

# Answering your legal questions about marital property

## What is marital property? What is individual property? What if my spouse and I disagree about marital property?

A sound marriage is a partnership of equals. That idea is the basis for Wisconsin's Marital Property Act, enacted in 1986. The law presents benefits and pitfalls. This brochure examines both. Below you'll find answers to several commonly asked questions about the Marital Property Act. It's a complex law, full of exceptions. The intent here is not to present legal advice, but rather to cover a few basics to acquaint you with the law. Individual situations vary. If you have additional questions, talk to your lawyer.

### Why was the Marital Property Act passed?

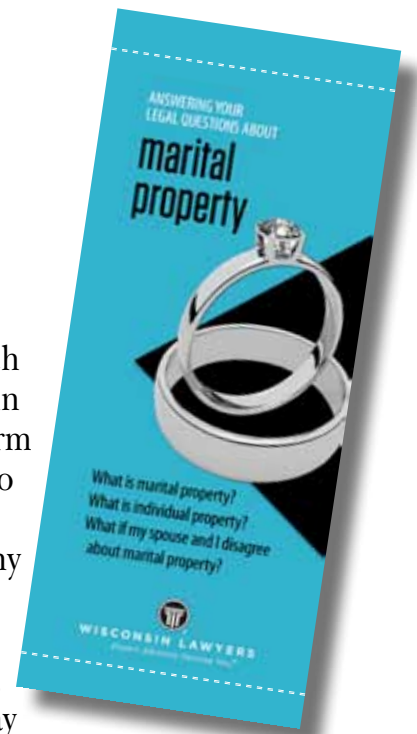
The law recognizes that both spouses contribute to supporting a marriage – even if only one earns a salary, or if both draw an income but one earns more than the other. The law says that, with limited exceptions, whatever the couple acquires during their marriage should belong to them equally. This translates into certain advantages. For example, a nonemployed spouse has easier access to credit, and each spouse can make individual decisions about bequeathing assets (more on this later).

### What is marital property?

Marital property includes all income and possessions a couple acquires after their “determination date” (with certain exceptions). The determination date is the latest of: the couple's marriage day; the date when they both took up residence in Wisconsin; or Jan. 1, 1986. Two concepts bear special mention:

- *Survivorship marital property* – This passes directly to the surviving spouse upon the other's death. It does not pass under a will. An example would be a residence that has both spouses' names (and only their names) on the title.
- *Deferred marital property* – This is a tricky concept; a brief explanation must suffice here. This term applies to property that would have been classified as marital property except that it was acquired before the couple's determination date. Say a couple moved to Wisconsin in 1995. All the property they brought with them did not automatically become marital property just because they moved to Wisconsin. But if one spouse dies, the survivor may have rights to a certain amount of money, based on the value of what would have been marital property if the Marital Property Act had been in effect during the entire marriage.

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The upshot is that the surviving spouse in this situation has some economic protection, even if not the beneficiary of the other's estate.

### Can I still have property that's my own?

Yes, you can have individual property. Usually this is property you owned before marriage. A personal gift or inheritance, no matter when received, also is individual property. For an item to be individual property, however, you must have records that prove it belongs solely to you. Otherwise the law presumes that all property owned by spouses is marital property, belonging to both of you equally.

Simply having only your name on the title to an item does not make it individual property. The spouse named on the title does, however, have the right to manage and control that property. The law requires the titled spouse to treat the nontitled spouse fairly if the item is marital property.

### Can individual property unintentionally become marital property?

Yes. During a marriage, individual and marital property can get jumbled together. The law presumes this mixed property to be entirely marital property, unless records prove that some portion is individual property.

For instance, say you had a savings account before you were married. Over the years, you deposit portions of your paychecks, which are marital property, and the account continues to earn interest. You often withdraw money to pay family expenses. That account has become mixed property and at least partially marital property. It becomes extremely complicated to trace a portion of that account as individual property because multiple deposits, interest earnings, and withdrawals have moved in and out of that account during the marriage.

Another example: You've owned a summer cabin since before you were married. After marriage, your spouse builds an addition to the cabin, without receiving compensation for his or her labor. That extra room boosts the cabin's value. The amount of increased value is marital property, even though the cabin's original value could remain individual property, if documentation so proves.

On the other hand, suppose you owned 100 shares of publicly-traded stock before you were married. You buy no more shares during your marriage, and the stock grows in value due to market changes. That stock, along with its increased value, remains individual property.

It bears repeating: *If you wish to maintain an item as individual property, you must have records to trace the ownership.*

### What are the credit implications of this law?

The law makes it easier for a nonincome-earning spouse to get credit. When deciding one spouse's creditworthiness, the creditor must consider the value of all marital property, including the other spouse's income.

But the Marital Property Act also presents some risks. Debts you incur during marriage are presumed to be in the interest of your marriage. To collect on such a debt, a creditor can go after not only the debtor's individual property, but also all marital property. For example, if one spouse borrows money and then becomes unemployed and can't pay the debt, the creditor can garnish the other spouse's paycheck.

If you and your spouse are prone to disagree on credit matters, consider entering into a marital property agreement. This could limit each spouse's liabilities for the other's debts. But you must give a creditor a copy of such an agreement before obtaining credit.

### How does this law affect my will?

Upon death, your estate will consist of your individual property plus half of all marital property. You may leave your estate to whomever you choose. A word of caution, however. Suppose you leave everything to a charity. The charity would receive your individual property, plus half your marital property. The latter could include half of property still half-owned and used by your surviving spouse, such as the family car. Your surviving spouse

would end up co-owning the car with a charity, which may not be what you had in mind. Be sure your bequests are exactly what you intend.

### What if I have no will?

In this case, your entire estate goes to your surviving spouse, unless you have children from outside your marriage. Then your spouse gets half the marital property and half of your property that is not marital property. The rest of your estate goes to your children, both from this marriage and from outside it.

### How does the law affect life insurance and retirement benefits?

People often pay into life insurance and deferred retirement plans before and during a marriage. Thus, special formulas exist to calculate which portions are marital or individual property.

You should name beneficiaries for life insurance and deferred retirement benefits. Then these assets can pass directly to your beneficiaries, rather than by a will. For life insurance, if you name someone besides your spouse as beneficiary, your spouse still may have a marital property claim to part of the death benefit. Keep this in mind if you wish to name children from another marriage as life insurance beneficiaries.

A spouse has a marital property interest in the other spouse's deferred retirement benefits — but only while alive. In other words, the spouse who dies first can't will away half of the survivor's retirement benefits.

### Can I give away marital property?

One spouse may give away marital property to a third party, if that spouse's name is on the title. If both spouses agree to the gift, it can be of any value. But if one spouse disputes the gift, and its value is more than \$1,000 (or a larger "reasonable" amount based on the couple's economic situation), that spouse can go to court to void the gift.

### What if my spouse and I disagree about marital property?

If you have disagreements you can't settle, you could go to court to seek legal remedies. Among others, these include:

- recovering property the other spouse gave away to a third party, if that gift exceeded the limit described above;
- having your name added to a property's title, so you and your spouse have joint management and control rights over that property;
- removing a spouse's name from a title, to limit his or her management and control rights; and
- asking for an accounting of your financial situation.

## How does the law affect divorce?

The Marital Property Act applies during marriage and upon a spouse's death. Wisconsin has other laws that cover the division of property upon divorce.

## Should we consider a marital property agreement?

You and your spouse may want such an agreement if you disagree on credit matters. A marital property agreement can serve other purposes, as well. Perhaps you both wish to avoid the marital property system. You'd rather keep some or all of your property separate, as individual property. Or, you may wish to have some or all of your individual property reclassified as marital property.

A marital property agreement allows you to either opt into or out of the marital property law. Deciding if either is a smart move for you depends on such factors as your tax situation and estate planning needs. An attorney can help you sort out the best options and also draft the agreement. Or you may be able to use the statutory form agreements. Either way, the agreement must be in writing, and both spouses must sign it voluntarily and with reasonable knowledge about the spouses' financial circumstances.

If you seek legal help to draft the agreement, you may be able to hire one attorney on both spouses' behalf. But if the agreement would seriously affect one spouse's property rights, it may be best for each of you to have your own lawyer.

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