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CLASSIFICATION OF PROPERTY UNDER THE UNIFORM MARITAL PROPERTY ACT

DANIEL L. FURRH*

I. INTRODUCTION

The Uniform Marital Property Act (UMPA) was approved by the National Conference of Commissioners on Uniform State Laws in 1983¹ and has been enacted, with some changes, in Wisconsin.² The Act is, in effect, a uniform community property statute that could be adopted in community property or common-law states. Although the familiar terms "community," "community property," and "separate property" are not used in the Act, it is the opinion of both this writer and other commentators that the UMPA is a community property statute.³

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1. UNIF. MARITAL PROP. ACT (1983), 9A U.L.A. 21 (Supp. 1986) was approved at the Annual Conference of the Commissioners on Uniform State Laws, Boca Raton, Florida, July 22-29, 1983. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETY-SECOND YEAR 60 (1983).

2. The Act was adopted in Wisconsin by Act of April 4, 1984, § 47, 1984 WIS. LAWS 186. As of this writing, the Act is under consideration in several other states. The Wisconsin version differs from the official version in several important respects, some of which will be discussed in this article.

3. K. CHRISTIANSEN, F. WM. HABERMAN, J. HAYDON, D. KINNAMON, M. MCGARITY & M. WILCOX, MARITAL PROPERTY LAW IN WISCONSIN 1-4 (1984) [hereinafter cited as MARITAL PROPERTY LAW IN WISCONSIN]; Kornfeld, *UMPA: The Uniform Marital Property Act*, 4 EQUITABLE DISTRIB. REP. 67, 70 (1983); Reppy, *The Uniform Marital Property Act: Some Suggested Revisions for a Basically Sound Act*, 21 Hous. L. REV. 679, 689 (1984); Taylor, *Wisconsin's Uniform Marital Property Act: Community Property Moves East*, 12 COMMUNITY PROP. J. 83, 84 (1985); Weisberger, *The Wisconsin Marital Property Act: Highlights of the Wisconsin Experience in Developing a Model for Comprehensive Common Law Property Reform*, 1 WIS. WOMEN'S L.J. 5, 23 (1985).

Professor Reppy has argued that the familiar terms "community" and "separate" should have been used rather than the analogous terms "marital" and "individual." Reppy, *supra*, at 682-83, 688-89. Whether or not the UMPA is a community property statute is of more than academic interest. I.R.C. § 1014 (b)(6) (1985) provides that if a decedent and surviving spouse held community property at the time of the decedent's death and if at least one-half of the community interest was includible in determining

The prefatory note to the UMPA acknowledges the Act's indebtedness to the community property system:

Some of the root concepts [of the UMPA] can be traced to the sharing ideal which is at the center of the historical community property approach. The fundamental principle that ownership of all of the economic rewards from the personal effort of each spouse during marriage is shared by the spouses in vested, present, and equal interests is the heart of the community property system. It is also the heart of the Uniform Marital Property Act.⁴

The terms "marital property" and "individual property," used in the UMPA, are analogous to the terms "community property" and "separate property" in the statutes and cases of the community property jurisdictions. It is important to note, however, that these terms are *analogous, not synonymous*.

The status of the UMPA as a community property statute is open to some dispute. In fact, language in the prefatory note to the Act itself *suggests* a different conclusion:

[The UMPA] translates the emotional and perceived concept of "ours" into a verified legal reality. And while that parallels sharing under community property systems, the Act is more accurately characterized as a *sui generis* approach, and as one which utilizes equally useful ideas developed in common law jurisdictions, such as title based management and control. . . . Though drafted with an awareness of various community property statutes and cases, the Uniform Marital Property Act is not an image of any of them, [sic]⁵

As is well known, there is no uniformity among the community

the value of the decedent's gross estate, the surviving spouse's share shall be considered to have been acquired or to have passed from the decedent. Under IRC § 1014(a)(1) (1985), the tax basis of the surviving spouse's share will be the fair market value of the property at the date of the decedent's death. *See also* I.R.C. §§ 66, 879, 2039(c) (1985). "Community property" is not defined in the Internal Revenue Code, but it is obviously important that the UMPA's status as a community property statute be clear.

Use of the term "marital property" may cause confusion in an adopting state. Divorce statutes sometimes refer to the property that is subject to division as "marital property." *See, e.g.,* ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd Supp. 1985); KY. REV. STAT. ANN. § 403.190 (Baldwin 1983); MINN. STAT. ANN. §§ 518.54, .58 (West 1985). Such marital property is not the same as "marital property" under the UMPA.

4. UNIF. MARITAL PROP. ACT prefatory note (1983), 9A U.L.A. at 24 (Supp. 1986).

5. *Id.* at 25.

fore, be classified as a community property act. That conclusion is the premise for this article, which relies extensively upon community property case law and commentary.

II. OVERVIEW

The classification of property is the first step in any application of the UMPA. The Act classifies all property acquired after the "determination date" as either "marital property" or "individual property," unless the property is the proceeds of property owned before the determination date.¹¹ "Determination date" is defined as the last to occur of (1) marriage, (2) 12:01 a.m. on the date of the establishment of a marital domicile in the state, or (3) 12:01 a.m. on the effective date of the Act.¹² The legal effects of the Act flow from this classification. Although the terms "marital" and "individual" are never explicitly defined,¹³ a reading of the entire Act provides a fairly comprehensive indication of what these two classes are and how they differ. For example, "Each spouse has a present undivided one-half interest in marital property,"¹⁴ regardless of which spouse holds "title" to the property in the traditional common-law sense. The ability of the titled spouse to deal with the property is determined under the management and control rules.¹⁵

The Act also deals with a third type of property—that which was owned before the determination date. The drafters made a conscious decision not to alter the classification or ownership rights of this property, subject to certain exceptions.¹⁶ As the Prefatory Note to the UMPA points out,

[This treatment] represents a deferred approach to reclassification of the property of spouses which does not otherwise have

1985, § 68, 1985 WIS. LAWS 37.

11. See *supra* note 148 and accompanying text.

12. UNIF. MARITAL PROP. ACT § 1(5) (1983). The effective date in Wisconsin was January 1, 1986. Act of April 4, 1984, § 93, 1984 WIS. LAWS 186.

13. De Funiak and Vaughn wrote that the early Spanish community property statutes defined community property as all property acquired during marriage, with certain exceptions. W. DE FUNIAK & M. VAUGHN, *supra* note 9, § 58, at 114-15. Since the UMPA follows the same pattern, it defines "marital property" in the same way, at least in De Funiak's terms. See *infra* text accompanying notes 20-27.

14. UNIF. MARITAL PROP. ACT § 4(c) (1983).

15. *Id.* § 5.

16. *Id.* § 4(h).

the characteristics of marital property due to the time or place of its acquisition. The deferral is to the time of marital termination at divorce or death A provision effecting automatic reclassification of such property with the passage of the Act would amount to retroactive legislation and would risk constitutional attack.¹⁷

The Act contains two indirect exceptions to the rule that property owned prior to the determination date remains unchanged. First, if such property becomes mixed with marital property and the nonmarital component cannot be traced, the property will be reclassified as marital property.¹⁸ Second, property that would have been marital property if acquired *after* the determination date will be treated as if it were marital property upon termination of the marriage by death or dissolution.¹⁹

A. Marital Property

Section 4 of the UMPA sets forth the general rules of classification. The first two subsections are central to the classification system. They provide:

(a) All property of spouses is marital property except that which is classified otherwise by this chapter.

(b) All property of spouses is presumed to be marital property.²⁰

17. *Id.* prefatory note, 9A U.L.A. at 24 (Supp. 1986). See also Furth, *Is the Marital Property Act Retroactive?*, 57 WIS. B. BULL. 15 (July 1984); Irish, *A Common Law State Considers a Shift to Community Property*, 5 COMMUNITY PROP. J. 227, 242 (1978).

18. UNIF. MARITAL PROP. ACT § 14(a) (1983). The provision is not retroactive because the mixing will occur *after* the determination date. Thus, reclassification can be avoided by preventing mixing or by drafting an agreement between the spouses. "Mixing" under the UMPA is the equivalent of "commingling" in the community property states. See *id.* § 14 comment, 9A U.L.A. at 44 (Supp. 1986).

19. *Id.* §§ 17, 18. An interesting question was presented in Wisconsin by the apparent inconsistency between § 17(a) and WIS. STAT. § 767.255 (1981), which governs the division of property upon divorce. Under § 767.255, all property owned by spouses at divorce, other than that acquired by gift, bequest, devise, or inheritance, is presumed to be divided equally. That property may differ, however, from property that is or would have been "marital property" under the UMPA, since the exceptions contained in § 767.255 are not identical to the exceptions to classification as marital property under the UMPA. WIS. STAT. § 766.75(1) (1981-82), which corresponds to UMPA § 17(1), has, therefore, been repealed. Act of October 22, 1985, § 141, 1985 WIS. LAWS 37.

20. UNIF. MARITAL PROP. ACT § 1(14) (1983) provides: "'Presumption' or a 'presumed fact' means the imposition on the person against whom the presumption or presumed fact is directed of the burden of proving that the nonexistence of the presumed

Thus, ambiguities in classification are likely to be resolved in favor of classification as marital property.

Although perhaps unnecessary in light of the subsections quoted above, the statute is specific in classifying income of a spouse as marital property. All income earned or accrued by a spouse and all income attributable to property of a spouse during marriage and after the determination date is marital property.²¹ Thus, the "income rule" of the UMPA follows the minority view among community property states that income produced by nonmarital property during marriage is marital property.²² The Act also includes specific provisions classifying certain life insurance policies and proceeds²³ and "deferred employment benefits,"²⁴ a discussion of which is beyond the scope of this article.

B. Individual Property

All property of spouses is marital property unless it is classified otherwise by the Act. The two classes of property that are not marital consist of property acquired before the determination date²⁵ and "individual property." Section 4(g) of the UMPA

condition or fact is more probable than its existence."

21. *Id.* § 4(d). This concept has already been recognized by Wisconsin opinions construing Wis. STAT. § 767.255 (1983-84), which provides for the division of property upon divorce. See, e.g., *Arneson v. Arneson*, 120 Wis. 2d 236, 244-45, 355 N.W.2d 16, 20 (Ct. App. 1984).

22. Idaho, Louisiana, and Texas follow the "Spanish rule" that "rents, issues and profits of separate property" are community property. W. McCLANAHAN, *supra* note 6, § 6:12, at 344-46. Arizona, California, Nevada, New Mexico, and Washington follow the "California rule" that "rents, issues and profits of separate property are . . . also separate property." *Id.* § 6:13, at 346. The drafters of the UMPA probably believed it was necessary to state the income rule with specificity since it is a minority position.

The Wisconsin version of the Act in effect provides an option for a spouse. Section 766.59 states: "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." The spouse must provide notice of this election to the other spouse. Act of October 22, 1985, § 122r, 1985 Wis. LAWS 37. This provision, in effect, will allow a spouse to choose between the "Spanish rule" and the "California rule" for all or some of that spouse's property. The rule is based on a Louisiana statute that requires filing for registry rather than for notice to the other spouse. LA. CIV. CODE ANN. art. 2339 (West 1985).

23. UNIF. MARITAL PROP. ACT § 12 (1983).

24. *Id.* § 13.

25. The Act specifically provides that it does not alter the classification and ownership rights of such property except as otherwise provided in the Act. *Id.* § 4(h). One of

provides that property acquired by a spouse during marriage and after the determination date is individual property if it is acquired in one of the following ways:

- (1) By gift or a disposition at death by a third person to that spouse and not to both spouses;
- (2) In exchange for or with the proceeds of other individual property of the spouse;
- (3) From appreciation of that spouse's individual property, except to the extent it is classified as marital under § 14;
- (4) By a decree;
- (5) By a marital property agreement;
- (6) By a written consent;
- (7) As a recovery for damage to the spouse's present undivided 50 percent interest in marital property, resulting from breach by the other spouse of his or her duty of good faith;²⁶
- (8) As a recovery for personal injury, with certain exceptions.²⁷

Section 7 provides that spouses may reclassify their property by gift, from one spouse to the other, or by marital property agreement. While marital property agreements must satisfy certain requirements,²⁸ property may be reclassified by gift without

the exceptions provides that property owned by a spouse at death or divorce "which would have been marital property . . . if acquired after the determination date must be treated as if it were marital property." *Id.* §§ 17(1), 18(a). Other exceptions include the treatment of income from such property as marital, as discussed *supra* notes 21-22 and accompanying text, and the reclassification of such property as marital because of mixing under *id.* § 14(a). See *infra* note 149 and accompanying text.

26. Section § 4(g)(5) establishes that such a recovery would be individual property, but refers to § 15(a), "Interspousal Remedies," for an explanation of what the recovery would be for. Section 15(a), in turn, refers to the good faith duty between spouses in matters involving marital property or other property of the other spouse, which is imposed by § 2.

27. The amount of the recovery attributable to expenses paid or otherwise satisfied from marital property will be marital property. *Id.* § 4(g)(6). The Wisconsin act provides that the amount of recovery attributable to loss of income during marriage will also be marital property. WIS. STAT. § 766.31(7)(f) (1983-84). It is an interesting question whether it will be necessary, under that provision, to distinguish between future lost income and pain and suffering in judgments and settlement agreements.

28. If the spouse against whom enforcement of a marital property agreement is sought proves that he or she was not provided a fair and reasonable disclosure of the property and liabilities of the other spouse, the agreement is not enforceable unless that spouse waived such disclosure or had actual notice of the property and liabilities of the other spouse. UNIF. MARITAL PROP. ACT § 10(f)-(g) (1983).

It is not clear precisely what is and what is not a marital property agreement. Section 10(a) requires that a marital property agreement be "a document signed by both

any formalities beyond the usual requirements of intent, delivery, and acceptance. It is likely, therefore, that spouses will choose to use gifts, where appropriate, as an easy and inexpensive way to reclassify their marital property as individual property.²⁹

The Act contains one additional provision under which individual property may be created. Section 6(a) limits to \$500 the value of gifts that a spouse acting alone may make to a third person during a calendar year, unless the amount of the gift, when made, is reasonable in light of the economic position of the parties.³⁰ Section 6(b) provides that if those limitations are exceeded, the other spouse may bring an action to recover the property or a compensatory judgment to the extent of the non-compliance "unless both spouses act together in making the gift."³¹ If the recovery occurs after dissolution of the marriage or

spouses." It is uncertain, however, whether *all documents* signed by both spouses, or only some limited number of them, are or may be marital property agreements. The Wisconsin version has been amended to provide that only spouses may be parties to marital property agreements. Act of October 22, 1985, § 112, 1985 Wis. LAWS 37. The amendment is intended to eliminate a possible argument that such documents as bank deposit agreements or consumer contracts signed by both spouses and a third party are marital property agreements. *See id.* § 112 note.

29. Since income attributable to property of a spouse is marital property under § 4(d), income attributable to property given by one spouse to the other will also be marital. This rule has been changed in the Wisconsin version by the 1985 amendments. Section 766.31(10) now provides: "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 . . . is established." Act of October 22, 1985, § 83, 1985 Wis. LAWS 37. Under the rule of § 4, spouses who want to make a complete gift, including future income, will be required either to enter into a marital property agreement pursuant to § 10 that classifies future income as individual or to make periodic gifts of the income. The Wisconsin amendment eliminates this complexity, is probably consistent with the intent of most individuals who give property to their spouses, and allows the donor the flexibility of choosing the classification of the future income.

30. The \$500 amount is bracketed in the UMPA, which recognizes that states may wish to choose a different amount. The Wisconsin version has been increased to \$1000. Act of October 22, 1985, § 88, 1985 Wis. LAWS 37.

31. UNIF. MARITAL PROP. ACT § 6(b) (1983). The meaning of the phrase "act together" is unclear. It certainly cannot mean "act simultaneously," since that would usually be impossible. Does it mean "within a limited span of time"? Does it include later acquiescence in the gift? Would the later signing of a gift tax return by the other spouse constitute "acting together"? If so, did the gift occur at the time of the signing of the return, or does it relate back to the original act of donation?

It would appear that the gift is complete upon delivery by the donor spouse with intent to give and acceptance by the donee. Section 6(b) merely creates a right of recov-

Furth: Classification of Property under the Uniform Marital Property Act after the death of either spouse, it is limited to one-half of the value of the gift and is individual property.³²

III. THE CLASSIFICATION SYSTEM IN DETAIL

The two most important factors in classifying property are the source of the property and the time of its acquisition.³³

A. Time of Acquisition

Time is central in the sense that only property acquired after the determination date³⁴ is classified as individual or marital. For example, section 4(d) classifies income earned or accrued by a spouse during marriage and after the determination date as marital property.³⁵ Thus, if income is earned before marriage, but not received until afterward, it is not marital property. The official comment states:

Actual ownership of [income received shortly after the determination date from effort or accrual of rights before the determination date becomes] fixed before the determination date and it should not be and is not classified as marital property.³⁶

Thus, if a real estate agent puts together and closes a transaction before marriage, but receives the commission check from the buyer's lender after marriage, that income would not be clas-

ery in the other spouse if the limitations are exceeded. This interpretation is consistent with the fact that this section contains a statute of limitations (the earlier of one year after the other spouse has notice of the gift or three years after the gift). If the aggrieved spouse does not take timely action, the remedy is lost, and presumably, the gift is complete as of its acceptance by the donee.

32. UNIF. MARITAL PROP. ACT § 6(b) (1983). The latter provision presents an ambiguity. During marriage the nondonor spouse may recover the property or a compensatory judgment to the extent of the noncompliance with § 6(a). If the recovery occurs after death or dissolution, "it is limited to one-half of the gift . . ." *Id.* If that means that a compensatory judgment after death or dissolution could be as much as one-half of the gift, it could be greater after death or dissolution than one-half of recovery (i.e., one spouse's share) during marriage. Assuming that the complaining spouse is seeking a compensatory judgment rather than the donated property, that spouse could thus increase the recovery by timing it to occur after the marriage has terminated. It is doubtful that this was the intended result.

33. *Id.* § 4 comment, 9A U.L.A. at 29 (Supp. 1986).

34. See *supra* text accompanying note 12.

35. UNIF. MARITAL PROP. ACT § 4(d) (1983).

36. *Id.* § 4 comment, 9A U.L.A. at 30 (Supp. 1986).

sified as marital property since it was earned before the determination date.³⁷ Income received after the determination date for work performed partly before and partly after the determination date would be "mixed" property—both marital and nonmarital. Thus, if the closing were held after the determination date, the commission would be mixed property because it was earned partly before and partly after the determination date.

Another problem related to time of acquisition arises when property is purchased, or agreed to be purchased, before the determination date, but payment is made partly before the determination date and partly afterward out of marital property. What is the interest of the "community" in the property purchased? Is it a right of reimbursement for the marital property used or an interest in the property itself?³⁸ The choice of how to

37. The spouses could, of course, agree to classify it as marital under § 7(b).

38. The courts in the community property states have dealt with this problem in a variety of ways. *See generally* W. DE FUNIAK & M. VAUGHN, *supra* note 9, § 64. In some states, if the right to the property is initiated before marriage, the property being purchased remains separate property even though it may be paid for with community funds. The community has a right to reimbursement from the spouse who owns the property in the amount of the community property used. *Potthoff v. Potthoff*, 128 Ariz. 557, 561, 627 P.2d 708, 712 (Ct. App. 1981); *Griffin v. Griffin*, 102 Idaho 858, 862, 642 P.2d 949, 953 (1982); *Fisher v. Fisher*, 86 Idaho 131, 136, 383 P.2d 840, 842-43 (1963); *McElyea v. McElyea*, 49 N.M. 322, 325, 163 P.2d 635, 637 (1945); *Colden v. Alexander*, 141 Tex. 134, 147, 171 S.W.2d 328, 334 (1943); *Dakan v. Dakan*, 125 Tex. 305, 317, 83 S.W.2d 620, 627 (1935).

In Washington, in addition to the reimbursement for community funds and labor added to the separate property, the community shares in any increase, due to inflation, of the value added by such funds and labor. *In re Marriage of Elam*, 97 Wash. 2d 811, 817, 650 P.2d 213, 216 (1982). The net effect is to classify the community and separate interests proportionately to their respective contributions, assuming those contributions can be proven. There is, however, a presumption that the increase in value of separate property is separate property. *Id.* The UMPA takes a similar approach to the appreciation of individual property. *See* UNIF. MARITAL PROP. ACT § 4(g)(3) (1983); *infra* note 68 and accompanying text.

In Louisiana, if title is transferred before marriage the property is separate. *Baker v. Baker*, 209 La. 1041, 1055, 26 So. 2d 132, 137 (1946). If it is transferred after marriage, it is community. *Succession of Siverd*, 167 La. 383, 385, 119 So. 399, 400 (1929). In either event, of course, there is a right to reimbursement. *Deliberto v. Deliberto*, 400 So. 2d 1096 (1981). The Louisiana statute specifies the manner in which the reimbursement is to be handled. At the time of the *Deliberto* case, the civil code provided that the other spouse was entitled to one-half of the increase in value attributable to the community funds or effort. LA. CIV. CODE ANN. art. 2408 (West 1971). As of January 1, 1980, the code provided that the other spouse was entitled to one-half of the value of the community property at the time it was used. *Id.* art. 2366 (1984).

In California, the property being purchased is both community and separate, in proportion to the respective amounts of separate and community property used to make the

approach this problem can be an important one. For example, if property is classified as separate, and the value of the property has increased, the nonowning spouse is in a worse position if entitled to reimbursement only for the amount of community property used in the purchase rather than for a proportionate share of the inflated value.

The UMPA does not specify which approach is to be followed. It does provide that when individual property appreciates because of the efforts of the nonowning spouse, that spouse acquires a marital property interest rather than a right of reimbursement, if the requirements of section 14(b) are met.³⁹ If the Act's treatment of the purchase of property or retirement of a purchase money mortgage is to parallel its treatment of appreciation, then payments after the determination date should also create a marital property *interest* in the property rather than a right of reimbursement. This interpretation is consistent with section 1(1), which provides that "[a]cquire . . . includes reduction of indebtedness on encumbered property"⁴⁰ The comment to that subsection states: "[I]n a typical marital situation, payment on a mortgage will be an important means of building assets. The definition makes it clear that this is a means of acquisition."⁴¹ Since this means of acquisition is not included in the list of ways to acquire individual property,⁴² the property thus acquired must be marital property under the rule that all property is marital property unless classified otherwise.⁴³ The best interpretation, then, is that under the UMPA such property will be classified as mixed, and the marital and nonmarital components will be proportionate to the respective contributions of each.

payments. *In re Marriage of Moore*, 28 Cal. 3d 366, 371-72, 618 P.2d 208, 210, 168 Cal. Rptr. 662, 664 (1980); *Forbes v. Forbes*, 118 Cal. App. 2d 324, 325, 257 P.2d 721, 722 (1953).

39. UNIF. MARITAL PROP. ACT § 14 comment (1983), 9A U.L.A. at 31 (Supp. 1986). For a discussion of the treatment of appreciation under the UMPA, see *infra* notes 68-133 and accompanying text.

40. *Id.* § 1(1).

41. *Id.* § 1 comment, 9A U.L.A. at 26 (Supp. 1986).

42. See *supra* notes 26-27 and accompanying text.

43. UNIF. MARITAL PROP. ACT § 4(a) (1983).

1. *Property Owned at Marriage*

Section 4(f) of the UMPA provides: "Property owned by a spouse at a marriage after the determination date is individual property."⁴⁴ This provision is consistent with the definition of "determination date."⁴⁵ Since the determination date will always be the last to occur of the three events listed in section 1(5)—marriage, establishment of domicile in the state, or the effective date of the Act—it would be impossible for the marriage to occur *after* the determination date. What must have been intended is that property owned at a marriage after the effective date of the Act will be individual property if the spouse has a marital domicile in the state immediately after the marriage.⁴⁶

The language of section 4(f) was altered substantially during the 1983 debates on the UMPA. The Draft for Approval submitted to the Commissioners at the beginning of the debates contained the following language: "Property owned at the time of marriage by a person married in this state on or after the effective date of this [Act] is individual property of that person after the marriage."⁴⁷ The import of the quoted language is almost identical to this writer's suggestion of what must have been intended by section 4(f). The one difference is that the earlier version did not require the persons to be domiciled in the state, but only to be *married* in the state, which certainly was not the intent.

The only reference to the change in the official transcripts of the debates is an off-hand comment that section 4(f) "has been cleaned up a bit, and simplified, and I think it's easier the

44. *Id.* § 4(f).

45. See *supra* text accompanying note 12.

46. It is interesting to note that property owned at a marriage *before* either the effective date of the Act or the establishment of a domicile in the state is not individual property, but is only treated as if it were individual property. UNIF. MARITAL PROP. ACT § 4(i) (1983). This distinction was undoubtedly made to avoid creating a retroactive effect. Property owned before the effective date of the Act is not to be reclassified by the Act itself. *Id.* § 4 comment, 9A U.L.A. at 31 (Supp. 1986). Spouses may, however, reclassify such property, either intentionally or unintentionally. See *id.* § 7(b) (authorizing reclassification by gift or marital property agreement); *id.* § 14(a) (reclassification when mixing (commingling) occurs).

47. *Id.* § 4(f) (Draft for Approval 1983)(submitted at the National Conference of Commissioners on Uniform State Laws, at Boca Raton, Florida, July 22-29, 1983).

way it is; also lots less words [sic].”⁴⁸ It seems probable, therefore, that the drafters intended no major substantive change from the original version. The use of the phrase “determination date” was merely a stylistic error, and the provision should be revised to state the meaning described above.

B. *Source of the Property*

Classification questions will frequently turn on the source of the property. This is particularly true if “source” includes not only the *person* from whom the property is acquired, but also the *means* by which it is acquired.

1. *Gifts to Spouses*

The UMPA, following the traditional community property rule, classifies property acquired by only one spouse through gift or disposition at death⁴⁹ from a third person as individual property.⁵⁰ This rule is a natural consequence of the theory underlying both the UMPA and the community property statutes:

At the foundation of [the concept of community property] is

48. 2 Transcripts of Debates, Proceedings in Committee of the Whole of the National Conference of Commissioners on Uniform State Laws—Marital Property Act, July 22-26, 1983, at 248.

49. UNIF. MARITAL PROP. ACT § 1(6) (1983) defines “disposition at death” as a transfer of property “by will, intestate succession, nontestamentary transfer, or other means that take effect at the transferor’s death.”

50. UNIF. MARITAL PROP. ACT § 4(g)(1) (1983). Such gifts are treated as “separate property” in all of the community property states and were so treated under the original Spanish system as early as 693 A.D. W. DE FUNIAK & M. VAUGHN, *supra* note 9, § 69, at 153-54. See also W. McCLANAHAN, *supra* note 6, § 4:10, at 187, § 6:4, at 334.

The corresponding Wisconsin provision includes the following additional sentence: “A distribution of *principal or income* from a trust created by a third person to one spouse is the individual property of that spouse *unless the trust provides otherwise*.” WIS. STAT. § 766.31(7)(a) (1983-84)(emphasis added). The italicized words were added by Act of October 22, 1985, § 80, 1985 WIS. LAWS 37. A distribution to one spouse from a trust created by a third party is essentially a gift from the third party to that spouse and should be treated as such. The Wisconsin language insures this result. The 1985 amendment relating to income was intended to simplify bookkeeping for trustees. All such distributions will be individual property even if they consist of commingled income and principal. This amendment will, of course, enable prospective donors to defeat the rule that income attributable to individual property is marital property if they make gifts in trust rather than outright. It is this writer’s opinion, however, that donors should have that option.

the principle that all wealth acquired by the joint efforts of the husband and wife shall be common property; the theory of the law being that, with respect to marital property acquisitions, the marriage is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property⁵¹

Property acquired by gift, devise, or descent is not acquired by the efforts of the spouses at all. It is not the product of the economic union that is the marriage, nor has the donee spouse deprived that union of any valuable effort by producing the property. Further, if the property is given to just one spouse, it was presumably the intent of the donor that it be owned by that spouse alone. The rule, therefore, is designed to give effect to the most likely intent of the donor, while not doing violence to the principles of community property and the UMPA. It is clearly consistent with the theory underlying community and marital property to make such property "individual."

The Act does not specifically provide for the classification of gifts made to *both* spouses, an issue that has caused problems in some community property states. The Texas community property statute contains a set of presumptions similar to those found in the UMPA. Section 5.01(a) of the Texas Family Code classifies as separate "the property acquired by the spouse during marriage by gift, devise, or descent"⁵² Subsection (b) then provides: "Community property consists of the property, other than separate property, acquired by either spouse during marriage."⁵³ Section 5.02 provides: "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property."⁵⁴ The Texas courts have construed these statutes to mean that a gift to both spouses is a gift to each of an undivided one-half interest in the property, as separate property.⁵⁵

51. W. DE FUNIAK & M. VAUGHN, *supra* note 9, § 1, at 2-3.

52. TEX. FAM. CODE ANN. § 5.01 (Vernon 1973).

53. *Id.* § 5.01(b).

54. *Id.* § 5.02.

55. *McLemore v. McLemore*, 641 S.W.2d 395, 397 (Tex. Civ. App. 1982); *White v. White*, 590 S.W.2d 587, 588 (Tex. Civ. App. 1979); *Bradley v. Love*, 60 Tex. 472, 478 (1883).

In *Andrews v. Andrews*,⁵⁶ the California Court of Appeals reached the same conclusion. In that case the court relied on extrinsic evidence and found that a gift of real property in which apparently only the husband was named as a grantee in the deed was, nevertheless, a gift to both spouses. The court then held, without offering any authority or discussion, that the property was owned by the spouses as tenants in common.⁵⁷

Arizona case law has reached the opposite result, but not without some confusion. In *Armer v. Armer*,⁵⁸ a real estate mortgage was paid with money that had been given to a couple. The trial court held that the spouses owned the mortgaged property as a tenancy in common,⁵⁹ but the Arizona Supreme Court, without explanation, reversed this decision and held that the proceeds from the gift were community property.⁶⁰

Washington law has also been confused on this issue. In an old federal circuit court case that construed Washington community property law, one of several alternative grounds of decision was that "the law of this state does not create community property out of real property acquired by gift In plain words [the statute declares] acquisitions by gift after marriage to be separate property."⁶¹ This view was rejected by the Supreme Court of Washington in 1964 when it held that gifts to both spouses are community property.⁶²

Although this confusion has not been explicitly avoided in the UMPA, a careful reading of the Act and official comments makes it clear that gifts to both spouses are marital property. Section 4(g)(1) specifically excludes a gift to both spouses from classification as individual property. Since such property is not "classified otherwise" by the Act, a gift to both spouses *must* be marital property under section 4(a).⁶³ This conclusion is supported by the comment to section 4, which provides that "[i]f a

56. 82 Cal. App. 2d 521, 186 P.2d 744 (1947).

57. *Id.* at 528, 186 P.2d at 748.

58. 105 Ariz. 284, 463 P.2d 818 (1970).

59. *Id.* at 287, 463 P.2d at 821.

60. *Id.* at 291, 463 P.2d at 825.

61. *Stockstill v. Bart*, 47 F. 231, 234 (C.C.D. Wash. 1891).

62. *In re Salvini's Estate*, 65 Wash. 2d 442, 447, 397 P.2d 811, 814 (1964).

63. See *supra* note 20 and accompanying text. The spouses themselves could, of course, achieve another classification by agreement or by gift under § 7(b). See *supra* notes 28-29 and accompanying text.

gift is made to both spouses, the donated property is marital property."⁶⁴

2. *Property Acquired in Exchange for Individual Property*

Under section 4(g)(2) of the UMPA, property acquired in exchange for individual property is also treated as individual property.⁶⁵ This provision simply allows an owner of property to use it to acquire other property without reclassifying the value it represents into marital property, even though it is acquired after the determination date from a third person. Of course, if there were a question about the classification of such property, the presumption that all property of spouses is marital property would resolve the issue. A party attempting to establish that such property is not marital will be required to trace it from the original individual property.⁶⁶

3. *Appreciation of Individual Property*

Section 4(g)(3) of the UMPA provides that the appreciation of individual property is also individual except to the extent that the appreciation is classified as marital property under Section 14."⁶⁷ Section 14(b) provides:

(b) Application by one spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity or managerial activity on individual property of the other spouse creates marital property attributable to that application if:

(i) reasonable compensation is not received for the application; and

(ii) substantial appreciation of the individual property of the other spouse results from the application.⁶⁸

64. UNIF. MARITAL PROP. ACT § 4 comment (1983), 9A U.L.A. at 31 (Supp. 1986).

65. *Id.* § 4(g)(2).

66. *See infra* notes 145-52 and accompanying text.

67. UNIF. MARITAL PROP. ACT § 4(g)(3) (1983).

68. *Id.* § 14(b). A similar concept has already been recognized in Wisconsin. In *Plachta v. Plachta*, 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984), it was argued that the appreciation of a house that had been given to one spouse was marital property subject to division under Wis. STAT. § 767.255 (1981-82), which lists certain items, including gifts, to be excluded from the marital estate in a divorce. The statute does, however, allow the separate property of a spouse to be included in the marital estate and divided between the spouses if the court finds that refusal to divide would create a hardship on

a. *Whose Individual Property?*

Section 14 of the UMPA only applies in the case of appreciation of property of the spouse not applying the effort. It does not apply when the appreciation sought to be classified is that of the spouse applying the effort. The corresponding Wisconsin statute, however, applies to the appreciation of “either spouse’s individual property.”⁶⁹

During the UMPA debates, there was a strong difference of opinion over the question of whether section 14 should apply to individual property of the other spouse.⁷⁰ Proponents of the position ultimately adopted in the UMPA argued that applying section 14 to the property of either spouse would make it very difficult for the UMPA to be adopted in common-law states.⁷¹ They also expressed concern that making section 14 applicable to efforts applied to one’s own individual property would mean that the mere *management* of such property would create mixed

the other spouse or the children. The *Plachta* court observed, in dicta, that “[f]ailure to divide separate property could cause a hardship when the nonowning spouse contributes to the property’s increased value. Under those circumstances, the trial court may distribute the nonmarital property in a manner reflecting each spouse’s contribution toward the appreciated value.” *Id.* at 334, 348 N.W.2d at 195-96.

The quoted language also demonstrates a problem likely to be caused by use of the word “marital” rather than “community” in the UMPA. Wisconsin attorneys and courts refer to the marital estate for purposes of divorce as “marital property.” “Marital property” under Wis. STAT. ch. 767 (1983-84), which governs divorce, is simply not the same as “marital property” under Wis. STAT. ch. 766 (1983-84), the Wisconsin Marital Property Act. Nevertheless, it is likely that Chapter 766 principles may influence courts in applying Chapter 767. The decisions in *Plachta* and *Arneson v. Arneson*, 120 Wis.2d 236, 355 N.W.2d 16 (Ct. App. 1984), *supra* note 21, may be early examples of that confusion. In a recent divorce case concerning the validity of a prenuptial agreement signed in 1973, the court actually cited Wis. STAT. § 766.58(6) (1981-82), which addresses the enforceability of marital property agreements, but which did not become effective until 1986. *Hengel v. Hengel*, 122 Wis. 2d 737, 745, 365 N.W.2d 16, 20 (Ct. App. 1985). *See supra* note 3.

69. Wis. STAT. § 766.63(2) (1983-84). Both § 766.63(2) and UMPA § 14(b) contain what appears to be an oversight. They apparently apply only to individual property and not to property of a spouse owned before the determination date. There is no policy reason to apply § 14(b) to appreciation of individual property, but not to appreciation of other nonmarital property. Section 4(i) provides that, generally, property owned before the determination date is to be treated as if it were individual property. This may make § 14(b) applicable to such property, but it is an unnecessary complexity. Wis. STAT. § 766.63(2) has, therefore, been amended to make it applicable to “property other than marital property . . .” Act of October 22, 1985, § 129, 1985 WIS. LAWS 37.

70. 1 Transcripts of Debates, *supra* note 48, at 196-210.

71. *Id.* at 197, 207.

marital and individual property. It would then be difficult "to separate ordinary appreciation from the application of management skills."⁷² The position adopted in section 14 of the UMPA, however, permits one spouse to devote an excessive proportion of time to the improvement of his or her individual property, while granting the other spouse no apparent recourse short of divorce. In fact, one argument against the Wisconsin position was that in most states "equitable distribution" statutes allow divorce courts to correct the unfair results of such activity by a spouse: "You do have equitable distribution in most of the states on divorce, so even if it's individual property, the judge can give the other spouse something."⁷³ This ignores the fact that the UMPA is not a divorce statute,⁷⁴ but rather "a means of establishing present shared property rights of spouses *during* the marriage On dissolution, the structure of the Act as a *property statute* comes into full play. The Act takes the parties 'to the door of the divorce court' only."⁷⁵ If a state adopted section 14(b) of the UMPA, a spouse could apparently devote all of his or her time to individual property, and the other spouse could not share in the resulting appreciation other than at divorce.

The 1983 debates on the UMPA, as well as sections 2⁷⁶ and 15⁷⁷ of the Act itself, support this conclusion. During a discussion of the question of whether or not a spouse would have a

72. *Id.* at 198.

73. *Id.* at 208.

74. The comment to § 17 states:

It is not the mission of the Act to enter into the territory of equitable distribution or other systems of property division at dissolution The Act is not designed to interfere with such a division under the statutes and cases in an adopting state or to ordain an equal division when that is not otherwise indicated.

UNIF. MARITAL PROP. ACT § 17 comment (1983), 9A U.L.A. at 49 (Supp. 1986).

75. *Id.* prefatory note, 9A U.L.A. at 22-23 (Supp. 1986)(emphasis in original).

76. Section 2 provides:

(a) Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. This obligation may not be varied by a marital property agreement.

(b) Management and control by a spouse of that spouse's property that is not marital property in a manner that limits, diminishes, or fails to produce income from that property does not violate subsection (a).

Id. § 2.

77. Section 15 addresses interspousal remedies. It is based on § 16 of the 1983 Draft for Approval, *supra* note 47.

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duty to produce income from individual property, rather than work for its appreciation, the following exchange took place:

MR. CANTWELL: . . . With respect to individual property, the income goes into the marital pot, while that which maximizes principal remains individual property [Y]ou personally have a conflict of interest as to what is in your personal interest and what is in the marital interest; and we're trying to remove the conflict.

MS. MUCHMORE: But the answer to the question is that it is your intention that the court can never say that good faith encompasses the obligation to produce income with regard to individual property, is that right?

MR. HILLMAN: Commissioner, if you will look at the comment on page 25, it is not intended to confer an absolute license or a selective abrogation of Section 2. In extreme cases, the subsection would not sanction a flagrant violation of section 2 and a remedy under Section 16 could be sought.⁷⁸

The commissioners were referring to sections 2 and 16 and the comment to section 5 of the Draft for Approval, which was being considered by the Committee of the Whole. The then existing draft of the comment, which was substantially revised before final approval, stated:

[S]ubsection (j) specifically negates the existence of any duty or obligation to maximize income production in these circumstances. Thus the owner of that property can seek only appreciation, only income, or any mix he or she desires. However, the subsection is not intended to confer an absolute license or a selective abrogation of Section 2. In extreme cases, the subsection would not sanction a flagrant violation of Section 2 and a remedy under Section 16 could be sought.⁷⁹

In the draft under consideration, however, section 2 merely provided that "[e]ach spouse shall act in good faith with respect to the other spouse *in matters involving marital property or*

78. 1 Transcripts of Debates, *supra* note 48, at 67-68. Mr. Cantwell was the Reporter for the Drafting Committee on the UMPA and a commissioner from Colorado; Ms. Muchmore was a commissioner from Iowa; and Mr. Hillman was Chairman of the Drafting Committee and a commissioner from Rhode Island.

79. UNIF. MARITAL PROP. ACT § 5 comment (Draft for Approval 1983); *see supra* note 47.

other property of the other spouse."⁸⁰ Section 16, which was revised and renumbered to 15 during the debates, provided that "[a] spouse has a claim against the other spouse for interference with the use of or damage to *the present undivided one-half interest in marital property of the claimant spouse.*"⁸¹ With the exception of the quoted comment to section 5, nothing in the language of this draft provided a cause of action for a spouse when the other spouse devotes much of his or her time to improving individual property rather than using it to produce income. The comment provided the only authority.

The final version of the UMPA does not change this result. The above-quoted language from section 2 of the draft was not altered, but subsection (b) was added, which specifically provides that it is not a violation of the good faith requirement if a spouse fails to produce income from his or her own property.⁸² The above-quoted comment to section 5 of the draft was deleted from the final version, along with subsection (j) to which it referred, and the comment to section 2 now makes it clear that a spouse has no duty to produce income. Finally, section 15(a), which creates a remedy for one spouse against the other for breach of the good faith requirement of section 2, refers to damage only to marital property, not to income or individual property.⁸³

The UMPA, therefore, does not prevent one spouse from working, perhaps exclusively, to improve that spouse's individual property. Nor does it require that a spouse reimburse the "community" for the value of his or her time or for any portion of the appreciation caused by efforts applied to that spouse's own individual property.

Two recent Texas cases illustrate the difficulty that section 14 of the UMPA may cause for the nonowning spouse. In *Vallone v. Vallone*,⁸⁴ the parties were married in 1966. In 1969, the

80. *Id.* § 2 (emphasis added).

81. *Id.* § 16 (emphasis added).

82. For text of this subsection, see *supra* note 76.

83. This may have been an oversight. Although § 2 creates a duty of good faith in matters involving marital property or other property of the other spouse, § 15 creates a remedy for damage only to marital property. If it is necessary to create a statutory remedy for breach of the duty toward marital property, why is it not necessary to create a remedy for breach of the duty toward nonmarital property?

84. 644 S.W.2d 455 (Tex. 1983).

husband's father gave him the assets of a restaurant business. A few months later, when he incorporated the business, its assets consisted of the gift, valued at \$9,365, and other assets, which were apparently community property, valued at \$10,298. The separate property (the gift) made up slightly over forty-seven percent of the initial capital. When the Vallones divorced, the trial court found that the corporation was worth \$1,000,000. The husband received, at least for the only year mentioned in the supreme court's opinion, salary and bonuses of \$200,000. The trial court held that forty-seven percent of the stock, as valued at the time of divorce, was the husband's separate property because it was traceable to the gift of \$9,365. The supreme court affirmed because the wife had not properly pleaded a claim for reimbursement to the community from the husband.⁸⁵ A strong dissent objected that the community should be reimbursed for community efforts:

The majority apparently finds solace in its determination that the community received "adequate compensation." However, what is adequate compensation is not the issue and is irrelevant here. Most people would agree that \$200,000 annual salary is adequate compensation for a successful basketball player, actress, or restaurateur [sic]. When these individuals actually earn \$1,000,000 per year, the entire \$1,000,000 belongs to the community estate, not just the amount an appellate court may deem "adequate compensation." The rule is not that a portion of the earnings found to be adequate compensation for labor belongs to the community estate. The rule always has been that earnings of a spouse—all of the earnings—are community property.⁸⁶

In *Jensen v. Jensen*,⁸⁷ the husband organized a corporation in March 1975 and acquired 48,455 of 100,000 outstanding shares for \$1.56 per share (\$75,589.80). He was married in July 1975 and was divorced in May 1980. At the time of the trial, Mr. Jensen's expert appraised the stock at \$13.48 per share (\$653,173.40) and Mrs. Jensen's expert appraised it at \$25.77 per share (\$1,248,685.30). In addition, Mr. Jensen had received sal-

85. *Id.* at 459.

86. *Id.* at 461 (Sondock, J., dissenting). Under § 14(b), if the spouse receives "reasonable compensation," the appreciation would not be marital.

87. 665 S.W.2d 107 (Tex. 1984).

ary, bonuses, and dividends on the stock (community property in Texas) ranging from \$64,065.97 in 1976 to \$115,000.00 in 1979. The trial court held that all of the stock owned by Mr. Jensen was separate property, even though the stock had appreciated by a factor of about nine during the five years of marriage, and entered a finding that the corporation's success was primarily due to the "time, toil and effort of [Mr. Jensen]." ⁸⁸

The *Jensen* case is remarkable because it took four appellate opinions to reach a final resolution—a fact that demonstrates the difficult questions raised in this area. The Texas Court of Civil Appeals concluded that the trial court had mischaracterized the appreciation as separate property and held that "if one spouse's separate property is increased because of the time, talent, and industry of either spouse, exceeding that required to preserve the separate property, then the increase becomes community property." ⁸⁹ The Supreme Court of Texas issued three separate opinions on the case.

In *Jensen I* the supreme court affirmed the court of appeals' decision, pointing out that Mr. Jensen admitted he had spent at least ninety percent of his time running the corporation:

We hold that an expenditure of 90 percent of one's time in the operation and development of a business exceeds a reasonable amount of time one may devote to one's separate estate. Further, we hold that the salary and dividends received by Mr. Jensen are in adequate compensation [sic] where the stock's enhanced value is substantially more than the sums received by the community estate An increase in the shares of stock, though separate property in origin, should belong to the community. ⁹⁰

The court was careful to point out that it was not "characterizing" (classifying) the stock. The stock was and remained separate property. The community, however, was entitled to be compensated "for the increase [in the value of the stock] that occurred during marriage." ⁹¹

88. *Id.* at 108-09.

89. *Jensen v. Jensen*, 629 S.W.2d 222, 224 (Tex. Civ. App. 1982).

90. *Jensen v. Jensen*, 26 TEX. SUP. CT. J. 480, 481-82 (July 6, 1983).

91. *Id.* It is interesting that in both the decision of the court of appeals and in the first supreme court opinion, *all* of the appreciation was apparently held to be community property.

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In *Jensen II*,⁹² when a new justice joined the dissenters in *Jensen I*, the court withdrew the earlier decision and reversed the court of appeals:

The community property states have adopted variations of either "reimbursement" or "community ownership" theories. Common to both theories is the general concept that the community should receive whatever remuneration is paid to a spouse for his or her time and effort because the time and effort of each spouse belongs to the community. . . . [T]he two theories diverge when it comes to the valuation of the community's claim against separately owned stock that has appreciated by virtue of a spouse's time and effort. The "reimbursement" theory provides that . . . the community is entitled for reimbursement for the reasonable value of the time and effort of . . . the spouses which contributed to the increase in value of the stock. The "community ownership" theory, on the other hand, holds that any increase in the value of the stock as a result of the time and effort of the owner spouse becomes community property.⁹³

The two *Jensen* opinions raise a clear question of policy: What should be the measure of compensation to the community for effort applied to the separate property of the titled spouse? If the entrepreneurial ability of one spouse enhances the value of individual property in excess of what would ordinarily be thought of as "reasonable" salary, should the other spouse share in the excess? In *Jensen III*⁹⁴ the Texas Supreme Court issued a compromise opinion in which eight of the justices joined, with the ninth concurring in the result. The court continued to follow the "reimbursement theory" rather than the "community ownership" theory, but remanded to the trial court on the ground that there was no adequate factual support for the trial court's holding that Mr. Jensen's compensation was reasonable. The court also stated that, on remand, "the burden of proving a charge upon the shares . . . will be upon . . . Mrs. Jensen."⁹⁵

The appreciation may, however, be taken into consideration in determining whether the compensation was reasonable. At the

92. *Jensen v. Jensen*, 27 TEX. SUP. CT. J. 68 (November 9, 1983).

93. *Id.* at 69.

94. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984).

95. *Id.* at 110.

first trial, Mr. Jensen's expert testified that Mr. Jensen had been adequately compensated, but added that his opinion was based primarily on the fact of Jensen's stock ownership. He stated that "without the stock ownership he seriously doubted that Mr. Jensen would have stayed with [the corporation]."⁹⁶ It is quite likely, therefore, that part of his compensation *was* in the form of appreciation of his stock and the community should be reimbursed for that.

The *Vallone* and *Jensen* problem has, ostensibly, been avoided in the UMPA. The spouse who devotes all of his or her efforts to operating and improving a business that is his or her individual property will not have to reimburse the marital partnership for the value of the effort that has been diverted from income to appreciation. This, at least, is the apparent consequence of section 14(b), the only provision specifically addressing appreciation of individual property.⁹⁷ Courts, however, may be tempted to follow the diverted income into the appreciation and declare that part of it *is* marital property, perhaps on the theory that all income is marital property and a spouse should not be allowed to subvert the purpose of the UMPA by hiding income in appreciation. A court might reason that it is unfair to require a spouse to establish a right to such appreciation under an equitable distribution statute⁹⁸ when the other spouse has, in effect, withheld part of the fruits of his or her productivity from the marital partnership. The Texas court's difficulty with this problem demonstrates the persuasiveness of such an argument.

The Texas courts have characterized the reimbursement solution, which has no statutory basis, as an equitable remedy:

The cases recognizing the general right of reimbursement between [community and separate] estates will disclose that the right of the estate claiming and entitled to reimbursement is not a fixed right or title in the property sought to be charged, but is an equity The decisions have correctly classified the right of the one making such advancement as an equity,

96. *Id.*

97. An attempt was made during the debates on the UMPA to make the section applicable to individual property of both spouses, but it was defeated. *See supra* notes 69-75 and accompanying text. A construction of the Act that treated appreciation of the individual property of the spouse applying the effort as marital property would be inconsistent with that "legislative history."

98. *See supra* note 73 and accompanying text.

and the final determination of the rights of the respective parties is to be determined upon equitable principles It is not a mere question of balancing ledger accounts.⁹⁹

It would not be surprising to see a court faced with section 14(b) of the UMPA adopt a similar approach and allow an "equitable reimbursement."

If section 14(b) is applicable to the appreciation, the result of a finding of no reasonable compensation under the UMPA will be quite different from the result in *Jensen*. Under the *Jensen* approach the community is to receive the value of the effort it should have received at the time the effort was performed.¹⁰⁰ Under the UMPA, the appreciation itself will be marital.¹⁰¹ This could produce some interesting results. For example, if a spouse who controlled a corporation paid himself or herself \$200,000 per year while the stock appreciated from \$10,000 to \$1,000,000, the other spouse would receive nothing if \$200,000 were reasonable, but would receive \$495,000 if it were not. Under the *Jensen* approach, the community would receive the value of the effort, which could fall between the two extremes. The UMPA provision would, in effect, penalize the spouse who failed to calculate accurately (in the opinion of the finder of fact) the value of reasonable compensation, a difficult task at best.

The question of whether the marital partnership is entitled, in equity, to reimbursement is avoided under the Wisconsin Act, which specifically provides that appreciation of the individual property of *either* spouse is marital property unless reasonable compensation was received for the effort.¹⁰² Assuming that the appreciation and effort applied are substantial and that the appreciation is attributable to that effort, the issue in Wisconsin

99. *Dakan v. Dakan*, 125 Tex. 305, 316-17, 83 S.W.2d 620, 627 (1935). See also *Hanrahan v. Sims*, 70 Ariz. App. 313, 512 P.2d 617 (1973); *Colden v. Alexander*, 141 Tex. 134, 171 S.W.2d 328 (1943). Other courts have granted an "equitable lien" to protect the right of reimbursement. See, e.g., *Gapsch v. Gapsch*, 76 Idaho 44, 277 P.2d 278 (1954); *Miracle v. Miracle*, 101 Wash. 2d 137, 675 P.2d 1229 (1984) (no right of reimbursement if contributing spouse received reciprocal benefit; equity will then find that the contributing spouse has been reimbursed).

100. 665 S.W.2d at 110.

101. Section 14(b) provides that the effort "creates marital property." The comment states that "the right of the spouse who created the marital property is to an interest in the asset and not to a right of reimbursement or a lien for a specific amount." UNIF. MARITAL PROP. ACT § 14 comment (1983), 9A U.L.A. at 45-46 (Supp. 1986).

102. WIS. STAT. § 766.63(2) (1983-84).

will be whether the salary paid to the spouse working with the individual property was "reasonable."¹⁰³

b. Activity of a Spouse

The description in section 14(b) of the types of activity a spouse might engage in that would cause the appreciation of individual property to be marital property was designed to be inclusive. It would be difficult to conceive of an activity not encompassed by the description. The trading of securities and commodities, for example, would be included,¹⁰⁴ as would, presumably, painting the kitchen, persuading a potential buyer that the twenty-year-old family jalopy is a valuable antique, and accidentally discovering oil while spading the garden.

Section 14(b) refers to "substantial appreciation" resulting from "[a]pplication . . . of . . . activity on . . . property"¹⁰⁵ It is obvious that appreciation caused by inflation is not included. A more interesting issue, however, is presented when appreciation results from a spouse's activities, but not from the direct application of the activity to the property. Suppose, for example, that a spouse gains fame as a national hero. The value of the other spouse's childhood diary then appreciates substantially as a result, at least in the eyes of Hollywood, although the owner has not written anything in the diary since marriage. Is that appreciation marital property? In other words, must the activity be directed *toward* the property or is it sufficient that the appreciation result *from* the activity? The comment to section 14 ignores this issue; it refers to application of personal effort "to" individual property illustrated by examples of improvements by physical effort applied to real estate.¹⁰⁶

The question may be approached from two quite different perspectives. If one accepts the fundamental principle of the

103. It should also be noted that the "reasonable compensation" of § 766.63(2)(a) means compensation to the marital partnership, not compensation that is individual property. 1 Transcripts of Debates, *supra* note 48, at 205; W. McCLANAHAN, *supra* note 6, § 6:18.

104. 1 Transcripts of Debates, *supra* note 48, at 219. For text of § 14(b), see *supra* note 68 and accompanying text.

105. The corresponding Wisconsin statute uses the language "activity to . . . property." WIS. STAT. § 766.63(2) (1983-84)(emphasis added).

106. UNIF. MARITAL PROP. ACT § 14 comment (1983), 9A U.L.A. at 45 (Supp. 1986).

UMPA and community property law that the economic rewards of the spouses' effort during marriage are to be shared,¹⁰⁷ then *all* economic rewards of spouses' effort during marriage should be marital property, not just those that result from application of effort to the particular property. In the hypothetical, presumably the spouse's fame resulted from effort, and the economic results of that effort should be marital property in order to be consistent with the underlying theory of the UMPA. Salary, endorsements, and the like received during marriage as a result of the fame certainly would be marital property.

On the other hand, if the authors of the UMPA had intended that such indirect appreciation be marital property, they could easily have made that result clear by using language such as the following: "Appreciation of individual property of one spouse which is attributable to the substantial labor, effort, inventiveness, physical or intellectual skill, creativity or managerial activity of the other spouse is marital property, if"¹⁰⁸

Section 14(b) requires not only that the appreciation be attributable to the activity of the spouse, but also that the activity be applied to that property—a result inconsistent with the fundamental principle stated above.¹⁰⁹ Of course, not all value produced by effort during marriage is marital property. If a spouse gives labor to a friend or relative and the donee's property appreciates as a result, this appreciation is not marital property. It belongs to the owner of the property. The diary, however, is the individual property of a spouse and is more clearly within the UMPA's fundamental principle. Nevertheless, since the effort must be applied *on* the individual property, appreciation resulting from an indirect cause is not marital.

c. The Four Elements of Section 14(b)

Section 14(b) contains the following four separate elements that must be established before appreciation can be classified as marital: (1) the effort must be substantial; (2) the appreciation must be substantial; (3) the appreciation must be "attributable to" the efforts of a spouse; and (4) the spouse must not have

107. *Id.* prefatory note, 9A U.L.A. at 24 (Supp. 1986).

108. Compare this language with § 14(b), *supra* text accompanying note 68.

109. See *supra* text accompanying note 107.

received reasonable compensation for the efforts.¹¹⁰

(1) *The Double Test of Substantiality*

Section 14(b) includes a *double* test of substantiality. Both the effort performed by the spouse and the amount of appreciation itself must be substantial. One might ask, however, what the word "substantial" means in this context. Although it is used twice and is obviously of great import, it is not defined in the Act.¹¹¹

The following hypothetical illustrates the problem presented. Assume that a business, which is the individual property of one spouse, has a value of \$10,000,000. The other spouse applies substantial effort to the business, causing appreciation in the amount of \$25,000. Is appreciation of \$25,000 "substantial"?

110. Apparently the burden of proof under § 14(b) is the reverse of the burden in other sections of the UMPA. Ordinarily, the party seeking to prove that property is not marital property will bear the burden of proof because of the presumption in § 4(b) that all property is marital property. Section 4(g)(3), however, provides that appreciation of individual property is individual "except to the extent that the appreciation is classified as marital property under Section 14." It is the *exception* that such appreciation is marital. It would seem that the party seeking to establish the exception should bear the burden of proof. This conclusion is supported by the comment to § 14, which states that this section "articulates a bias against creation of marital property." UNIF. MARITAL PROP. ACT § 14 comment (1983), 9A U.L.A. at 45 (Supp. 1986). There is precedent for such an approach. The Washington Supreme Court has held that there is a presumption that the appreciation of separate property is separate. *Elam v. Elam*, 97 Wash. 2d 811, 650 P.2d 213 (1982).

The Arizona Supreme Court, on the other hand, has held that "when the value of separate property is increased the burden is upon the spouse who contends that the increase is also separate property to prove that the increase is the result of the inherent value of the property itself and is not the product of the work effort of the community." *Cockrill v. Cockrill*, 124 Ariz. 50, 52, 601 P.2d 1334, 1336 (1979). The court relied on the presumption in favor of community property.

The meaning of "reasonable compensation" and methods available to establish its value are familiar concepts and are not discussed further in this article.

111. The word "substantial" is not defined in the Wisconsin statutes either. The Wisconsin Court of Appeals has conceded the ambiguous nature of the word. In *Town of Pleasant Prairie v. Department of Local Affairs and Dev.*, 108 Wis. 2d 465, 475, 322 N.W.2d 486, 492 (Ct. App. 1982), *aff'd*, 113 Wis. 2d 327, 334 N.W.2d 893 (1983), the court stated that "the meaning of 'substantial' in the context of the statute [under consideration] is not readily apparent." That statute provides that the territory of an area seeking to incorporate as a village or city "beyond the most densely populated square mile shall have the potential for residential or other urban land use development on a *substantial* scale within the next three years." Wis. STAT. § 66.016(1)(b) (1983-84) (emphasis added). The court deferred to the agency's determination that "substantial," as applied to the area in question, meant 25%. 108 Wis. 2d at 476, 322 N.W.2d at 492.

Should the finder of fact consider the amount of appreciation in light of the previous value, or may it simply consider the absolute dollar amount? In this example, it is quite possible that jurors would say that \$25,000, taken in the abstract, is substantial. It is, however, only 0.25 percent of the value of the business. If asked whether appreciation of 0.25 percent is substantial, the answer may be less certain.¹¹²

Illustrations of substantial effort were given at the 1983 debates on the UMPA. One spouse owns property that is zoned residential before marriage. After the marriage, the other spouse obtains a rezoning of the property to commercial, with a resulting increase in value. It was agreed at the debates, without objection, that the effort described was not substantial.¹¹³ Another example given was the following: One spouse, a "brilliant investor," sells the other spouse's individual gold at exactly the right moment and reinvests the proceeds in real estate and common stock. It was agreed that the amount of the appreciation attributable to the efforts of the spouse doing the investing would be marital;¹¹⁴ thus, this effort must have been viewed by the debaters as "substantial." A rezoning matter could require a few minutes or hundreds of hours of work; the same is true of making investment decisions. What, then, does "substantial" mean in this context? Because courts will inevitably be asked whether certain amounts of appreciation and effort are or are not, as a matter of law, "substantial," the question is of more than academic interest.

The comment to section 14 of the UMPA suggests one means of interpreting the word substantial: "The rule of the sec-

112. In *In re Krause's Estate*, 173 Wash. 1, 21 P.2d 268 (1933), the issue was whether one party had "substantially benefited" the property of the decedent. The court stated:

"Substantial" as an adjective means something worth while as distinguished from something without value or merely nominal. . . . In its ordinary parlance "substantially benefited" . . . would mean some worth while advantage, profit or good. . . . [T]here can be no question but that the saving of real estate from loss by sale for taxes and assessments . . . would be substantially benefiting the real estate.

Id. at 8, 21 P.2d at 270 (citations omitted). Under such a definition, *substantial appreciation* would not mean *relative to total value*, but merely "worth while," i.e. of more than nominal value.

113. 1 Transcripts of Debates, *supra* note 48, at 226-28.

114. *Id.* at 219-20.

tion is strict. It articulates a bias against creation of marital property from such an act unless the effort has been substantial and has been responsible for substantial appreciation. *Routine, normal and usual effort is not substantial.*"¹¹⁵

The UMPA debates also shed some light on the meaning of "substantial." First, the two uses of the word "substantial" were referred to as having a single purpose: "I think you should note in lines 18 and 25¹¹⁶ the word 'substantial' [sic] That is very studied, to avoid the kind of things . . . just mentioned creating mixed property. We are talking about substantial labor . . . and substantial appreciation."¹¹⁷ The speaker was referring to such activities as merely posting a "For Sale" sign on real property or making a decision not to sell a stock because its value is increasing.

It was the intent of the Commissioners to avoid creating marital property every time such ordinary, but minimal, activity takes place. This approach has also been taken in community property states. A Louisiana court, for example, stated that "minor repairs . . . are not to be considered as 'improvements of a substantial, permanent character'"¹¹⁸ The community is not to be reimbursed for the value of time and effort expended merely to manage and preserve separate property of either spouse.¹¹⁹ It is this writer's opinion that the double test of substantiality was included to avoid nuisance suits or frequent litigation when the effort or appreciation, or both, is minimal. This would explain the "bias" built into the statute against the creation of marital property.¹²⁰ This approach is a reasonable compromise that prevents the creation of marital property when the spouse who applied the effort made only a "routine" effort.

115. UNIF. MARITAL PROP. ACT § 14 comment (1983), 9A U.L.A. at 45 (Supp. 1986)(emphasis added).

116. The speaker was referring to the Draft for Approval, *supra* note 47, at 44.

117. 1 Transcripts of Debates, *supra* note 48, at 199.

118. *Deliberto v. Deliberto*, 400 So. 2d 1096, 1100 n. 5 (La. Ct. App. 1981)(quoting *Courrage v. Colgin*, 51 La. Ann. 1069, —, 25 So. 942, 943 (1899)).

119. *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984); *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1983).

120. See *supra* note 115 and accompanying text.

(2) *Appreciation Attributable to a Spouse*

Section 14(b) requires that the appreciation be attributable to the activity of the spouse. Given the fluctuating nature of prices, how will one separate the portion attributable to the efforts of a spouse from the portion attributable to the economy, or as it is sometimes stated in the community property states, attributable to an increase "in the intrinsic value" of the property?¹²¹ Let us return to the two illustrations provided during the debates on the UMPA.¹²² In the first example, in which the nonowning spouse causes residential property to be rezoned as commercial, the amount attributable to the effort could probably be established through an appraiser's testimony regarding the value immediately before and immediately after the rezoning. It would be more difficult to determine the marital property component in the second example, in which the nonowning spouse decides to sell certain gold and reinvest the proceeds. Is it fair to assume that *all* of the increase in value is attributable to the efforts of the spouse who watches the market and manages the investment? Should not some of the appreciation be attributed to economic forces?

The community property states have dealt with this problem through a process known as "apportionment." Two quite different apportionment approaches have been developed¹²³ to determine whether and how much appreciation is attributable to the efforts of a spouse. One method, commonly referred to as the "*Pereira* approach,"¹²⁴ allocates a fair return on the separate property and treats the balance of the increase as community property.¹²⁵ Under the second method, the "*Van Camp* approach,"¹²⁶ the court determines a reasonable value for the effort

121. *Strohm v. Strohm*, 182 Cal. App. 2d 53, 61, 5 Cal. Rptr. 884, 889 (1960).

122. See *supra* notes 113-14 and accompanying text.

123. In addition to the California and Nevada cases discussed below, see *Cockrill v. Cockrill*, 124 Ariz. 50, 54, 601 P.2d 1334, 1338 (1979) ("the trial court . . . may select whichever [method] will achieve substantial justice between the parties"); *Katson v. Katson*, 43 N.M. 214, 217-18, 89 P.2d 524, 526-27 (1939).

124. See *Pereira v. Pereira*, 156 Cal. 1, 7, 103 P. 488, 491 (1909) (allocating "at least . . . the usual interest on a long investment well secured" to the separate property).

125. *Beam v. Bank of Am.*, 6 Cal. 3d 12, 18, 490 P.2d 257, 261, 98 Cal. Rptr. 137, 141 (1971). The "legal interest rate" is sometimes used as the reasonable rate of return on the separate property. *Id.* at 19, 490 P.2d at 262, 98 Cal. Rptr. at 142.

126. See *Van Camp v. Van Camp*, 53 Cal. App. 17, 199 P. 885, 889 (1921). *Van*

of the spouse, allocates that proportion of the increase to the community estate and treats the balance as separate property.¹²⁷ Apparently, either approach may be used in a single jurisdiction, depending on which is appropriate and equitable in a particular situation.¹²⁸

A Nevada case, *Schulman v. Schulman*,¹²⁹ provides a good illustration of the choice between the *Pereira* and *Van Camp* approaches. The husband owned and operated a meat market and processing business in the Las Vegas area. The trial court held that the economic growth in the area and the fact that the business had received a Small Business Administration loan outweighed any effort applied to the property by the couple.¹³⁰ The supreme court affirmed the trial court's decision that it would be unfair to use the *Pereira* rule, "which effects a greater attribution of profits to the industry of the community."¹³¹ In fact, when it adopted the *Pereira* and *Van Camp* rules, the Nevada court observed: "Both approaches have vitality and may be applied as circumstances warrant. Courts of this state are not bound by either the *Pereira* or the *Van Camp* approach, but may select whichever will achieve substantial justice between the parties."¹³²

Although courts in states adopting the UMPA will not be bound by any particular rule relating to apportionment and appreciation, some rule or rules will need to be formulated since situations like the one in *Schulman* are certain to occur.¹³³

Camp did not involve the appreciation of a particular piece of property, but rather large dividends paid to the husband by the company he headed and his resulting accumulations of property. The court held that since the husband had been paid an adequate salary, *Pereira* v. *Pereira*, 156 Cal. 1, 103 P. 48 (1909) was inapplicable. This approach is similar to that of UMPA § 14(b): if reasonable compensation is received by the spouse doing the work, any appreciation of individual property is individual.

127. *Beam v. Bank of Am.*, 6 Cal. 3d 12, 18, 490 P.2d 257, 261, 98 Cal. Rptr. 137, 141 (1971); *Johnson v. Johnson*, 89 Nev. 244, 247, 510 P.2d 625, 626-27 (1973)(citing *Beam*).

128. *Beam v. Bank of Am.*, 6 Cal. 3d 12, 18, 490 P.2d 257, 261, 98 Cal. Rptr. 137, 141 (1971); *Logan v. Forster*, 114 Cal. App. 2d 587, 600, 250 P.2d 730, 737 (1952).

129. 92 Nev. 707, 558 P.2d 525 (1976).

130. *Id.* at 711, 588 P.2d at 528.

131. *Id.* n.2 (quoting the district judge).

132. *Johnson v. Johnson*, 89 Nev. 244, 247, 510 P.2d 625, 626-27 (1973)(citing *Beam v. Bank of Am.*, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971)).

133. See generally COMMUNITY PROPERTY LAW OF IDAHO VI-7 to VI-18 (1982)(discussing the *Pereira* and *Van Camp* rules and attempting to improve on them). This work notes that the community property states following the "American rule" that income

C. *Forms of Holding Property*

Section 11 of the UMPA lists several ways in which property may be held,¹³⁴ all of which are directly related to the provisions on management and control of property.¹³⁵ For example, section 11(a) authorizes listing the names of the spouses on the document of title in the alternative,¹³⁶ while section 11(b) authorizes listing them in the conjunctive.¹³⁷ Under section 5(a)(6) either spouse, acting alone, may "manage and control" marital property held in the alternative, pursuant to section 11(a); under section 5(b), however, spouses may manage and control marital property held in the conjunctive, pursuant to section 11(b), only if they act together. Thus, the choice between these two forms of holding marital property will be dictated by the spouses' wishes concerning management and control. Section 11(c) authorizes holding property as individual property, while section 11(d) permits spouses to hold property in any other form permitted by law, including joint tenancy.

Section 11(e) creates a new form of holding property: "survivorship marital property."¹³⁸ Unlike the law in at least some of

from separate property is separate (Arizona, California, Nevada, New Mexico, and Washington) have faced the "most perplexing problems of apportionment" because they must distinguish between income as a return on capital and income as a return on labor. *Id.* at VI-8. It is also pointed out, however, that the states following the "civil law" rule that income from separate property is community (Idaho, Louisiana, and Texas) have also faced apportionment problems since it must sometimes be determined "whether the community labor of either spouse contributed to the increase in value of the separate property." *Id.* at VI-13 to VI-14. This is precisely the problem posed by UMPA § 14(b).

134. The Act provides the following definition of "held":

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.

UNIF. MARITAL PROP. ACT § 1(9) (1983).

135. Section 1(11) defines management and control as "the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, institute or defend a civil action regarding, or otherwise deal with, property as if it were property of an unmarried person." *Id.* § 1(11).

136. Section 11(a) provides in part: "Spouses may hold marital property in a form that designates the holder of it by the words '(name of one spouse) or (name of other spouse) as marital property'" *Id.* § 11(a)(emphasis added).

137. Section 11(b) (1983) provides in part: "Spouses may hold marital property in a form that designates the holder of it by the words '(name of one spouse) and (name of other spouse) as marital property'" *Id.* § 11(b)(emphasis added).

138. The Wisconsin statute also classifies a homestead acquired exclusively between

the community property states,¹³⁹ the UMPA allows use of joint tenancies when the property involved is marital property.¹⁴⁰ A married couple that, before the UMPA, would choose to put property in joint tenancy to take advantage of the right of survivorship will have to choose between joint tenancy and the new survivorship marital property. Assume for example that a couple purchases a home with wages earned after their determination date. The home will be marital property unless they effectively agree that it is not.¹⁴¹ Since selection of the form of holding the property has nothing to do with determining its classification, the spouses will be free to choose whichever form is preferable. The respective rights of each spouse should not be affected by the choice, since the property is marital in either event. For third parties, however, it may make a difference. A title examiner, for example, will not be able to determine the classification of property from the record if it is held in joint tenancy; the classification of survivorship marital property, however, will be clear from the documents of title. Knowing the classification may also make a difference for third parties curious about rights of management and control¹⁴² or for creditors whose rights vary with the classification of property.¹⁴³ Therefore, under most cir-

spouses after the determination date as "survivorship marital property." WIS. STAT. § 766.605 (1983-84).

McClanahan has described survivorship marital property as "a new concept not used in any existing [community property] statutes." W. McCLANAHAN, *supra* note 6, § 14.5, at 642. This is not entirely accurate. Nevada community property law provides for "community property with a right of survivorship." NEV. REV. STAT. § 111.064 (1981). Holding marital property in one of the other forms described in the UMPA does *not* carry with it a right of survivorship. UNIF. MARITAL PROP. ACT § 4(c) (1983) ("Each spouse has a present undivided one-half interest in marital property."). Also, no right of survivorship is created by the mere act of creating marital property. *Id.* § 11(e) ("Holding marital property in a form described in subsection (a) or (b) does not alone establish survivorship ownership between the spouses with respect to the property held in that form.").

139. *Tomaier v. Tomaier*, 23 Cal. 2d 754, 758, 146 P.2d 905, 907 (1944). *See also* 32 CAL. JUR. 3d *Family Law* § 394 (1977).

140. This fact is not obvious in the Act. Section 11(d) authorizes spouses to hold property in joint tenancy, but says nothing about the classification of such property. Nevertheless, since § 4(a) provides that all property of spouses is marital property unless classified otherwise by the Act, and the Act contains nothing to indicate that joint tenancies between spouses cannot be marital, one must conclude that joint tenancy does not affect the marital status of property. Unlike the situation in California, joint tenancy is not incompatible with marital property under the UMPA.

141. *See supra* note 28 and accompanying text.

142. UNIF. MARITAL PROP. ACT § 5 (1983).

143. *Id.* § 8(b).

cumstances it would seem that survivorship marital property would be the preferable form. The parties are more likely to understand what they own, and the record title will be clear.

Section 11(d) authorizes spouses to hold property in any form permitted by law, including "a form that provides for survivorship ownership."¹⁴⁴ It does not, however, specifically state that when marital property is held in such a form, the survivorship feature works like survivorship in the common-law joint tenancy. Do the rights in marital property granted to creditors by section 8 survive the death of the spouse who incurred the obligation, or are they lost, as they are in a joint tenancy? May a spouse sever such a joint tenancy unilaterally, or do the management and control rules of section 5 control the marital component of such property? A joint tenancy held in the form of husband and wife may be severed by one spouse. Marital property held in that form would require the act of both spouses to convey an interest in the property. What is the result if joint tenancy and marital property are combined? There are similar ambiguities related to management and control of tenancies in common that have a marital component.

Because of these uncertainties, the Wisconsin version of the UMPA was amended to clarify how joint tenancies and tenancies in common are to function when they are partially or entirely marital property. Under this amendment, if the incidents of joint tenancy or tenancy in common conflict with the incidents of property classification under marital property, the incidents of joint tenancy or tenancy in common will control.¹⁴⁵ The amendment, however, contains one exception: joint tenancy exclusively between spouses created by the spouses after the determination date would be survivorship marital property, even if it is labeled a joint tenancy in the document of title.¹⁴⁶

D. Tracing

There are several provisions in the UMPA that will require tracing. Section 4(g)(2) provides that property is individual

144. *Id.* § 11(d).

145. Act of October 22, 1985, § 123, 1985 WIS. LAWS 37. It should be noted that this amendment does not affect the spouses' remedies. *Id.*

146. *Id.* § 124.

property if it is acquired in exchange for or with the proceeds of other individual property of a spouse. Thus, a party seeking to establish that property is individual might have to trace it as proceeds of other individual property. Sections 17 and 18 provide that at death and dissolution property acquired before the determination date that would have been marital property if acquired after the determination date must be treated as if it were marital property. This provision will require tracing to determine which assets would have been marital and which would have been individual.¹⁴⁷ Section 4(h) provides that enactment of the UMPA does not alter the classification of property acquired before the determination date. If this provision applies to property acquired in exchange for predetermination date property, as was probably intended, it will also give rise to a tracing problem.¹⁴⁸

Section 14(a) of the UMPA provides that mixing marital property with property of any other classification reclassifies the nonmarital property as marital, unless the nonmarital component can be traced. This rule is a natural extension of the presumption of section 4(b) that all property of spouses is marital property.¹⁴⁹ The result is that all property of spouses is marital unless the party claiming otherwise meets the burden of proving that it is not.

Despite the importance of "tracing" under the Act, the term is never defined. The comment to section 14 states that "tracing would necessarily be done under the appropriate tracing rules of an adopting state."¹⁵⁰ That assumes, however, that there are "appropriate tracing rules" in states that adopt the UMPA.

147. MARITAL PROPERTY LAW IN WISCONSIN, *supra* note 3, at 3-7.

148. The Wisconsin act has been clarified by adding to the corresponding Wisconsin provision, § 766.31(8), the following language: "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." Act of October 22, 1985, § 82, 1985 WIS. LAWS 37.

149. The same rule is followed in the community property states. See, e.g., *Houska v. Houska*, 95 Idaho 568, 570, 512 P.2d 1317, 1319 (1973) ("The commingling doctrine is a special application of the general presumption that all property acquired during marriage is community property."). This presumption has been described both as a rule of evidence, W. DE FUNIAK & M. VAUGHN, *supra* note 9, § 60, at 118-19, and as a rule of law, Comment, *The Mix-Hicks Mix: Tracing Troubles Under California's Community Property System*, 26 UCLA L. REV. 1231, 1237-38 (1979). The distinction between substance and procedure would seem to be significant only in a multi-jurisdiction context.

150. UNIF. MARITAL PROP. ACT § 14 comment (1983), 9A U.L.A. at 44 (Supp. 1986).

Wisconsin case law on tracing is not well developed. In fact, Wisconsin attorneys concerned about practice under the Act have turned to the tracing rules of community property jurisdictions.¹⁵¹ Those rules, while complex, are at least well known.¹⁵² It is likely that courts in many states adopting the UMPA will at least look to the case law on tracing in the community property states when developing their own rules. Indeed, they will have the opportunity to pick and choose from among those rules as they attempt to achieve the policies of the Act.

IV. CONCLUSION

The Uniform Marital Property Act will bring the community property principle of equal sharing during marriage to adopting common-law states. Classification of property as marital, individual, or other property will be the starting point for most problems involving the property of spouses under the Act. Title to property will no longer exclusively determine legal ownership. Instead, the time of acquisition and the source of the property will determine its classification. Divorce litigants use a similar process in many states to determine what property is available for division, but the common-law states presently have no procedure analogous to classification during marriage.

Every major change in the law has its costs. The necessity of classification of property is one of the costs of the Uniform Marital Property Act. Since it is probably not possible to calculate the costs, in monetary terms, of adopting the marital property system, legislators considering the Act will be faced with the dilemma of whether the common-law system, which does not recognize the value of a spouse's unpaid work or the principle of sharing during marriage, is so unfair that the state should adopt

151. See, e.g., MARITAL PROPERTY LAW IN WISCONSIN, *supra* note 3, at 3-8 to -17.

152. See, e.g., Bell, *The Evolution of the Community-Out-First Presumption: A Matter of Trust*, 24 S. TEX. L.J. 191 (1981); Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 769, 782-84; Comment, *The Commingling of Separate and Community Funds: The Requirement of Tracing in Texas*, 6 ST. MARY'S L.J. 234 (1974); Comment, *Community Property: Commingled Accounts and the Family-Expense Presumption*, 19 STAN. L. REV. 661 (1967); Comment, *Community Property: The Concept of Tracing Ownership*, 8 TEX. TECH L. REV. 637 (1977); Comment, *supra* note 149; Note, *Community Property: Characterizing Assets Acquired from Mixed and Commingled Accounts: See v. See*, 14 UCLA L. REV. 935 (1967).

a system of community property. Are the incalculable costs of converting from the common law to a community property system outweighed by the perceived unfairness of the present system? Before enacting the Uniform Marital Property Act, states should study the Act carefully and examine the effects of its enactment in Wisconsin, the only state that has thus far adopted it.