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USES OF MARITAL PROPERTY AGREEMENTS IN ESTATE PLANNING

Wisconsin is a marital property state, and the applicable laws are set forth in the Marital Property Act (the "Act"), codified in Chapter 766 of the Wisconsin Statutes. The Act determines the property rights of married spouses during life and at death. The Act applies to a married couple after their "determination date," which is the date on which the last of the following requirements is met: (i) marriage; (ii) both spouses are domiciled in Wisconsin; and (iii) 12:01 a.m. on January 1, 1986.

Under the provisions of the Act, marriages are generally considered equal partnerships, and after the determination date married spouses are treated as sharing equally in most assets acquired by either spouse during the marriage. Such assets, which include property acquired from the earnings of either spouse, are presumed to be marital property. In effect, each spouse is presumed to own an undivided one-half interest in each item of marital property acquired during the marriage, regardless of how the property is titled. On the other hand, property acquired by a spouse prior to the determination date, and property acquired by a spouse during marriage by gift or inheritance from a third party, is presumptively classified as the individual property of the acquiring spouse. The non-acquiring spouse does not have ownership rights in the acquiring spouse's individual property during life or at death.

Importantly, the Act sets forth the "default" rules, but a married couple may enter into a marital property agreement to alter any of the provisions of the Act, including the classification of any or all assets as marital or individual property. There are many benefits to entering into such an agreement, especially because determining with exactitude the property classification of an item of property under the Act is at best an uncertain process. A marital property agreement provides certainty as to the classification of property, which is especially important when the couple has created a comprehensive and tax-conscious estate plan for the disposition of their assets at death.

In Wisconsin, it is common for a married couple to enter into a marital property agreement classifying all property of both spouses as marital property, including property which would otherwise be classified as the individual property of one spouse. These "opt-in" agreements are especially suitable for a first marriage where neither spouse has children from a prior relationship. Classifying all property as marital property simplifies estate administration because it is no longer necessary for the couple to keep marital and individual property

separate, and because it will not be necessary to analyze which assets are marital property and which are individual property upon the death of a spouse. Additionally, there are ordinarily significant income tax advantages to opt-in marital property agreements. Classifying all of a married couple's assets as marital property as part of a comprehensive estate plan equalizes each spouse's estate, and will usually enable the couple to maximize the estate tax exemptions available for each spouse. Further, at the time of death, the basis of assets passing from a decedent for purposes of determining gain or loss for income tax purposes is "stepped-up" (or "down") to an amount equal to a fair market value of the assets as of the date of death. In the case of marital property, the basis of a surviving spouse's marital property interest is also stepped-up. "Opt-in" marital property agreements often also contain what is known as a "Washington Will" provision, which states that upon the death of either spouse, all or any of the property of one or both spouses passes to a designated person, trust or other entity by nontestamentary disposition, and without probate. As such, the provision is a simple mechanism whereby the spouses contract for the disposition of all or a portion of their community property at the time of each of their deaths, and simultaneously avoid probate as to that property.

Alternatively, a married couple may choose to enter into a marital property agreement reclassifying all property of both spouses as the individual property of each spouse, including property which would otherwise be classified as marital property. In these "opt-out" agreements, the wages earned by each spouse, and all property acquired with the earnings, will be classified as the individual property of the earning spouse. The non-earning spouse will not have any ownership rights in such assets, either in life or at death. An "opt-out" marital property agreement may be advantageous in second marriage situations, where one or both spouses have children from a prior relationship, because the agreement will allow each spouse to bequeath his or her individual property to his or her own children at death.

Marital property agreements may also reclassify only certain assets. For example, a spouse may want to bequest a specific asset to a person other than his or her spouse at death. A marital property agreement could classify only the specific asset as the individual property of the spouse. As a result, the spouse would have full ownership rights in the asset during life, and the right to bequeath the entire asset to the third party at death. Without such an agreement, the spouse would only have the right to bequeath his or her one-half interest in the asset.

Marital property agreements are essential tools for creating a comprehensive estate plan tailored to the individual needs of the couple, and have a significant impact on the disposition of a couple's assets both during life and at death.

If you have any questions regarding this article, please contact Attorney Megan Harried at O'Neil Cannon at 414-276-5000.