.** The court shall presume that all property not described in sub. (2) (a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

- (a) The length of the marriage.
- (b) The property brought to the marriage by each party.
- (c) Whether one of the parties has substantial assets not subject to division by the court.
- (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- (e) The age and physical and emotional health of the parties.
- (f) The contribution by one party to the education, training or increased earning power of the other.
- (g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
- (h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.
- (i) The amount and duration of an order under s. 767.56 granting maintenance payments to either party, any order for periodic family support payments under s. 767.531 and whether the property division is in lieu of such payments.
- (j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
- (k) The tax consequences to each party.
- (L) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.
- (m) Such other factors as the court may in each individual case determine to be relevant.

GOOD EXAMPLES!

Example 1

(A) Husband will make the following provisions for Wife based upon the length of the marriage:

Full Years Parties Have Been
Married Prior to Commencement
of Proceedings for Dissolution of
the Marriage

Payment

Less than 2 full years	3% of Husband's net worth, reduced (but not below 0) by 3% of Wife's net worth.
At least 2 full years but less than 5 full years	5% of Husband's net worth, reduced (but not below 0) by 5% of Wife's net worth.
At least 5 full years but less than 7 full years	10% of Husband's net worth, reduced (bit not below 0) by 10% of Wife's net worth.
At least 7 full years but less than 10 full years	15% of Husband's net worth, reduced (but not below 0) by 15% of Wife's net worth.
At least 10 full years but less than 15 full years	20% of Husband's net worth, reduced (but not below 0) by 20% of Wife's net worth.
15 full years or more	25% of Husband's net worth, reduced (but not below 0) by 25% of Wife's net worth.

For purposes of this paragraph, a party's "net worth" shall be the party's total assets less the party's total liabilities. A party's total assets shall not include (i) assets divided pursuant to Paragraph (C) of this article and (ii) such party's intellectual property and revenues therefrom and such party's retirement and pensions benefits from the Wisconsin Retirement System. A party's total liabilities shall not include personal guarantees for which the underlying obligation is not in default.

Example 2

Section 10. Fund for M. On or before the first anniversary of the parties' marriage, D will establish a fund for M ("Fund") with an initial deposit of Sixty Thousand Dollars (\$60,000). On or before each subsequent anniversary of the parties' marriage, up to and including the year in which D reaches age 65, D will contribute an additional Twenty Thousand Dollars (\$20,000) to the Fund. Since the intent of the Fund is to provide for M to restart her life in the event of divorce or D's death (if the parties are then married), the parties intend that no withdrawals will be made from the Fund during the parties' marriage. The Fund investments will be titled in D's name, and denominated "Payable on Death" (POD) or "Transferable on Death" (TOD) to M. The Fund investments will be subject to D's management and control during the parties' marriage, and will be classified as his individual property; provided, however, that D will consult with M from time to time, but at least annually, regarding investment strategy for the Fund. Upon dissolution of the marriage by divorce, legal separation, or annulment, the Fund shall be distributed to M as provided in Section 11(b)(i).

Example 3

B. In the event that there shall be a dissolution of the marriage of the parties, any and all marital property of the parties shall be divided equally between the parties.

C. Notwithstanding paragraph A of this Section, should the marriage terminate by divorce or separation, the parties' agree that E should receive a percentage of the equity in the parties' current primary residence titled in M's name as follows:

(1) If the divorce action is commenced within four full years of marriage, then M shall retain 100% of the equity in the residence; and

(2) For each full year of marriage thereafter, E shall receive 5% equity interest in the residence, until the completion of 13 full years of marriage, at which point, E's equity interest shall be capped at 50%:

4 full years of marriage	5%
5 full years of marriage	10%
6 full years of marriage	15%
7 full years of marriage	20%
8 full years of marriage	25%
9 full years of marriage	30%
10 full years of marriage	35%
11 full years of marriage	40%
12 full years of marriage	45%
13 full years of marriage	50%

The equity shall be determined by obtaining an appraisal of the residence by a mutually agreed upon certified appraiser, sharing equally the cost of such appraisal, and deducting any mortgage, liens, or other indebtedness against the residence.