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Community Property for Those Just Who Practice Common Law
Implications of Practicing Near an Uncommon State

Chicago Estate Planning Counsel
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Mark A. Shiller
Certus Legal Group, Ltd.
10700 W. Research Drive, Suite 165
Milwaukee, WI 53202

(414) 939-8370
mshiller@certuslegalgroup.com
www.certuslegalgroup.com

I. Marital and Community Property Basics

It is not the purpose of this presentation to fully delve into the mechanics and theories of marital and community property systems. However, a basic overview may be helpful.

A. Where Is It?

Community or marital property systems exist in nine states – Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin. Puerto Rico is also a community property jurisdiction. In addition, since 1998 Alaska has an elective community property system. Wisconsin is the only jurisdiction in that list that refers to its system as "marital property." For the author's convenience, and in recognition of the audience's proximity to the state, marital property will be the predominant term used in this outline and presentation.

1. Previous Community Property Jurisdictions

There was also a flurry of state activity in the 1940's that led to the adoption of community property statutes in the states of Michigan, Nebraska, Oklahoma, Oregon, Pennsylvania, and Hawaii. Each of these states repealed their statutes after federal tax changes in 1948 or had their statutes declared unconstitutional.

2. Uniform Marital Property Act and Future Prospects

The Uniform Marital Property Act was promulgated by the National Council of Commissioners on Uniform State Laws in 1983. It purported to be a distillation of community property laws in the states of Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington, but deviated in some respects from them all. Wisconsin was the first to adopt the UMPA, and for the most part has remained alone in its adoption. The only other jurisdiction to adopt a significant portion of the UMPA is Alaska – although, as referenced above, the state's version contained in the Alaska Community Property Act is wholly voluntary in nature.

Consider the following language from NCCUSL's summary of the UMPA:

> Elementary sociology tells us the self-evident fact that the nuclear family is the basic social unit upon which all other social and political institutions are based. Much has been said, as well, in those arenas in which public policy is debated and made, about the primacy of the family and the need to support and sustain it. But most of this discussion and concern has overlooked an inherent weakness in the family as an economic unit, at least in those states that are common law states. Although members of the family may have property and income, the family does not. As an economic unit, it is non-existent. And of all those factors that contribute to the problems of the family, perhaps its economic weakness is the most devastating.
>
> After three years of consideration, the Uniform Law Commissioners promulgated the Uniform Marital Property Act (UMPA) in 1983. For the first time, the family can be made into a functioning economic unit. And, for the first time, there is an opportunity to give more than lip service to the family as an economic entity.

Whether based on these lofty ideals or otherwise, the UMPA did get some consideration in a handful of states, including Illinois in the mid-1980's and as recently as 1994. There is no other state that the author is aware of that is currently considering adoption of the UMPA. New Hampshire, however, did have the Act introduced early this year in its House of Representatives, but it stalled when the legislation was passed along to its Senate.

B. What Is It?

At its base, community and marital property is a system of classification of property held by a marital community that is not wholly driven by an asset's title. Underpinning these systems is a notion that each of the parties in the marital community has an ownership in at least certain assets earned or improved during the marriage. Therefore, assets brought in to a marriage are often classified as individual or separate property whereas wage earnings during a marriage are typically classified as marital or community property.

1. Marital or Community Property

Marital or community property is a classification of property ownership whereby each spouse owns an undivided one-half interest in the whole of the subject property. It is often related back to the Spanish ganancial system of ownership. The word ganancial is rooted in the Spanish verb ganar, which means to earn or to achieve.

According to Justice Douglas in his dissent in the important community property decision of *Comm'r v. Harmon*, 323 U.S. 44 (1944):

> The distinctive feature of the community property system is that the products of the industry of either spouse are attributed to both; the husband is never the sole "owner" of his earnings; his wife acquires a half interest in them from their very inception. 1 de Funiak, Principles of Community Property (1943) §239.52.

Id. at p. 56. While there are certainly aspects of property ownership and management that may be viewed by some as "earned" and others as simple appreciation, this general concept goes a long way towards identifying property that will typically be classified as marital or community property.

2. Individual or Separate Property

The following are generally presumed to be individual property:

a. Property brought into marriage by a spouse.

b. Property received by a spouse through gift or inheritance.

c. Property that was a spouse's before both spouses were domiciled in the community or marital property jurisdiction.

However, if a particular asset cannot be effectively traced back to one of the above, it may be subject to a general presumption of marital property. In addition, certain jurisdictions — Idaho, Louisiana, Texas, and Wisconsin[1] — adopt what is sometimes referred to as the "Louisiana Fruits Rule" whereby income earned on individual property is considered marital or community property.

3. Deferred Marital Property or Quasi-Community Property

Common law jurisdictions have developed protections for a non-wage earning or less propertied spouse over the years – often referred to as an elective share. Those protections can be significantly impacted by a change of domicile to a community property state which presumes that each spouse will receive one-half of the community property and his or her individual property at dissolution of marriage or at the other spouse's death. For these and other reasons, the concepts of deferred marital property and quasi-community property exist. While a full exploration of these systems and concepts is beyond the scope of this presentation, in short they are a type of "widow's election" that applies community property principles to assets that may have been accumulated by the marital community in non-community property jurisdictions.

C. How Do You Get It?

1. Application of Default Rules

Each jurisdiction will vary in its approach, but generally the rules of community or marital property systems begin to apply following the date of a couple's marriage when both are domiciled in a community property jurisdiction or the date both spouses change their domicile to such a jurisdiction.

2. Marital Property Agreement

Another avenue to accumulating community or marital property is for married persons domiciled in a community or marital property jurisdiction to agree that all or certain assets are community or marital property. There appears to be significant variability in the use of such agreements among the different community property jurisdictions. In Wisconsin, perhaps because of a flurry of activity opting in or opting out of marital property

[1] There is some talk amongst members of the Real Property, Probate and Trust law section of the State Bar of Wisconsin to consider abandoning the Louisiana fruits rule although no legislation has been drafted to accomplish the change.

after the Marital Property Act's passage, it is normal to include a marital property agreement in a foundational estate plan.

3. Commingling/Mixing/Transmutation

Mixing is the process whereby marital property is added to individual property. As an example, consider a house owned by one spouse prior to a couple's marriage (an individual property asset) that had a mortgage on it. If either spouse pays for the mortgage out of earnings (marital property), the house is now part individual and part marital. While tracing can be accomplished to unwind the split, at some point the mixing becomes difficult or impossible to trace and therefore the mixed property effectively becomes marital property.

A less obvious, and perhaps somewhat unsettled issue, is whether mixing occurs within an asset. For instance, if a spouse comes into the marriage with a corporation and expends personal effort to increase its value – but chooses not to distribute the corporation's earnings either as personal wages or as dividends – is there a mixing of property? There is perhaps more caselaw on this particular subject in the divorce context than in the general community property caselaw, but the issue remains somewhat unsettled.

D. Common Misconceptions About Marital Property

Although the Wisconsin Marital Property Act became effective on January 1, 1986 – nearly 30 years ago – there are a number of misconceptions that persist among the general public. A review of them may be of help.

1. **Because we're married, everything we own is marital property.**

2. **If we die while married, everything goes to my spouse.**

3. **If we divorce, my spouse will get half and I'll get half.**

4. **Once we moved to Wisconsin [or other state], everything became marital property.**

5. **Once we moved from Wisconsin [or other state], we no longer had marital property.**

6. **If we keep everything titled separately, he'll control the disposition of his accounts and I'll control the disposition of my accounts.**

II. Advising Clients Migrating to a Common Law Jurisdiction from a Community Property Jurisdiction

Probably the most common community property challenge for a common law practitioner/advisor is how to serve clients who migrate from a community property jurisdiction. While there may be a tendency to plan as if community property ceases to have relevance, potentially significant advantages may be wiped out.

A. What Rights Cross the Border?

Most common law states do not have specific legislation or cases concerning the continuation of community property rights upon migration to a common law state.[2] However, general principles of conflicts of law indicate that the classification of property held by spouses do not change solely by a change of domicile. *See, e.g.,* Under Restatement (Second) of Conflicts of Law § 259, Comment (a) ("Considerations of fairness and convenience require that ... the spouses' marital property interests are not affected by a change of domicile to another state by one or both of the parties."). The author is not aware of a decision in a common law state to the contrary, whereas there are a number that are supportive of that proposition. *See, e.g., Wallack v. Wallack,* 211 Ga. 745, 88 S.E. 2nd 154 (1955); *Drank v. Glover,* 30 Ala. 382 (1987); *Doss v. Campbell,* 19 Ala. 590, 54 Am. Dec. 198 (1851); *Beard v. Basye,* 46 Ky. 133 (1846); *Quintana v. Ordono,* 195 So. 2d 577 (Fla. 1967); and *Edwards v. Edwards,* 108 Okla. 93, 233 Pac. 477 (1925).

1. Degradation of Marital Property Rights

It is settled that following a move, newly acquired/earned property will be governed by the laws of the state of domicile. The marital or community property characteristics of property, or at least the ability to prove up such characteristics, can be impacted by some very common activities:

a. Transfer to an account with different titling;

b. Transfer an account or asset to a revocable trust;

c. Adding or mixing property earned or received in a common law jurisdiction with property brought from marital property jurisdiction;

Query whether keeping income earned on marital property brought over within the same account is an addition or mixing transaction. Indeed, the

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[2] See, however, the discussion below on the Uniform Disposition of Community Property Rights at Death Act.

split between community property jurisdictions on this subject may make this somewhat unclear. However, federal caselaw is friendlier to the proposition that income on marital property is marital property. *See, e.g., Johnson v. Commissioner*, 88 F. 2d 952 (8th Cir. 1937) (however, the language used in the decision refers primarily to the income as being half attributable to the husband and half to the wife – not specifically that such income is community property).

2. Exchanges of Marital Property

Putting aside the Louisiana Fruits aspects following a move, it is generally safe to say that exchanges of marital property assets for a different asset result in the new property maintaining marital property classification. *See, e.g., In re Eisner*, 2007 WL 2479654 (Bankr. E.D. Tex. 2007) (Missouri home purchased with community property was a community property asset, as would the proceeds its sale).

3. Management and Control Rights

Although the decision is the subject of fairly strong criticism, in *In re Kessler's Estate*, 203 N.E.2d 221 (Ohio 1964), the application of management and control principles to community property brought to the State of Ohio resulted in a full inclusion for Ohio inheritance taxes. The theory was something akin to a §2036 inclusion issue.

4. Strategies to Preserve Marital Property Character

a. Maintaining Separate Accounts/Titling

b. Create a Marital Property Trust or LLC

i. Tangible and intangible property

ii. Real Property

c. Preserve Detailed Financial Statement and Supporting Materials as of Date of Move

d. Sweep Income

e. Caution Regarding Joint Accounts

B. Joint Trusts in Common Law Jurisdictions

It is fairly common in community property jurisdictions for spouses to settle revocable trusts jointly. The approach is in many ways easier for clients to understand when they have a common dispositive plan. Moreover, since the titling of the assets into the joint revocable trust does not impact classification in a community property jurisdiction, there are no gift implications or confusions regarding ownership of the property held by the revocable trust at a spouse's death. However, the joint trust may not be the best structure for common law jurisdiction spouses.

1. Property Added to Joint Trust Post-Migration

Although a joint trust may provide a mechanism for segregating property that is individual, marital or otherwise, adding property to that same trust post-move is likely mixing.

2. Estate Tax Planning

Joint trusts are potentially problematic for common law situations. While a joint trust may provide for separate accounts for each spouse's property, such trusts are fairly high-maintenance and likely to be administered poorly. Therefore, the concern is that all of the property of the joint trust will be considered subject to a general power of appointment in favor of both spouses and that a traditional funding of a credit shelter is either an incomplete gift from the surviving spouse in whole or in part, and therefore ineffective for the desired purpose.

In the early part of the 2000's, increased attention on joint trusts was considered – although the approach admittedly had some limitations. For instance, PLR 200101021 or PLR 200210051, the IRS indicated a willingness to treat assets in a joint trust as being fully owned by the first spouse to die if he or she had a general power of appointment over the entire trust. The downside of this approach, however, was giving up a basis adjustment for the property as being transferred within one year of death as provided in I.R.C. §1014(e).

C. Uniform Disposition of Community Property Rights at Death Act

The Uniform Disposition of Community Property Rights at Death Act (UDCPRDA) has been adopted in 16 states: Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Minnesota, Montana, New York, North Carolina, Oregon, Utah, Virginia, Wyoming. States that have not

adopted UDCPRDA do not necessarily have contrary law – but the disposition of community property at death may be less clear.

1. UDCPRDA only applies to dispositions at death.

2. UDCPRDA creates presumptions in favor of maintaining community property.

3. Absent UDCPRDA, uncertainty exists regarding court interpretation of ownership of community property by deceased spouse's estate or surviving spouse.

III. Advising Clients Migrating to a Community Law Jurisdiction from a Common Law Property Jurisdiction

The implications of a move to a community property jurisdiction are somewhat easier to manage. Importantly, a two revocable trust plan can be just as effective in a community property jurisdiction as in a common law jurisdiction. Outside of state specific issues, the general areas that should be considered on a migration to a community property jurisdiction are as follows:

A. Individual vs. Joint Trusts

1. Consider potential efficiencies of a joint trust plan.

2. If individual trusts will be maintained, include references in each spouse's trust that other spouse's interest in community or individual property will be segregated and transferred to the other spouse (or his or her Estate or trust) at the first death.

3. Do not rely on titling in a spouse's revocable trust as determinative of ownership.

B. Reclassify Assets by Agreement

1. In a jointly determined plan, individual classification of life insurance in the insured spouse may provide asset protection or tax exemption utilization advantages. Note that a significant percentage of estate planners in Wisconsin may classify life insurance based on which spouse is the owner of the subject policy. The author rarely takes that approach.

2. Retirement assets can be somewhat awkward to administer in community property jurisdictions.

a. Retirement accounts that are subject to ERISA are subject to certain pre-emptions. A conservative approach is to consider that ERISA accounts cannot be classified as marital property.

b. *Boggs v. Boggs*, 520 U.S. 833 (1997) is generally supportive of the notion that ERISA pre-empts community property classification – although the decision is more directly focused on rights of a surviving spouse and an employee's rights to manage his or her retirement account.

c. If non-ERISA (e.g., IRAs) accounts are a large portion of a couple's estate, consider whether classification of the IRA as marital or community property may be preferable. This assumes that an aggregate approach to marital or community property is available, as it is in Wisconsin.

C. Irrevocable Trusts

1. Clients of means will often have life insurance trusts as part of their estate plans. While the funding of such trusts is fairly straight-forward in common law jurisdictions, great care needs to be taken to ensure that the non-insured spouse beneficiary does not inadvertently become a donor to a trust of which he or she is a beneficiary. The issue can generally be solved quite easily by agreement – but clients do not necessarily consider such planning issues right away.

2. Similarly, grantor trusts that rely on a power to re-acquire trust assets for grantor trust status should consider the classification of post-move contributions to such trusts. The concern is that unwittingly a trust may end up with two donors instead of one. Moreover, is grantor status applied as to a percentage of a trust asset in such "blended grantor" situations?

D. Non-Citizen Spouse Specific Planning

E. Ethical Issues

IV. Implications of Property Acquired in Community Property Jurisdictions by Common Law State Domiciliaries

Given the existence of a case in Illinois regarding the acquisition of community property rights by an Illinois resident, a bit of attention to this subject is in order. In *Millikin Trust Company v. Jarvis*, 180 N.E.2d 759 (1962), an Illinois court held that, under Louisiana law, an undivided one-third interest in Louisiana oil and gas leases constituted community property because the husband acquired the property through conveyances

which failed to recite that the purchase was made with his separate funds and for his separate estate. Therefore, the court held that the wife had a vested one-half interest in the property at the time of its acquisition and was entitled to one-half of the proceeds of the sale of the property when it was sold, even though the transaction occurred after the couple relocated to Illinois.

Appendix

IRS Manual -- Exhibit 25.18.1-1
Comparison of State Law Differences in Community Property States

	Arizona	California	Idaho	Louisiana	Nevada
1. When do spouses become subject to state community property laws?	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.
2. Does the state recognize common law marriage?	No, but it recognizes a common law marriage legally established elsewhere.	No, but it recognizes a common law marriage legally established elsewhere.	No, but it did until 1/1/96. It recognizes common law marriages established in Idaho before 1/1/96 or legally established elsewhere.	No, but it recognizes a common law marriage legally established elsewhere.	No, but it recognizes a common law marriage legally established elsewhere.
3. Does the state recognize some from of domestic partnership as an alternative to marriage?	No.	Yes.	No.	No.	Yes.
4. Does a domestic partnership under state law create community property rights and obligations?	Not applicable.	Yes.	Not applicable.	Not applicable.	Yes.
5. When does the community property regime terminate (causing subsequently acquired assets or future income to no longer be characterized as community property)?	Change of domicile, death, decree of divorce or decree of legal separation. Also, property acquired after a petition for dissolution or separation or annulment is separate property, if the petition results in a final decree.	Change of domicile, death of spouse, living separate and apart before dissolution with no present intent to resume marital relations and conduct evidencing a complete and final break in the marital relationship, legal separation or judgment of dissolution.	Change of domicile, death or decree of divorce.	Change of domicile, death or entry of a judgment of separation of property or judgment of divorce.	Change of domicile, death, decree of divorce or decree of legal separation.
6. How is post marital income generated from separate property (e.g., rents, dividends, interest) characterized?	Separate property unless a portion is derived from CP time, effort and skills. If so, an allocation must be made.	Separate property unless a portion is derived from CP time effort and skills. If so, an allocation must be made.	Community property.	Community property.	Separate property unless derived from a spouse's labor or community property funds. If so, an allocation must be made.

	Arizona	California	Idaho	Louisiana	Nevada
7. How does the state characterize appreciation in the value of separate property?	Separate property. If a spouse's labor or community property funds are used to acquire or improve the asset, a right to reimbursement exists, but this does not change the character of the asset.	Separate property where appreciation is a "natural enhancement of SP" and spouse has expended a minimum of effort or effort has insignificant value. If spouse's labor or CP funds are used to acquire or improve the SP, a right of reimbursement exists, but does not change the character of the SP. A federal tax lien attaches to the right of reimbursement.	Separate property unless a portion is derived from community property. If so, an allocation must be made. A federal tax lien attaches to the right to reimbursement.	Separate property. If a spouse's labor or community property funds are used to acquire or improve the asset, a right to reimbursement exists, but this does not change the character of the asset.	Separate property unless derived from a spouse's labor or community property funds. If so, allocation or reimbursement issues must be dealt with. A federal tax lien attaches to the right to reimbursement.
8. How does the state characterize property taken by spouses under a deed reflecting that the property is held in joint tenancy?	Strong presumption that it is community property. To be a joint tenancy, deed should have language negating the possibility that it is held as community property.	The property is rebuttably presumed to be a joint tenancy. Factors rebutting the resumption include: If acquired during marriage, if acquired with CP funds, if parties knew the legal consequences of JT vs. CP, if loan proceeds deposited into CP account.	Community property unless there is clear and convincing evidence that the spouses intended to hold the property in joint tenancy rather than as community property. . Holding title in joint tenancy is not sufficient by itself to overcome CP presumption.	Community property.	The property is rebuttably presumed to be a joint tenancy.
9. How does the state characterize property taken by spouses under a deed reflecting that the property is held in tenancy in common?	Strong presumption that it is community property. To be a tenancy in common, deed should have language negating the possibility that it is held as community property. Rare form of ownership between spouses.	The property is rebuttably presumed to be separate property. Very uncommon form of ownership between spouses.	As a tenancy in common, if deed uses specific language "as tenants in common." It may also create a tenancy in common if separate property of both spouses is used to acquire the property. Otherwise it is community property.	Community property.	The property is presumed to be community property.

	Arizona	California	Idaho	Louisiana	Nevada
10. Does a deed taken in the name of one spouse as sole and separate property create separate property?	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.
1. Does the state recognize pre or post marital property characterization agreements?	Yes.	Yes.	Yes.	Yes.	Yes.
12. What are the property characterization agreements called?	Premarital, post marital, prenuptial or postnuptial agreements,	Premarital, post-marital, prenuptial or postnuptial agreements.	Premarital agreements and marriage settlement agreements.	Matrimonial agreements. (but, post marital agreements require court approval).	Premarital or ante nuptial agreements or post marital contracts.
13. Are property characterizations agreements required to be in writing?	Premarital agreements must be in writing.	Premarital agreements must be in writing. Postmarital agreements need only be in writing if they involve real estate.	Agreements must be in writing.	Agreements must be in writing.	Agreements must be in writing to be effective against the Internal Revenue Service.
14. Are property characterization agreements valid against creditors?	Yes, but fraudulent conveyance statutes can be applied.	Yes. Premarital contracts before 1986 required to be recorded. After 1986, no need for recording to be valid. Premarital not subject to fraudulent conveyance laws. Post-marital need not be recorded, but are subject to fraudulent conveyance laws.	Yes, no notice is required.	Yes, but only if the agreement is recorded (As to real property, with parish registry where real property is located, and as to personal property, with parish registry where spouses domicile).	Yes, but case by case analysis required. Agreement must conform to required state law formalities, and terms of agreement must be mutually observed by parties. Fraudulent conveyance and nominee/alter ego laws can be applied.
15. What property is available to satisfy a premarital federal tax obligation assessed against only one spouse?	All separate property of liable spouse. Also, 100% of community property traceable to or contributed by the liable spouse and 50% of all other community property.	100% of all community property and all separate property of the liable spouse.	100% of all community property and all separate property of liable spouse.	100% of all community property and all separate property of liable spouse.	50% of community property and all separate property of liable spouse.

	Arizona	California	Idaho	Louisiana	Nevada
16. What property is available to satisfy a post marital federal tax obligation assessed against only one spouse?	100% of all community property and all separate property of the liable spouse.	100% of all community property and all separate property of the liable spouse.	100% of all community property and all separate property of liable spouse.	100% of all community property and all separate property of liable spouse.	100% of all community property and all separate property of liable spouse.

	New Mexico	Texas	Washington	Wisconsin*
1. When do spouses become subject to state community property laws?	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	On the determination date, which is the first day after marriage, both spouses domicile in Wisconsin and January 1, 1986 (the effective date of the Marital Property Act in Wisconsin).
2. Does the state recognize common law marriage?	No, but it recognizes a common law marriage legally established elsewhere.	Yes. To qualify, spouses must cohabit in Texas, agree to be married and represent that they are married. Parties to a common law marriage must obtain a divorce or annulment to terminate the marriage.	No, but it recognizes a common law marriage legally established elsewhere.	No, but it recognizes a common law marriage legally established elsewhere.
3. Does the state recognize some from of domestic partnership as an alternative to marriage?	No.	No.	Yes.	Yes.
4. Does a domestic partnership under state law create community property rights and obligations?	Not applicable.	Not applicable.	Yes.	No.
5. When does the community property regime terminate (causing subsequently acquired assets or future income to no longer be characterized as community property)?	Change of domicile, death, decree of divorce or decree of legal separation. Upon separation, spouses may also ask court for division of property, which may affect subsequently acquired property.	Change of domicile, death, decree of divorce or annulment.	Change of domicile, death or a separation that is intended to be permanent.	Change of domicile, death, decree of divorce or decree of legal separation or decree of separate maintenance.

	New Mexico	Texas	Washington	Wisconsin*
6. How is post marital income generated from separate property (e.g., rents, dividends, interest) characterized?	Separate property unless derived from a spouse's labor or community property funds. If so, an allocation must be made.	Community property.	Separate property unless derived from a spouse's labor or community property funds. If so, an allocation must be made.	Marital (community) property.
7. How does the state characterize appreciation in the value of separate property?	Separate property. If a spouse's labor or community property funds are used to acquire or improve the asset, a right to reimbursement exists, but this does not change the character of the asset.	Separate property. If community property funds are used to acquire or improve the asset, when the marriage is terminated by death or divorce, a claim for economic contributions exists.	Separate property unless derived from a spouse's labor or community property funds. If so, allocation or reimbursement issues must be dealt with.	Market appreciation is individual (separate) property. Appreciation due to the efforts of either spouse or application of marital (community) property is marital (community) property.
8. How does the state characterize property taken by spouses under a deed reflecting that the property is held in joint tenancy?	Community property unless the deed also specifically designates it as separate property.	Depends on source of funds used to acquire property. Community property remains CP unless a written agreement to partition is first executed. Otherwise property is CP with a right of survivorship. Property purchased with separate funds may be held as joint tenants, with undivided 1/2 interest being separate property.	Community property unless there is a written agreement between the spouses which clearly evidences the spouses' intent to hold the property in joint tenancy rather than as CP. Holding title in joint tenancy is not sufficient by itself to overcome CP presumption.	Marital (community) property with right of survivorship, which in Wisconsin is called survivorship marital property, unless the deed was executed before 1/1/86. If the deed predates 1/1/86 it is a joint tenancy.
9. How does the state characterize property taken by spouses under a deed reflecting that the property is held in tenancy in common?	Community property unless the deed also specifically designates it as separate property.	Community property, unless a written agreement to partition is executed. Property purchased with separate and community funds is owned as tenants in common.	Community property unless there is clear and convincing evidence establishing the spouses' intent to hold the property in tenancy in common. Title in tenancy in common is not sufficient by itself to overcome CP presumption.	Marital (community) property unless the deed was executed before 1/1/86. If the deed predates 1/1/86, it is a tenancy in common.
10. Does a deed taken in the name of one spouse as sole and separate property create separate property?	Yes. The property is rebuttably presumed to be separate property.	Only if the deed also contains a recital that the consideration was paid from separate funds of that spouse. If so, the property is then presumed to be separate.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.
11. Does the state recognize pre or post marital property characterization agreements?	Yes.	Yes.	Yes.	Yes.

	New Mexico	Texas	Washington	Wisconsin*
12. What are the property characterization agreements called?	Premarital, post marital, prenuptial or postnuptial agreements,	Premarital and marital or post nuptial agreements.	Separate property agreements.	Marital property agreements.
13. Are property characterizations agreements required to be in writing?	An oral agreement will be recognized, but the claim of one will be strictly scrutinized.	Agreements must be in writing.	An oral agreement will be recognized, but the claim of one will be strictly scrutinized.	Marital property agreements must be in writing.
14. Are property characterization agreements valid against creditors?	Unknown. State law requires agreements to be in writing and be acknowledged. There is no case law on the effect of a valid agreement on creditors.	Yes, unless existing creditor's rights are intended to be defrauded by agreement.	Not against existing creditors.	If incurred after the determination date, no, unless creditor has actual notice of the agreement before the obligation is incurred. If incurred before the determination date, yes as to future income or property.
15. What property is available to satisfy a premarital federal tax obligation assessed against only one spouse?	50% of all community property and all separate property of liable spouse.	All separate property of liable spouse, 100% of joint management community property, 100% of liable spouse's sole management community property, and 50% of nonliable spouse's sole management community property. If a homestead is involved, contact counsel.	50% of community property and all separate property of liable spouse.	All individual (separate) property of the debtor spouse, 2. Half of marital (community) property and 3. all marital (community) property that would have been debtor spouse's individual (separate) property but for marital property law or the marriage.
16. What property is available to satisfy a post marital federal tax obligation assessed against only one spouse?	100% of community property and all separate property of liable spouse,	All separate property of liable spouse, 100% of joint management community property, 100% of liable spouse's sole management community property, and 50% of nonliable spouse's sole management community property. If a homestead is involved, contact counsel.	100% of community property and all separate property of liable spouse.	Assuming the obligation is incurred in the interest of the marriage and family, 100% of marital (community) property and all separate property of liable spouse.

*Wisconsin law refers to community property as "marital" property and separate property as "individual" property.