

# *Family Estate Planning*

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IN WISCONSIN

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**Extension**  
UNIVERSITY OF WISCONSIN-MADISON



# Contents

## Introduction

Estate planning objectives . . . . .	1
Laws that affect estate planning . . . . .	2

## Property ownership and distribution

Kinds of property . . . . .	2
Real property . . . . .	2
Personal property . . . . .	2
Ways to own property . . . . .	4
Sole ownership . . . . .	4
Co-ownership . . . . .	4
Ownership interests measured by time . . . . .	5
Ownership under the Wisconsin Marital Property Act . . . . .	6
Property classification . . . . .	6
Determination date . . . . .	6
Additional classification rules . . . . .	9
Mixed property . . . . .	9
Deferred employment benefits . . . . .	13
Effect of title . . . . .	14
Debt brought to the marriage . . . . .	15
Record keeping requirements . . . . .	15

## Property distribution at death

Probate . . . . .	16
Assets not subject to probate . . . . .	16
Assets subject to probate . . . . .	17
Property distribution when there is no will . . . . .	17
Other intestate rules . . . . .	18
Probate procedures . . . . .	19
Formal estate administration . . . . .	19
Informal estate administration . . . . .	19
Simplified procedures . . . . .	19
Motor vehicle transfer to surviving spouse . . . . .	19
Termination of joint tenancy and survivorship marital ownership . . . . .	19
Transfer by affidavit . . . . .	20
Summary settlement or assignment . . . . .	20

## Federal taxes on property transfers

Federal gift tax . . . . .	21
Exclusions . . . . .	21
Deductions . . . . .	21
Applicable exclusion amount . . . . .	21
Special circumstances . . . . .	22
Federal estate tax . . . . .	22
Gross estate . . . . .	22
Federal income tax . . . . .	24
Marital property . . . . .	24
Carryover basis for some deaths in 2010 . . . . .	25
Sale of principal residence . . . . .	25

## Wisconsin taxes on property transfers

### Estate planning tools

Wills . . . . .	25
Formalities of a will . . . . .	26
Who needs a will? . . . . .	27
Children need not be beneficiaries . . . . .	28
Getting started . . . . .	28
Steps to making a will . . . . .	28
Letter of last instructions . . . . .	30
Reviewing your will . . . . .	30
Making changes to your will . . . . .	30
Effect of marriage or divorce on a will . . . . .	31
Where to keep your will . . . . .	31
Cost of a will . . . . .	31
Wisconsin Basic Will and Basic Will With Trust . . . . .	31
Trusts . . . . .	32
Living trusts . . . . .	33
Revocable living trusts . . . . .	33
Irrevocable living trusts . . . . .	34
Testamentary trusts . . . . .	34
Selecting a trustee . . . . .	35

Marital property agreements . . . . .	35
Scope of marital property agreements . . . . .	35
Formalities . . . . .	36
Impact of marital property agreements at divorce . . . . .	36
Statutory terminable property classification agreements . . . . .	36
Will substitute agreements . . . . .	37
Other estate planning tools . . . . .	38
Unilateral statements . . . . .	38
Gifts . . . . .	38
Gifts to minors . . . . .	38
Uniform Transfers to Minors Act . . . . .	39
Irrevocable trust . . . . .	39
Installment sales . . . . .	39
Life insurance . . . . .	40
Private annuity . . . . .	40
Reverse mortgages . . . . .	41
Planning for incapacity . . . . .	41
Spousal impoverishment . . . . .	42
Asset protections . . . . .	43
Income protections . . . . .	43
Estate recovery and lien laws . . . . .	43
Divestment . . . . .	44
Advance directives . . . . .	44
Power of attorney for finances . . . . .	44
Power of attorney for health care . . . . .	45
Living will (Declaration to Physicians) . . . . .	46
Do not resuscitate orders . . . . .	47
Authorization for final disposition . . . . .	47
Guardianship . . . . .	47

## Planning ahead

Choosing a lawyer . . . . .	48
Selecting a financial advisory team . . . . .	49

## Glossary . . . . . 50

## Resources . . . . . 53

## Appendix . . . . . 54

Statements in this bulletin reflect Wisconsin legislation in effect as of June 30, 2017. Other states may have different laws; this information may not apply to property you own outside Wisconsin. This information was revised in 2017 by Mary Meehan-Strub, Karen P. Goebel, Philip E. Harris, and Linda Roberson. The authors wish to acknowledge and thank Richard J. Langer for his contributions on previous versions of this publication. The authors assume responsibility for these changes, but stress that this publication does not constitute legal advice and cannot be considered a substitute for discussing your specific situation with your own attorney.

# Introduction

Planning an estate can be simple or very complex, depending on your assets and family situation.

**Estate planning** involves not only the disposition of property at death, but also the wise accumulation, use, and preservation of assets during life. It may include planning and executing documents such as a living will or powers of attorney that will carry out your wishes in case of a long illness, disability, incapacity, or incompetency.

Estate planning should be a continuing project. You need to modify your plan as:

- family circumstances change,
- assets change, and
- laws change.

The **goal of effective estate planning** is finding the best possible methods to meet your needs and wishes while minimizing current and future costs such as taxes and probate expenses.

This publication is intended to introduce the laws that affect estate planning in Wisconsin and to provide some ideas for planning. It is not intended to substitute for professional advice but will help you decide what professional advice you need and how to make the best use of that advice. This publication will also note the special challenges that non-traditional families face in their estate planning and will suggest possible solutions where they exist.

This booklet is organized into chapters that cover specific areas of concern in the estate planning process. These chapters are organized in three main areas.

- **Property ownership and distribution** covers how property is owned, the Wisconsin Marital Property Act, and probate procedures.

- **Estate planning tools** covers wills, trusts, powers of attorney, marital property agreements, and planning for incapacity.
- **Planning ahead** covers choosing a lawyer and selecting a financial advisory team.

Federal and state tax laws are covered in separate chapters, and a glossary at the end defines technical and legal terms.

## Estate planning objectives

Since the ultimate goal of estate planning is to carry out your intentions for owning and disposing of assets and for taking care of family members, estate planning objectives depend entirely upon your desires. The following objectives are common to many people and may help you think about your own.

- **Financial security** — Many people want to make sure they have enough money to meet family members' basic needs. This concern arises at several stages of life. A young couple is often concerned about the financial security of their minor children in the event that one or both parents would die. People want to have enough money to pay living and medical expenses during retirement. They also want to make sure that if one spouse or partner dies, the surviving spouse or partner will have enough money to live on.
- **Minor children** — In addition to financial security for children, most people want to make arrangements for rearing minor children in the event of both parents' deaths. For non-traditional families, this is a difficult area.

- **Property disposition** — Many people have special plans for disposing of certain property. Family heirlooms may be earmarked for certain persons. Some people have a farm or other business that they want to turn over to children who will continue the business. Others have real estate they want to give to a particular person.

- **Fairness** — Most people want to treat surviving family members equitably. That does not always mean an equal division of the wealth that remains at death. Some children have more need than others or may have received help already. For example, if a couple were to die after paying for one child's college education but before the other went to college, an equitable distribution may include providing for the younger child's college education before the remaining estate is divided.

Some children have made greater sacrifices for the family, and deserve compensation. For example, a child who stays home to care for parents and help in the family business has invested time in the business and may deserve a greater share of the family wealth.

- **Minimize taxes and probate costs** — Most people want to minimize the amount of their tax liability and the costs of probating an estate.

Planning objectives often compete, and the planner must compromise. Each family's plan will differ, since each family differs in size, age, personal desires, health, property ownership, and means of livelihood. A family's plan must be tailored to fit its circumstances and should be reevaluated often.

## Laws that affect estate planning

Legislatures and courts do not write a separate set of laws that apply only to estate planning. Instead, several sets of laws must be considered. You will find more detailed information on each of these areas in its section in this publication.

**Property laws** — Property laws govern ownership and the rights and duties with respect to that property. These rules define how property can be bought and sold, mortgaged, or given away. The federal government has left this area of the law to the states. So Wisconsin law is important to Wisconsin residents. Wisconsin's marital property law, effective January 1, 1986, governs the property rights and obligations of married people in Wisconsin. Real property in another state is subject to that state's laws.

**Probate laws** — At death, property owned by the **decedent** (deceased person) must be legally transferred to a survivor. State probate laws govern the process of determining who is to receive the property and then making the transfer.

**Tribal laws** — Probating the estate of all American Indians owning trust property is handled by the Bureau of Indian Affairs (see Resources, page 53).

**Federal tax laws** — After property and probate laws are applied to determine how property is transferred, federal tax laws are applied to determine the estate and gift taxes, if any, that must be paid to the federal government. The transfer method also affects the amount of federal income tax that must be paid.

**Wisconsin tax laws** — Wisconsin currently has no gift tax on lifetime transfers and no inheritance or estate tax on transfers at death.

## Property ownership and distribution

### Kinds of property

#### Real property

There are two basic kinds of property — real property and personal property. Real property consists of: land; permanent **improvements** to land such as buildings, fences, and crops; and whatever is underneath the surface of the earth, such as mineral rights.

#### Personal property

All other property is personal property, which may be either tangible or intangible.

**Tangible personal property** includes belongings such as cash, cars, furnishings, appliances, and clothing.

#### Intangible personal property

includes contracts with other people or entities, such as partnerships or corporations, or claims against them, such as mortgages or checking and savings accounts. If you own intangible digital property (e.g., music you have composed and recorded, manuscripts, photographs, etc.) you must provide the appropriate access information (e.g., account number, user name, password, etc.) to your power of attorney/fiduciary for access. You must ensure that the terms of service with the entity holding your digital property allows a power of attorney/fiduciary access to your account and materials without violating state and federal law. Some terms of service prohibit account holders from allowing anyone else to access your account and indicate "no right of survivorship and nontransferability." The following list defines additional kinds of intangible personal property that people may own.

**Life insurance** — In general, a life insurance policy is a contract between the policy owner and the insurance company. According to the terms of this contract, the company agrees to pay policy proceeds to a beneficiary named by the owner upon the death of the insured. The insured person and the owner need not be the same. For unmarried people, the owner is the person designated as owner on the policy records. Marital property law applies different rules to life insurance owned by married people (see Life insurance on pages 11–12).

**Savings bonds** — The distribution of U.S. Savings Bonds proceeds is governed by U.S. Treasury Regulations rather than by Wisconsin inheritance law. These regulations provide for three forms of registration: in one name, in the names of two persons as co-owners, or in one name payable-on-death (POD) or transfer-on-death (TOD) to one other designated individual.

If a savings bond is registered in one person's name and he or she dies, the bond becomes part of the decedent's estate. When a bond is registered in the names of two persons, either of them may cash the bond. When one dies, the other is the sole owner.

When a **payable-on-death (POD) or transfer-on-death (TOD)** beneficiary is named, the designated beneficiary receives the proceeds on the owner's death.

**Bank accounts** — Savings or checking accounts at a financial institution may be held as single or joint accounts. Only the named individual can draw upon a single account, unless it is an agency account. Upon the designated owner's death, the single account is closed and becomes part of the decedent's probate estate — unless it is designated as payable-on-death (POD) or transfer-on-death (TOD) to a beneficiary.

A joint account may be held by any two or more people, and has **survivorship rights**. Upon the death of one party, the account becomes the property of the survivor(s) — unless there is strong evidence that the person who established the account intended the survivor to be an agent only for signing checks and making withdrawals. If you want to have such an agent, the better practice is to set up an agency account or give your agent power of attorney.

Accounts owned by married people are presumed to be marital property. Accordingly, a spouse may have an ownership interest in an account even if his or her name does not appear on the account.

Wisconsin law permits husbands and wives to create a **marital property account** the spouses co-own, but this account does not include the right of survivorship. A marital property account must be payable on request to either or both spouses and designated as a marital property account.

During the lifetime of the husband or wife, the account belongs to both without regard to their individual contributions to the account. Upon the death of the husband or wife, the survivor owns 50 percent of the net sum on deposit, and the deceased spouse's probate estate owns the other 50 percent.

**Securities** — The term **securities** commonly refers to **stocks and bonds**. The most common kind of stock is **common stock**. When you buy common stock in a company, you become a stockholder and part owner of the company. Stockholders are entitled to voting rights and dividends, at the board of directors' discretion.

**Preferred stock** guarantees stockholders a fixed rate of dividend paid before dividends are paid to common stockholders. Owners of preferred

stock also have prior claims against the company's assets in case of liquidation.

When you buy **bonds**, you are lending money to the company rather than buying a part ownership. A bond is an IOU issued by a corporation or branch of the government. The bond is a promise to repay the loan at a specified time and rate of interest at regular intervals. If you buy federal government bonds, you are lending money to the United States of America.

If you buy corporate bonds, you are in essence buying a promissory note from the corporation, usually issued at \$1,000 each. As a bondholder, you expect to earn a fixed interest on the money lent. But in this case, you are a creditor of the corporation and not a part owner. Often, corporate bonds are sold to the public by investment bankers who buy the bonds from the corporation and then sell them to the public.

**Municipal bonds** are issued by a state or political subdivision, such as a county, city, town, or village, as a way of raising funds needed to operate or make improvements.

The term also designates bonds issued by state agencies and authorities. In general, municipal bonds differ from other bonds in that the interest paid on these bonds is exempt from federal income taxes and from state and local income taxes within the state of issue.

**Mutual funds** — Some people invest in mutual funds by buying shares in an investment company. The company (sometimes a trust) uses its capital to invest in other companies.

**Retirement plans** — At least 10 kinds of retirement plans are available: defined-benefit pension plans, money-purchase pension plans, profit-sharing plans, savings plans, employee stock-ownership

plans, tax-sheltered annuity plans (TSAs), tax-deferred retirement plans such as 401(k)s, 403(b)s, and others, individual retirement accounts (IRAs), Keogh plans, and simplified employee pension plans. Some are funded by the employer or by the employer with optional employee contributions. Others, such as IRAs or Keogh plans, allow employees or self-employed persons to contribute to plans they set up on their own.

Funds contributed to these plans may be invested in a variety of ways. For example, defined-benefit pension funds provided by employer companies are usually diversified among stocks, bonds, cash, and sometimes real estate. In contrast, employee stock-ownership plans invest funds on behalf of the employee in the employer company's stock.

IRAs are accounts the wage earner sets up with a bank, brokerage company, insurance company, mutual fund, credit union, savings and loan, or independent trustee.

**Pension plans** are an important form of property ownership for many people and may be one of the largest assets a working person owns. Plans have different kinds of benefits. Some provide **annuities** that pay out sums to the employee each month after retirement, some provide **lump sum payments**.

Some pension plans require that an employee work for a company for a certain number of years before the plan will **vest** — that is, be owned by the employee. If the employee terminates employment prior to becoming vested, he or she forfeits the money the employer has put aside as a pension contribution.

## Ways to own property

You can own property in a variety of ways. The best way for you to own property depends on your individual or family situation, as well as your wishes and expectations for future ownership transfer of that property.

### Sole ownership

Sole ownership is the simplest form of ownership. One person owns all the interest in the property. The owner may lease, mortgage, or transfer the property during his or her lifetime. At the owner's death, this solely owned property becomes part of the owner's probate estate and passes to those entitled to it by inheritance laws or under the owner's will.

### Co-ownership

Co-ownership of property in Wisconsin may occur in one of three forms. The two traditional forms of property ownership are tenancy-in-common and joint tenancy. In these terms, **tenancy** means holding ownership rights. A third form of co-ownership applies only to married people — marital property ownership, discussed later in this section.

Arnold and Arthur are brothers who own a vacation cottage together as equal **tenants in common**. Arnold dies. Arthur still owns his one-half interest in the cottage. Arnold's one-half interest passes to the beneficiary he named in his will. If Arnold has no will, his one-half interest passes to his legal heirs.

**Tenancy in common** — This exists when each of two or more persons owns an undivided interest in the property. Each owner has a right to a fraction of the property, but not to a specific part. Each tenant-in-common may transfer his or her interest during his or her lifetime. If an interest is owned at death, it becomes part of his or her probate estate. Thus, upon the tenant's death, each tenant's fractional interest will pass to those designated by inheritance law or under the tenant's will.

The tenants may agree to a physical division of the property, or they may bring a court action for a property partition or division.

**Joint tenancy** — This exists when two or more persons own the entire property with the **right of survivorship**. This means that at the death of one joint tenant, his or her interest passes directly to the surviving joint tenant(s). It does not become a part of the decedent's probate estate. Therefore, it cannot be controlled by his or her will and is not subject to creditors' claims against the estate. The last surviving joint tenant becomes the sole owner of the property.

Betty and Barbara own a piece of property as **joint tenants**. Betty dies. Barbara becomes sole owner of the entire property. Betty could not give away her ownership interest in her will.

During the lifetimes of all co-owners, their interest in the jointly held property is subject to the claims of their creditors and to division at divorce.

Beatrice makes her son Bob a **joint tenant** on her home. Bob's wife Bonnie subsequently files for divorce. Bob's interest in his mother's home is subject to division in this divorce action unless he can prove it was a gift.

For property acquired **before** January 1, 1986, Wisconsin law states that if husband's and wife's names are on a document of title, without any indication of contrary intent, they own the property as joint tenants. Thus, the survivor would succeed to an ownership interest in the whole property.

For property acquired **on or after** January 1, 1986, the Wisconsin Marital Property Act changed this rule. For discussion of property ownership by spouses, see pages 6–16.

Unless otherwise stated, co-tenants who are not married to one another are tenants-in-common. If they wish to be joint tenants with the right of survivorship, the deed or instrument of title must state that intention.



## Ownership interests measured by time

Ownership interests may be measured by time and may vary in duration.

**Fee simple** ownership describes the interests of an owner who has an unrestricted right to lease, sell, mortgage, or otherwise manage and control his or her interests in property during his or her lifetime. Upon the owner's death, these interests pass according to inheritance laws or provisions of the owner's will.

**Life estate** ownership is limited to a lifetime. A life estate owner — called a **life tenant** — holds ownership rights for his or her lifetime. In some unusual circumstances, a life tenant's rights are measured by another person's lifetime.

Upon the death of the person whose lifetime measures the life estate, the ownership rights pass to another person whose interest in the property is called a **remainder interest**. The life tenant does not have the right to will any interest in the property in which he or she has a life estate. In this case, no interest in that property can be included in the life tenant's probate estate.

A person may create a life estate by conveying the remainder interest to another party, but retaining ownership of the life estate. In that case, however, for estate tax purposes the full value of the property will be included in the life tenant's gross estate at his or her death.

Generally, if someone other than the life tenant creates a life estate, it will not be included in a life tenant's gross estate for estate tax purposes.

A life tenant is entitled to receive income generated by the property. If the property is real property, the life tenant may occupy and use the property as he or she wishes, as long as the remainder interest owners' property rights remain intact. The life tenant is obligated to pay taxes and keep up maintenance on the property.

A life tenant may sell his or her life interest or lease the property during his or her lifetime. But the buyer or lessee gains no greater rights in the property than the original life tenant has.

Life interests in personal property are usually created by trusts. If the tenant and owner of the remainder interest agree, they can lease, mortgage, or transfer the property the same as a sole owner.

Cora's will states that some property passes to her daughter Christine during Christine's lifetime. And on Christine's death, the property passes to Christine's daughter Catherine. Christine holds a life estate in the property, and Catherine has a **remainder interest**.

# Ownership under the Wisconsin Marital Property Act

## Property classification

Under the Wisconsin Marital Property Act, effective January 1, 1986, Wisconsin became a community property state.

**Community property law** treats marriage as a partnership of legal and economic equals. A husband and wife each have an equal, present interest in all assets either acquires during their marriage as a result of their labors or as income from their assets.

Incidents of ownership of such community or marital property vest equally in the spouses at the time the property is acquired. Under this law, title does not determine ownership rights between husband and wife. Rather, property classification determines ownership.

Property classification rests on two important factors:

- when property was acquired, and
- what funds were used to acquire it.

## Determination date

An important concept under marital property law is the determination date:

If the couple was married and living in Wisconsin **before** the law took effect, their **determination date** is the effective date of the law — **January 1, 1986**.

For people who marry in Wisconsin **after** 12:01 a.m. on January 1, 1986, their **determination date** is their **date of marriage**.

For couples who move to Wisconsin after 12:01 a.m. on January 1, 1986, their **determination date** is the **date they both establish a domicile in Wisconsin**.

## Same-sex couples

Because of a 2015 United States Supreme Court ruling, the gender of spouses is irrelevant. However, establishing the determination date for same-sex couples who married earlier than 2015 may be complicated. As of this writing there is no dispositive law resolving this issue. From the available law, the following inferences seem reasonable:

## Determination date

Dimitri and Deena married in Wisconsin in 1985, and have lived here ever since. Their determination date is January 1, 1986.

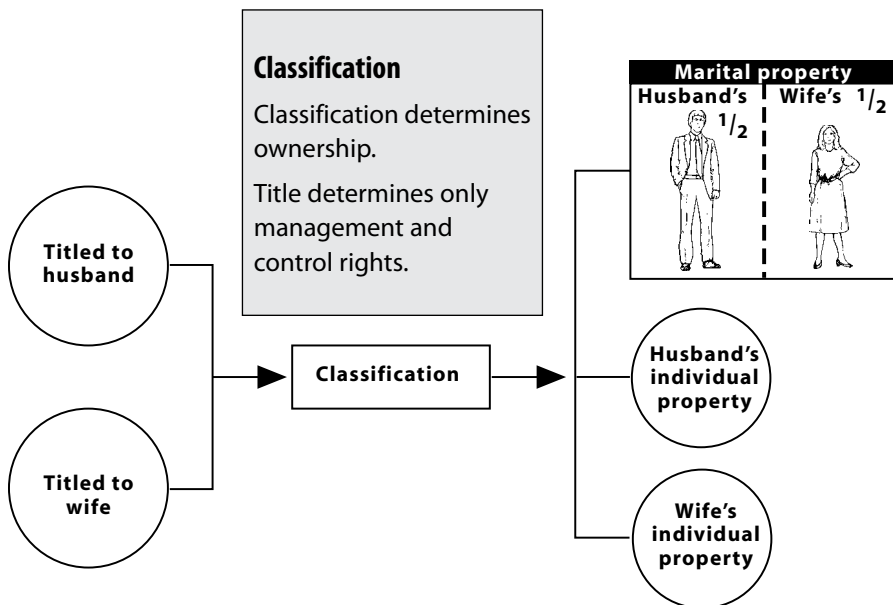
David and Deborah married in Illinois in 1981. They moved to Wisconsin in 1984, and have lived here ever since. Their determination date is January 1, 1986.

Elisabeth and Eduardo married in Illinois in 2017. They moved to Wisconsin on July 1, 2017. Their determination date is July 1, 2017.

Fernando and Felicia live in Wisconsin and married on September 30, 2017. Their determination date is September 30, 2017.

- For same-sex couples who were Wisconsin domiciliaries at the time of their marriage and who married in a state other than Wisconsin that then recognized same-sex marriage, the determination date is likely to be the date of their marriage.
- For same-sex couples who are now Wisconsin domiciliaries but were domiciled in other states at the time of their marriage and who married in a state that, at the time, recognized same-sex marriage, their determination date is likely to be the date they established domicile in Wisconsin.
- For other same-sex couples, the determination date is likely to be October 6, 2014, when a ruling from the United States Supreme Court clarified the legitimacy of same-sex marriage in Wisconsin.

Couples affected by this transition period are advised to consult with counsel and enter into a marital property agreement.



All property spouses acquire after their determination date is classified as either individual property or marital property. All property is presumed to be marital property unless someone proves that it is individual property. The effect of this presumption is that a person who wishes to maintain sole ownership of an asset bears the burden of proving it is other than marital property.

**Note:** These property law classifications do not determine how property will be divided between spouses at divorce. The divorce statute, Chapter 767 of *Wisconsin Statutes*, defines what property is divisible at divorce.

**Individual property** — The statutes outline a number of ways in which spouses may acquire individual property after their determination date. Most commonly, individual property is property a spouse owned prior to the marriage or property the spouse acquires during the marriage by gift or inheritance. Spouses may also acquire individual property by virtue of a court order, a marital property agreement, or as a recovery for damage to individual property or for pain and suffering in a personal injury action.

### Individual property

Greg and Georgia were married on August 8, 2006. At the time of the marriage, Greg owned a \$10,000 certificate of deposit purchased with his earnings before the marriage. That certificate of deposit is Greg's individual property.

Georgia's grandmother gave her a ruby ring in July 2009. The ring is Georgia's individual property.

■ ■ ■

#### Individual property includes:

- Property received by gift or inheritance.
- Property brought into the marriage.
- Property designated as individual through a marital property agreement.

**Marital property** — Property acquired during the marriage as a result of the efforts or labors of either spouse is classified as marital property. It is owned equally by the spouses, regardless of how it is titled.

### Marital property

Helen and Harry purchased a vacation home in 1983. Both spouses' names are on the deed, but the precise form of ownership is not specified. Harry died in 2011. Because the property was purchased before their determination date (January 1, 1986), the law presumes joint tenancy ownership, and Helen receives the entire ownership interest in the property.

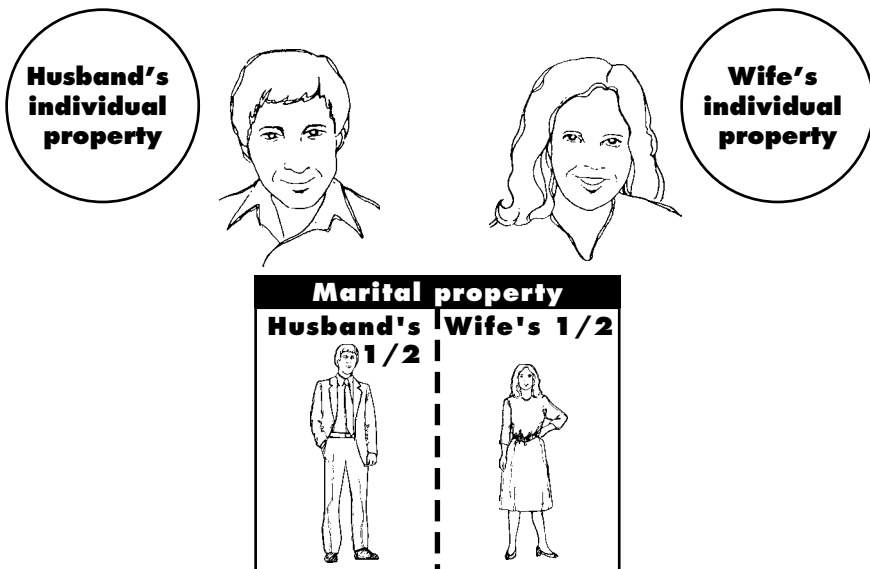
Compare their situation to that of another married couple. Richard and Rhoda purchased a vacation home in 2000, after their determination date. Again, both names are on the deed, but the precise form of ownership is not specified. Richard died in 2011. The law presumes that the property is marital property, and Richard may transfer his one-half interest by will to a beneficiary of his choice.

There is an exception to this general rule for homestead property. If Richard and Rhoda had purchased their primary residence, the law would classify the property as marital survivorship property and Rhoda would receive the entire ownership interest in the property (see page 14).

■ ■ ■

#### Presumption

- All property is marital property.
- All marital property is automatically shared equally.



**Income** generated by property owned by the spouses — including individual property — is also classified as marital property. However, either spouse has the right to declare unilaterally that the income from his or her non-marital property is individual property.

This **unilateral statement** must be in writing, notarized, and delivered to the other spouse within five days of its execution. The declaration applies only to income earned after the execution of the unilateral statement.

Property **appreciation** — its increase in value over time due to market conditions and inflation — is not considered income for marital property law purposes, even though it may constitute income for tax purposes.

Appreciation carries the same classification as the original property. An exception to this general rule is that a substantial increase in property value that results from the substantial uncompensated efforts of either spouse is classified as marital property. This is discussed in the section on mixed property (see pages 9–15).

**Unclassified property** — Property interests solely owned by a married person before the marital property law went into effect on January 1, 1986, are not classified by the Marital Property Act. However, the law affects such unclassified property in several important ways.

**Income** generated by unclassified property after a married couple's determination date is marital property — unless the title-holder has executed a unilateral statement. During the marriage, unclassified property is treated as the title-holder's individual property.

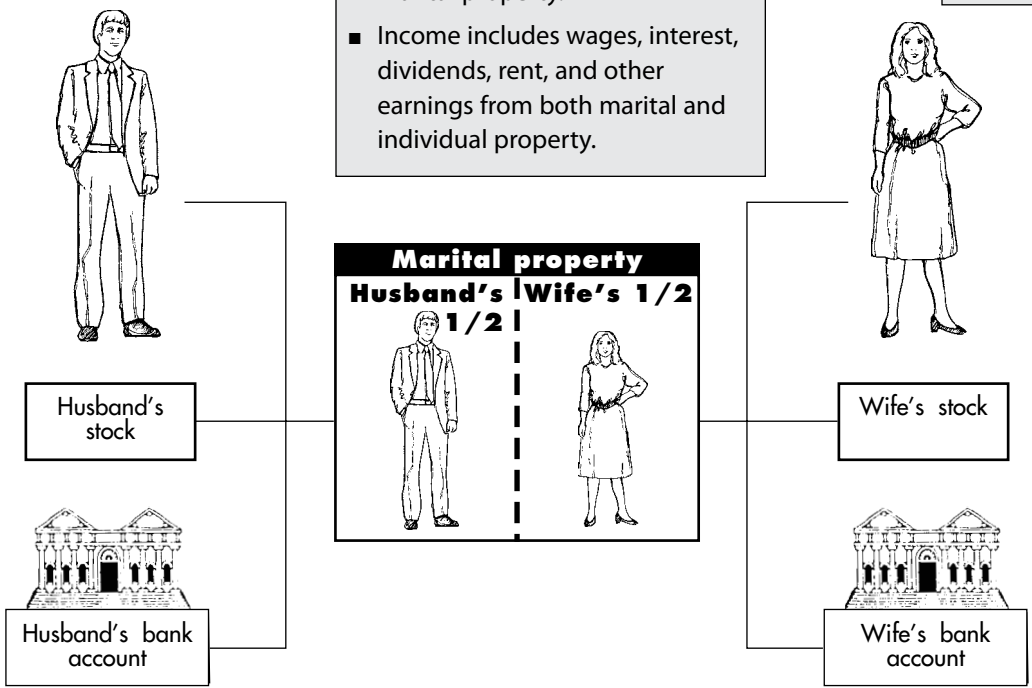
### Unilateral statement

While married and after their determination date, Isabel inherited \$25,000 from her mother, which she does not want to share with her husband, Isaac. Nor does she want to share the interest income from the \$25,000 with him. She executes a unilateral statement before a notary, and immediately delivers a copy of the statement to Isaac, including a receipt so she can prove delivery.

The interest income generated by her \$25,000 after the date on which she executed the unilateral statement is her individual property. Any interest income generated by the \$25,000 before she executed the statement remains classified as marital property. These actions protect her ownership of the inheritance and its income during the marriage and at either spouse's death. Further legal steps are necessary to protect the inheritance and income in the event of divorce.

**Income rule**

- All income of both spouses is marital property.
- Income includes wages, interest, dividends, rent, and other earnings from both marital and individual property.



However, at the titled spouse's death, that spouse's unclassified property is subject to certain elective rights of the surviving spouse. The surviving spouse may elect half the total value of all deferred marital property in the marriage.

**Deferred marital property** is unclassified property that is acquired during the marriage but before the marital property rules applied — before the determination date.

The surviving spouse may elect to receive one-half of deferred marital property that is part of the decedent's probate or nonprobate estate. However, the availability of this election depends on what other property the surviving spouse has received from the decedent either at death or during the decedent's lifetime.

The statutes that provide for this nonprobate election are designed to protect a surviving spouse whose spouse transferred deferred marital property to a third party at or before his or her death.

Whether the surviving spouse is entitled to the election depends on a number of factors, including whether the surviving spouse has received a significant portion of the decedent's other property. In general, the election applies only under extreme circumstances in which the decedent has failed to provide for the surviving spouse.

The election applies to the decedent's deferred marital property that is:

- part of the decedent's probate estate and
- not part of the probate estate.

For example, this election applies to life insurance proceeds and joint tenancy property that passed to a third person outside of probate.

Juan and Julia married in 1982. Among their assets is \$10,000 in Blue Chip Company stock, purchased with Julia's earnings in 1984. The stock is **unclassified property** titled to Julia. She has all management and control rights to the stock.

If Juan dies before Julia does, the stock remains completely hers, and is not part of Juan's estate. However, if Julia dies before Juan does, Juan may be able to elect an interest in the stock, since it meets the definition for deferred marital property. The amount Juan can elect is one-half of the value of both his and her **deferred marital property**, reduced by the value of any assets Julia transferred to Juan during life or at death. The availability of this election to Juan will depend on whether he received an amount equal to his deferred marital property share, including deferred property already titled to him, as well as transfers made to him by Julia during her lifetime or at her death.

## Additional classification rules

### Mixed property

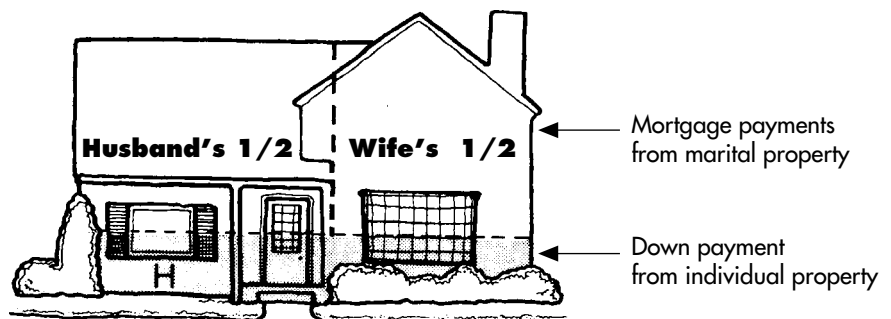
Many valuable assets are acquired over some period of time. The funds used to purchase the assets may be derived from a variety of sources, making it difficult to classify the property. A common example is a family residence purchased with a lump-sum down payment from property inherited by one spouse and titled in that spouse's name, with subsequent mortgage payments made from the family's income. Such an asset has both marital and individual components and is mixed property.

Some very important rules apply to mixed property that may significantly alter a spouse's individual property rights.

**The law presumes that all property a spouse owns is marital property.**

### Mixed property

**Mixing** — The entire house is classified as marital property unless the individual portion can be traced.



**Income** from any source a spouse receives during the marriage is marital property. The only exception to this is income derived from a spouse's individual property where the spouse has maintained the individual character of such income by executing a unilateral statement.

Mixing marital property with any other property results in the reclassification of the entire asset as marital property — unless the component of the mixed property that is not marital property can be **traced**. This is called the **mixing rule**.

### Mixed property

Ken was married before 1986. He received \$20,000 in proceeds from his mother's life insurance policy and deposited it in a separate account in his name in 1986. The interest the \$20,000 generated has been added to the account; there have been no other deposits and no withdrawals. The account now totals \$26,000.

This account is **mixed property**. The \$20,000 Ken originally deposited is his **individual property**. The \$6,000 interest income is **marital property** in which Ken's wife has a 50 percent interest.

■ ■ ■

Lucy inherits 50 shares of stock in Best Business, Inc. She sells the stock and purchases real estate with the sale proceeds. Because the stock was individual property, the real estate is also individual property.

However, if Lucy puts both her name and her husband Larry's name on that real estate's document of title, the real estate may be reclassified as marital property.

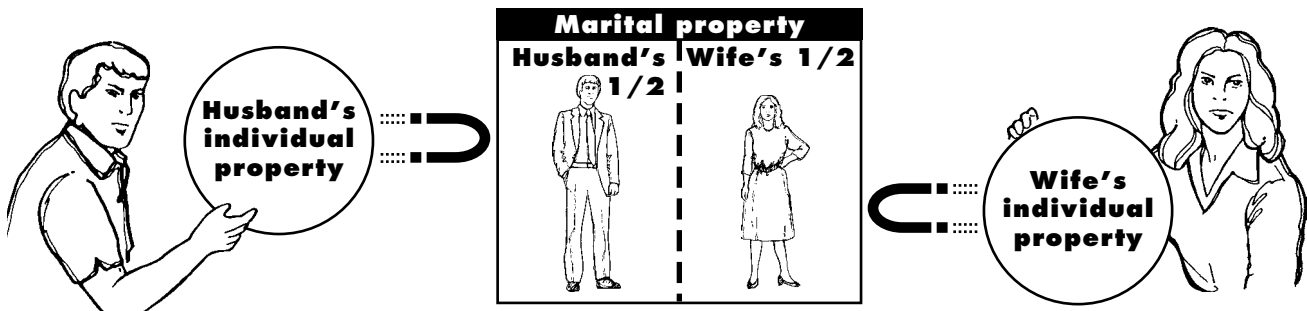
If either spouse substantially increases the value of individual or unclassified property through "substantial uncompensated labor, efforts, inventiveness, physical or intellectual skill, creativity, or managerial activity," the increase in value attributable to such effort is classified as marital property. Applying this **substantial efforts rule** is another method of creating mixed property.

When property is exchanged for other property — or sold and the sale proceeds are used to buy other property — the newly acquired property has the same classification as the original property. This principle permits **tracing** property through successive sales or exchanges, demonstrating that the property's initial classification was individual property in order to substantiate a claim that property is individual property.

However, changing title to include the spouse as a result of one of these transactions will likely be construed as a reclassification to marital property. Mixing individual property with any other property may make tracing impossible. Thus, a spouse who wishes to protect individual property must exercise great care in maintaining its individual property classification.

### Mixing rule

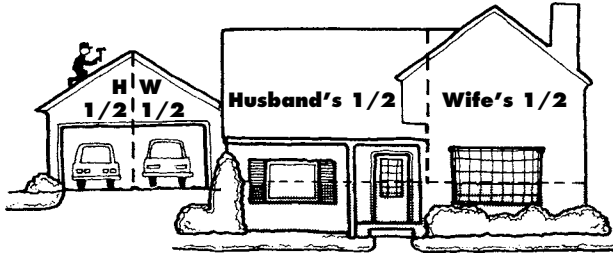
- You must act to keep property individually owned, or it will likely become marital property over time.
- Mixing marital and individual property produces marital property, unless the individual property can be traced.





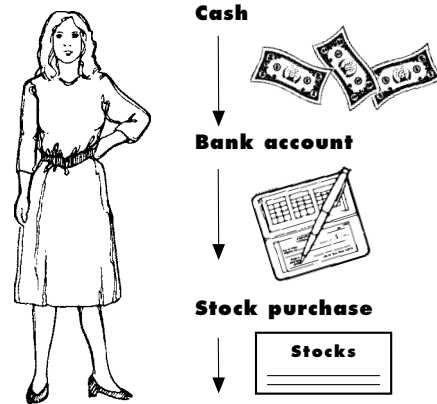
**Substantial efforts rule**

A spouse's substantial uncompensated efforts create marital property.



**Tracing rule**

Sale or exchange of the property does not change the property's classification.



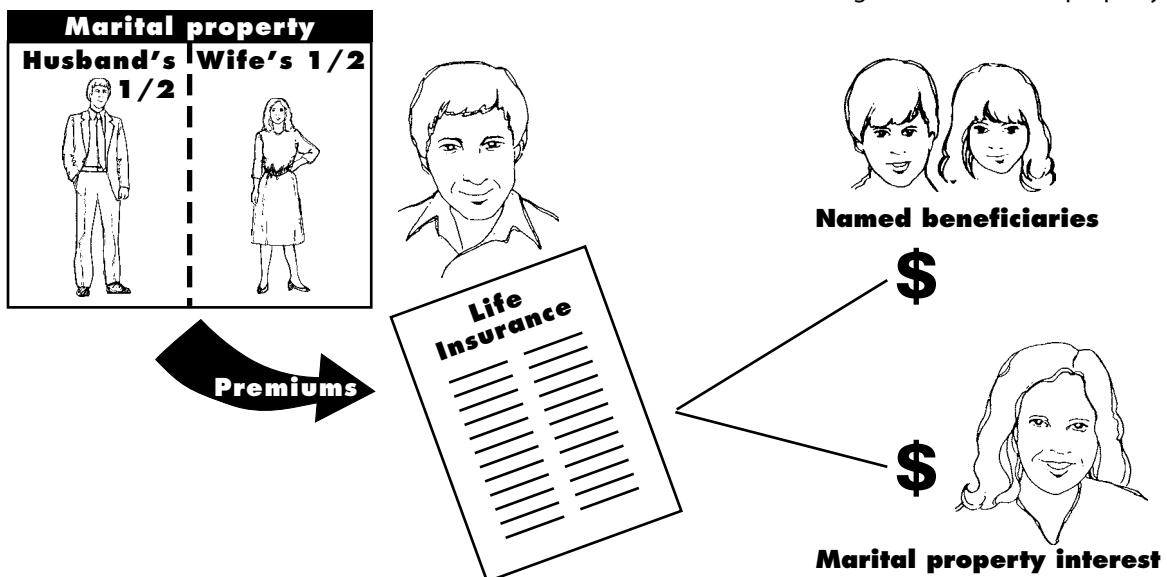
**Life insurance**

- Life insurance proceeds may be classified as marital property.
- If so, the beneficiary named in the insurance policy may not collect all of the proceeds.

**Life insurance** — Special classification rules apply to life insurance policies. The basic rule is that a life insurance policy issued after the spouses' determination date with the insured spouse listed as owner on the insurance company's records is marital property — regardless of whether the premiums are paid with marital or individual property.

However, a life insurance policy issued after the determination date that one spouse owns and insures the other's life will be classified as the owner's individual property — regardless of the classification of property used to make premium payments.

A policy issued before the determination date that continues in effect after that date is a **straddle policy**. The payment of even one premium with marital property results in the policy being treated as mixed property.



The marital property portion is determined by a formula that multiplies the proceeds by a fraction — the period after a premium payment was first made from marital property, divided by the entire period the policy was in effect. This formula can be expressed as follows:

$\frac{\text{Period after initial payment of premium with marital assets}}{\text{Entire period policy was in effect}} \times \text{Entire policy proceeds} = \text{Marital property component of life insurance proceeds}$
--

For example, when a couple married, the wife owned a life insurance policy that required premium payments over a 20-year period. She had already paid on the policy for 8 years. During the marriage, the remaining premiums were paid with marital property. The policy's \$100,000 face value would include a marital property component calculated according to this formula:

$\frac{12 \text{ years of payments with marital assets}}{20 \text{ years policy was in effect}} \times \$100,000 = \$60,000 \text{ Marital property component of life insurance}$
---

A husband and wife who want to change the rules regarding classification of life insurance policies may do so with a marital property agreement. The policy or proceeds may also be reclassified if a spouse signs a **written consent** that permits designating another person as beneficiary, or reclassifies the policy.

The marital property component of the life insurance is \$60,000. Each spouse has a \$30,000 share of the marital property component. The remaining \$40,000 is the wife's individual property.

**Note:** Payment of even one premium with marital property is the triggering event. Payment of further premiums with individual property does not reclassify or change the proportion of policy proceeds classified as marital property.

This written consent is revocable unless it specifically provides otherwise. Written consent forms are available from most insurance companies. If part or all of the policy is marital property, a designated beneficiary other than a spouse **may not** receive all of the policy proceeds.

Neil owned a \$60,000 insurance policy, with his wife Nancy as beneficiary. He owned the policy for 10 years before the Wisconsin Marital Property Act took effect. After January 1, 1986, Neil continued to pay premiums from his earnings, which were marital property. Neil died 5 years later. Since the policy was in effect for a total of 15 years and for 5 years after a premium was first paid with marital property, one-third of the insurance proceeds — \$20,000 — is marital property.

Since marital property is owned 50 percent by Neil and 50 percent by Nancy, she owns \$10,000 of the insurance as her share of the marital property. The remaining \$50,000 is paid to her as the designated beneficiary.

Neil would have been free to name a beneficiary other than Nancy only with respect to \$50,000 of the policy proceeds. He could not divest Nancy of her \$10,000 marital property interest, even if a beneficiary other than Nancy were named in the insurance policy.



**Deferred employment benefits**

A somewhat similar rule applies with respect to deferred employment benefits. These benefits are defined in the law as including a “pension, profit-sharing, or stock-bonus plan, employee stock-ownership or stock-purchase plan, savings or thrift plan, annuity plan, qualified bond purchase plan, self-employed retirement plan, simplified employee pension, and deferred compensation agreement or plan.”

As with life insurance, deferred employment benefits may be mixed property. The basic rule is that a deferred employment benefit arising as a result of the spouse’s employment that starts after the determination date is entirely marital property.

However, a deferred employment benefit arising as a result of the spouse’s employment partly before and partly after the determination date is mixed property. The marital and individual components of the benefit are determined by a formula similar to the one used for life insurance.

The marital property component is determined by multiplying the entire benefit by a fraction — the period of employment after the couple’s determination date, divided by the total period of employment. This formula can be expressed as follows:

$$\frac{\text{Period of employment after determination date}}{\text{Entire period of employment}} \times \text{Entire deferred employment benefit} = \text{Marital property component of employment benefit}$$

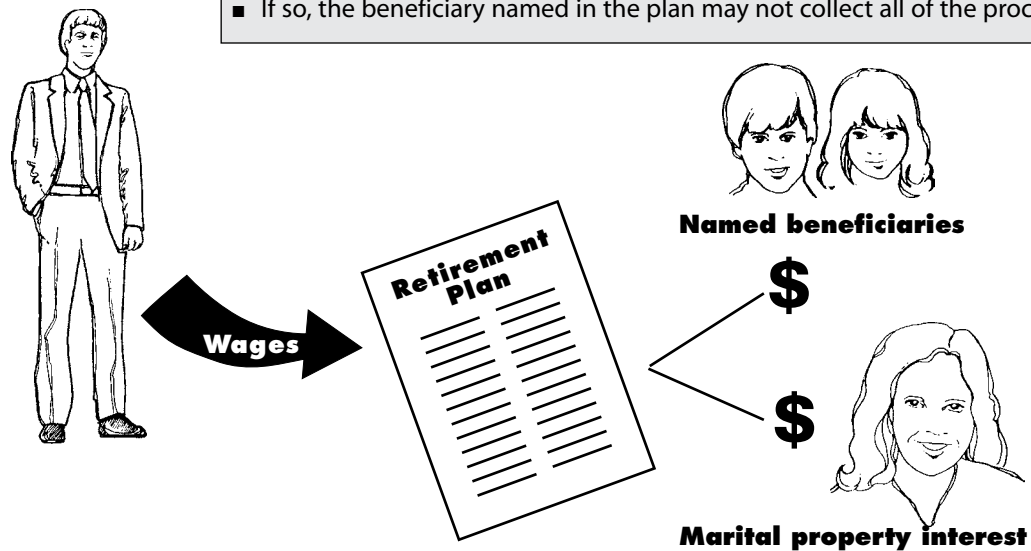
For example, a couple was married New Year’s Eve, 1993, and one spouse had worked for 20 years as of January 1, 2000. A \$100,000 straddle deferred employment benefit would be divided as follows:

$$\frac{6 \text{ years employment after determination date}}{20 \text{ years total employment}} \times \$100,000 = \$30,000 \text{ Marital property component of employment benefit}$$

Each spouse has a \$15,000 share of the marital property component. The remaining \$70,000 is the worker’s individual property, so the worker ends up with \$85,000 of the entire benefit.

**Retirement benefits**

- Retirement benefits may be classified as marital property.
- If so, the beneficiary named in the plan may not collect all of the proceeds.



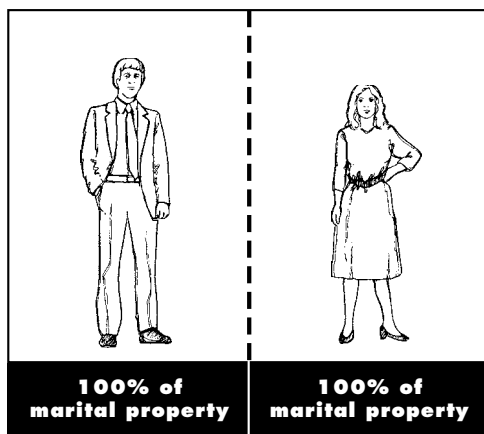
Ouma married Owen in 1976. On January 1, 1980, Ouma began making contributions to a deferred employment benefit plan through her employer. These contributions continued until December 31, 1989, when Ouma retired. At the time of her death in 2001, the total value of the plan was \$60,000.

Forty percent of the plan — \$24,000 — is marital property, because 40 percent of Ouma’s total employment occurred after her determination date, January 1, 1986.

Owen owns one-half of the marital property component — \$12,000 — provided that he survives Ouma. If Owen dies before Ouma, he cannot will his share of the marital property component of Ouma’s plan to a third party.

**100 percent rule — Credit**

Each spouse has access to 100 percent of the marital property for the purpose of obtaining credit.



There is an exception to the general classification rule for deferred employment benefits. If the non-employee spouse dies first, the non-employee spouse’s marital property interest in such a benefit terminates. Thus, the surviving employee spouse receives the full retirement benefit, and the deceased non-employee spouse’s estate does not include any interest in that benefit. This exception is called the **terminable interest rule**.

**Effect of title**

Spouses are permitted to title property as marital property or as individual property. While title is not conclusive evidence of classification, it is evidence of one or both spouses’ intention. So use of these new forms of title may result in the property being classified as it is titled.

Spouses may also title property as **survivorship marital property**. This new form of title is like joint tenancy in that the property is entirely owned by the surviving spouse without probate when one spouse dies. If spouses acquire property after their determination date and intend to create a joint tenancy, they have in fact created survivorship marital property. (If they intend to create a tenancy-in-common, they should title the property as marital property.)

If spouses title real estate in both their names after their determination date and use the property as their personal residence — **homestead** — the real estate is survivorship marital property unless the deed or transfer document expresses a contrary intent.

However, with respect to other property co-owned by spouses after their determination date, the law presumes that the property is marital property and does not have a right of survivorship. These are major changes from property classifications under the old law.

Even though title does not determine underlying ownership in a marital property system, title to property is still important because it determines which spouse can manage and control the property.

**Management and control** is defined by statute 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.”

If only one spouse holds title to a marital property asset, that spouse alone may manage and control that asset. If both spouses hold title in the **alternative** — husband or wife — either of them acting alone may manage and control the asset.

However, if title is held in the **conjunctive** — if *and* rather than *or* connects the names — **joinder** of *both* husband and wife is required to manage and control the asset. That is, both must sign. In the sale of a homestead, marital property law maintains the traditional requirement for joinder whether or not both spouses hold title to the property.

The statute imposes some limitations on these basic management and control rules. First, for the purpose of obtaining unsecured credit, either spouse, regardless of title, may manage and control 100 percent of the marital estate other than business property. However, only the spouse with management and control rights — **title** — may pledge or encumber that property as security for credit.

There are other protections for a non-managing spouse. Chief among these is the creation of a **duty of good faith** the spouses owe one another. This duty requires each spouse to act in good faith in matters involving marital property or property held by the other spouse.

The law also restricts spouses in making unilateral gifts of marital property to third parties by imposing a **limit of \$1,000 per donee per calendar year**, or a larger amount if it is **reasonable** in the context of the family's economic position.

**Gifts**

- One spouse alone may give a gift of up to \$1,000 to any person.
- Both spouses' consent is generally required for larger gifts.

Finally, the law provides an array of remedies to a spouse who is financially disadvantaged by the other spouse. These **remedies** include:

- a statutory claim for breach of the good faith duty.
- the right to an accounting.
- the right to have one's name added to the title of marital property (other than business property and multiple party accounts).
- in extreme circumstances, the limitation or termination of management and control rights.

- the right to a set-off to compensate a spouse when marital property is used to satisfy a non-marital debt.
- the right to reimbursement or recovery of marital property given or otherwise transferred to a third party.

When a spouse dies, his or her **personal representative** succeeds to the interest of the decedent in marital property for purposes of managing the estate. Thus, the personal representative has management and control rights of property titled to the decedent, and may make use of any of the remedies described above to limit the management and control rights of the surviving spouse.

**Debt brought to the marriage**

Wis. Stat. Sec. 766.55(3) says: "This chapter does not alter the relationship between spouses and their creditors with respect to any property or obligation in existence on the determination date." Therefore, on divorce, debt goes with the spouse who brought it to the marriage unless the settlement or divorce decree assigns it to the other spouse. On death of the spouse who brought the debt to the marriage, the creditor has a claim against the estate but not against the surviving spouse or other beneficiaries.

**Record keeping requirements**

Couples who want to establish the classification of their property as other than marital need accurate records to establish the date of acquisition and source of funds, and to trace the assets through changes in value, successive sales, and new purchases.

Keeping the following documentation will help:

- **List all assets**, including real estate, household furnishings and personal effects, motor vehicles and boats, bank accounts (checking, savings, CDs, etc.), individual retirement accounts (IRAs), stocks and bonds, insurance policies, and deferred employment benefit plans including pension funds. Other assets may include business and farm interests.
- **Determine when each asset was acquired** to help you classify it.
- **Determine ownership as of your determination date**: Solely owned? Joint tenancy or tenancy-in-common? With whom? How are insurance policies held? Joint bank accounts? **Payable-on-death (POD)** designation on any accounts, or **transfer-on-death (TOD)** on any intangible personal property?
- **Determine how the asset was originally acquired**, by which source of funds. Was it from a gift or inheritance? Note if and when substantial improvements were made with efforts of either spouse. Which assets were provided as employment benefits prior to and during marriage?
- **Determine each asset's value** when acquired and as of your determination date.
- **Keep original documentation** — account statements, wills, cancelled checks, etc. — to substantiate your conclusions.
- **List existing marital or pre-marital property agreements.**

Couples who do not keep comprehensive records over time will find most or all property classified as marital property. This may satisfy some families' plans. However, records may be needed for other purposes, such as establishing basis in property for income tax purposes.

As an alternative, couples may choose to create a **marital property agreement** in which they specify the classification of their property, individual or marital. These agreements may even provide for the disposition of property at either spouse's death without probate and without will formalities. Classifying assets through a marital property agreement simplifies the transfer of assets to the surviving spouse at the other spouse's death.

The law does **not** require that marital property agreements be drafted by an attorney, notarized, witnessed, or recorded. However, because important legal rights are at stake, it is critical to make full financial disclosure and to ensure each spouse fully understands the significance of the agreement. In most situations, spouses should seek the advice of separate legal counsel before signing a marital property agreement (see Marital property agreements, page 35).

## Property distribution at death

When a person dies, his or her assets must be transferred to another person or an entity such as a limited liability company, partnership, corporation, or trust. As discussed previously, some co-owned assets become the assets of the surviving co-owner(s) upon the death of one of the owners. Some assets pass to a beneficiary named in a life insurance policy, retirement account, trust, or other legal document. Assets that are not transferred from the decedent by any other means are transferred through the probate process, which is discussed in the next section.

Beneficiaries of a decedent often ask if they are liable for the decedent's debts. In general, they are not. The

decedent's assets are liable for the decedent's debts, but if the decedent's debts are more than the assets, the beneficiaries are not liable for the excess debt unless they were co-debtors with the decedent or guaranteed the payment of the debt in the event the decedent did not pay it.

## Probate

**Probate** is the legal process that transfers property ownership from a decedent to heirs-at-law or those named in a will. Probate is necessary for properly transferring ownership. Probate also protects the rights of spouses and minor children, gives creditors a chance to get paid, and provides a time and place for paying taxes.

Probate rules are based on state law and therefore vary from state to state. Some states, including Wisconsin, have provisions for informal or do-it-yourself probate.

For American Indians owning trust property, the Bureau of Indian Affairs (BIA) handles probating the estate. The information needed differs somewhat; for example, tribal enrollment information and number and certificate of Indian blood degree (see Resources, page 53).

### Assets not subject to probate

Some assets are not subject to probate, because ownership of those assets is controlled by property law or contract law rather than probate law.

- **Property owned in joint tenancy or as survivorship marital property** — These assets are owned by the surviving joint tenants or the surviving spouse upon an owner's death. Since this result is mandatory and automatic, the joint tenancy or survivorship marital property does not become a part of the probate estate and is not subject to probate rules.

- **Life insurance proceeds** — These are paid to the beneficiary named in the policy. Unless the estate is named as the beneficiary — or the named beneficiary does not survive the insured person — these proceeds do not become part of the probate estate. However, if the decedent owned the policy, the face value is included in the calculations to determine the taxable estate.

- **Assets held in trust** — These are usually distributed according to the provisions of the trust upon the death of the person who created it. Property put into a trust created during the property owner's lifetime is not subject to probate rules, unless the trust directs transfer of the property to the probate estate. In some cases, the assets will remain in the trust for a period after death. In either case, the trust document and trust law, not probate law, determine property disposition.

### Keeping track

Ask your county UW-Extension office for *Our Family Records* (B2369), which provides more information about marital property law. You can use *Our Family Records* to record individual and marital property and changes in property value and to trace whether those changes add to your marital or individual property.

- Certain accounts in financial institutions** — These may be transferred outside of probate if the ownership instrument specifies that they are joint accounts with the right of survivorship, payable-on-death (POD), or subject to a transfer-on-death (TOD) designation.

**Assets subject to probate**

Generally, because no other law provides for the transfer of ownership to a survivor, all other assets are subject to the probate process. Therefore, property owned individually, as marital property, or as a tenant-in-common is subject to probate.

**Bank accounts, interests in partnerships, and securities** are subject to probate — except for those designated as joint tenancy, payable-on-death (POD), transfer-on-death (TOD), or survivorship marital.

Life insurance proceeds made payable to the estate — or if no named beneficiary is living — are subject to probate.

**Property distribution when there is no will**

If a Wisconsin resident dies without a will or with a will that does not include all assets — **intestate** — the assets not covered by the will are distributed according to a set of rules in *Wisconsin Statutes*. The rules of intestate succession contained in Chapter 852 of *Wisconsin Statutes* are summarized here.

**If the decedent is married but has no issue** (children, grandchildren, etc.), or **if the surviving issue are all issue of the surviving spouse and the decedent** — the spouse inherits the **net intestate estate** — after debts and taxes are paid.

**If the decedent has issue from other than the present marriage...**

The surviving spouse:

- receives 50 percent of the decedent's individual property, and
- continues to own his or her one-half interest in marital property.

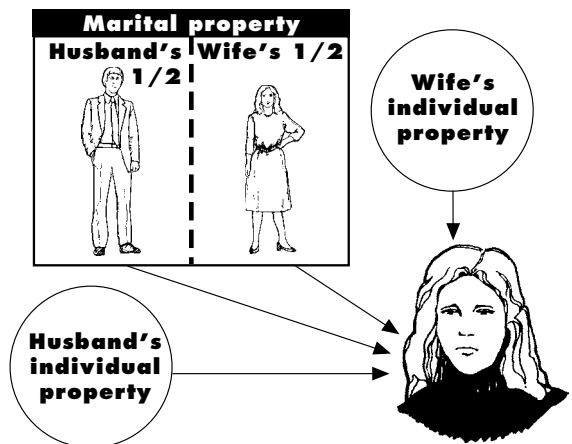
The decedent's issue inherit by representation:

- the other 50 percent of the decedent's individual property, and
- the decedent's one-half interest in marital property.

Under Chapter 861 of *Wisconsin Statutes* (Probate – Family Rights), the surviving spouse may also have rights to **deferred marital property** held by the decedent.

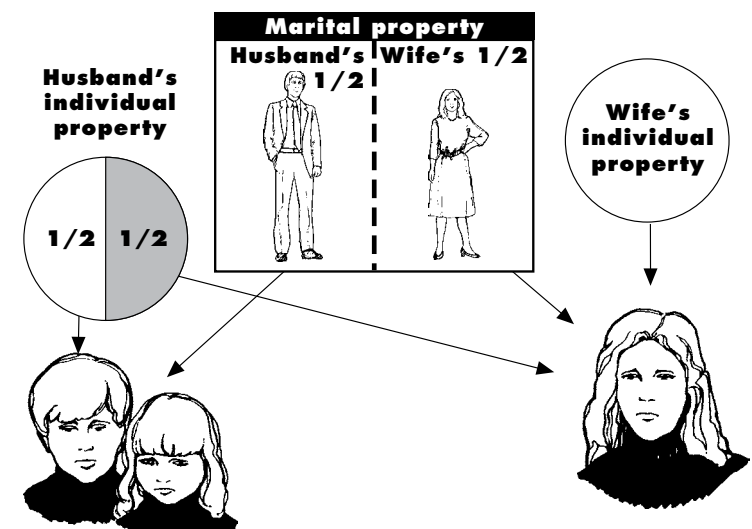
**No will — No children from a previous marriage**  
 Without a will, all property passes to the surviving spouse if:

- There are no children; or
- All children are of this marriage.



**No will — Children from a previous marriage**  
 Without a will, if there are children from the decedent's prior marriage:

- One-half of the individual property passes to the surviving spouse.
- The balance of the decedent's net intestate estate passes in equal shares to all of the decedent's issue by representation.



The spouse must act affirmatively to exercise these rights, which protect surviving spouses in marriages in which substantial property was acquired before the Marital Property Act took effect. Chapter 861 also has provisions for a needy surviving spouse. Strict time limits for exercising these rights are set forth in the statute.

**If the decedent has no spouse**, his or her issue inherit the net intestate estate by representation.

**If the decedent has no spouse and no issue**, his or her parents inherit the net intestate estate. If there are no parents, then siblings or siblings' issue are the heirs.

**If no spouse, issue, parents, siblings or issues of siblings survive**, the next takers are the decedent's four grandparents, then their issue. Since 1999, the net intestate estate is divided into maternal and paternal shares, and each side takes one-half of the net intestate estate.

If either the maternal — or the paternal — side has no surviving grandparent or issue of a grandparent, the net intestate estate passes to the decedent's relatives on the other side. If none of the decedent's relatives survive, the net intestate estate passes to Wisconsin's Common School Fund. See the Appendix for the order of intestate succession, and columns 3 and 4 of the intestate succession flow chart for grandparents.

A person who does not wish his or her net intestate estate to be distributed according to these provisions must make a will or establish a trust stating how it should be distributed. Even a person who is satisfied with the statute should consider making a will or trust (see pages 26 and 32).

Note that the law of intestacy does not provide automatic inheritance rights for unmarried partners or the un-adopted children of unmarried partners. Thus, it is especially important for members of non-traditional families to make wills.

### Other intestate rules

**Status of adopted persons** — A legally adopted person is treated as a natural child of his or her adoptive parents for inheritance purposes under the laws of intestate succession and wills. Generally, a legally adopted child ceases to be treated as a child of his or her natural parents under these laws.

However, if a natural parent marries or remarries and the child is adopted by the stepparent, the child is still treated as the child of the natural parent. If a natural parent of a legitimate child dies, the other natural parent remarries, and the child is adopted by the stepparent, the child can still inherit through the deceased natural parent as well as the new adoptive parent and the surviving natural parent.

Under some circumstances and in some states, gay or lesbian partners may be able to adopt the biological child of a partner or may be able to adopt an unrelated child together. Where this is possible, it is an important step that should be taken to preserve the child's right to two parents.

**Status of same-sex, married partners** — Wisconsin recognizes marriage between same-sex partners. The Wisconsin intestacy laws recognize a same-sex spouse as a legal spouse for purposes of intestacy, as long as the spouses were legally married in Wisconsin or elsewhere.

**Inheritance by and from a non-marital child** — Any nonmarital child — that is, a biological child born to parents who are not married to one another — or his or her issue is entitled to inherit in the same manner as a marital child from and through his or her mother.

Inheritance from and through the father can occur only if the court has determined him to be the father in a paternity proceeding, he has admitted in open court that he is the father, or he has acknowledged in writing that he is the father.

A nonmarital child's property passes according to laws of intestate succession — except that the father or his kindred can inherit only if the father's paternity has been established in a paternity proceeding.

A nonmarital child becomes a marital child if the parents subsequently marry.

For purposes of intestate succession, paternity can be established after the decedent's death.

**Survivorship requirement for transfer (120 hour rule)** — The heir must survive the decedent for 120 hours. If any person who would otherwise be an heir does not survive the deceased intestate person by 120 hours, the estate passes as if that heir had died before the decedent.

When it cannot be established that the heir survived by at least 120 hours, it is presumed that the potential heir died within 120 hours of the decedent's death.



## Probate procedures

### Formal estate administration

In the formal proceedings of an ordinary estate administration, an attorney represents the **personal representative** (formerly called the executor) before the court, and follows the steps necessary for probate. The attorney does all the work in the personal representative's name.

First, through counsel, either the personal representative named in the will or any other interested party petitions the circuit court to appoint the personal representative and admit the will to probate.

The personal representative must give published notice to creditors and heirs through a newspaper once a week for three weeks, and personally notify all those known to have an interest in the estate. The personal representative must send a copy of the will, if any, to all who have an interest in the estate except those whose only interest is as a beneficiary of a monetary bequest or specific property. These people receive notice of the specific bequest.

The court holds a hearing on the day specified in the notice. At this hearing, the personal representative must prove the will, if any, to be the decedent's valid last will. The court determines who are heirs and formally appoints the personal representative.

Creditors must file claims within the time the court orders — three months from the date of the order — or they will be disregarded. The court then holds a hearing on claims. If invalid claims are filed, the personal representative must contest them.

The personal representative must inventory estate assets and have them appraised, pay valid claims, and compute and pay taxes.

The court holds a hearing on the personal representative's final account. The final closing of the estate takes place after the personal representative transfers the property to the heirs.

### Informal estate administration

*Wisconsin Statutes* permit the informal administration of estates. Informal administration steps are much like those of formal estate administration. The personal representative is responsible for carrying out the administration and making sure all legal requirements are met, and taxes properly computed and paid. An attorney is not required.

Informal administration can reduce or eliminate legal fees, since the personal representative may need little or no assistance from an attorney. The personal representative may elect to hire an attorney, or may be required to hire an attorney if a dissatisfied heir or creditor forces the administration to proceed before the probate court. An attorney or the court may help settle the estate and avoid future legal problems and expenses.

Whether administration is informal or formal, the personal representative is compensated for expenses incurred in managing and settling the estate. In addition, he or she receives a fee for service equal to 2 percent of the value of the property for which he or she is accountable.

## Simplified procedures

### Motor vehicle transfer to surviving spouse

A simple procedure allows transferring to a surviving spouse a decedent's title of not more than five motor vehicles less than 20 years old. The simple procedure applies to any number of vehicles 20 years old or older.

A decedent's vehicle(s) may be transferred to the surviving spouse by sending the Division of Motor Vehicles the title(s) signed by the surviving spouse, and an affidavit stating the decedent's date of death, vehicle description and value, and the spouse's intention to assume liability for the decedent's debts and charges to the extent of the vehicle's value.

This subsequent transfer of title to the surviving spouse does not affect any liens on the vehicle.

### Termination of joint tenancy and survivorship marital ownership

A simplified procedure is provided for administrative termination of a joint tenancy of a decedent and surviving joint tenant. This procedure also applies for terminating ownership of survivorship marital property between the decedent and the surviving spouse.

This applies to property such as stock certificates, bonds including U.S. Savings Bonds, corporate and municipal bonds, checking and savings accounts, and all real estate in Wisconsin.

The surviving joint owner should file with the county **register of deeds** a certified copy of the death certificate and a sworn application giving the description and value of the joint assets and stating that the applicant is the surviving joint tenant.

Where real property is to be transferred, the real estate tax assessed value for the preceding year must be furnished to the register of deeds. A small filing fee is charged.

After recording, the application will have the same force and effect as a certificate of termination of joint tenancy issued by the probate court.

A formal or informal procedure for the termination of joint tenancy is still required for other assets held jointly.

### Transfer by affidavit

This method is available when a decedent leaves solely owned property in Wisconsin that does not exceed \$50,000 in value including real estate.

Any heir may have such property transferred to him or her by simply giving whoever has the property an affidavit stating:

- the property and its value, and
- the total value of the decedent's property at date of death, and
- whether the decedent or the decedent's spouse ever received benefits such as family care benefits, Medicaid, or long-term community support services.

### Summary settlement or assignment

For probate estates where the value of assets does not exceed \$50,000 or does not exceed costs, expenses, family allowances, and certain preferred claims, *Wisconsin Statutes* provide for simple settlement proceedings — either summary settlement or summary assignment. Although neither of these requires appointment of a personal representative, the services of an attorney may be needed. The attorney's fees may be less for an ordinary probate proceeding.

**Summary settlement** may be used when:

- a) the decedent is survived by a spouse and/or one or more minor children and the net value of the decedent's solely owned probate estate does not exceed \$50,000 in value, **or**
- b) no estate is left after payment of certain claims, allowances, or expenses.

**Summary assignment** may be used when the decedent is not survived by either spouse or minor children and the net value of solely owned probate property does not exceed \$50,000 but does exceed claims, allowances, and expenses.

### Probate and guardianship forms available online

**Probate and guardianship forms** are available from your county register in probate office or online at: [www.wicourts.gov/forms1/circuit/index.htm](http://www.wicourts.gov/forms1/circuit/index.htm)

### Helpful guide

Also available from the State Bar of Wisconsin is the useful resource *A Handbook for Personal Representatives*, 14th edition, 2011. If you do not have a computer, you can call toll-free: (800) 728-7788



## Federal taxes on property transfers

Congress imposes taxes on some transfers by gift during one's lifetime and on some transfers of assets at death. On January 1, 2013, President Obama signed legislation that set the amount that can be transferred tax-free in 2013 and thereafter at \$5 million, adjusted for inflation. The inflation-adjusted amount for 2017 is \$5,490,000. This means that in 2017, a married couple can pass \$10,980,000 to their children or any other beneficiaries without owing any federal gift or estate taxes.

The legislation signed on January 1, 2013, also set the gift and estate tax rate for gifts and estates that exceed the \$5 million exclusion at 40%.

### Federal gift tax

Any transfer of an asset from one person — **donor** — to another — **donee** — may create a federal gift tax liability if the donee does not pay fair market value for the asset.

However, exclusions, deductions, and credits allow each donor to give away a substantial amount before any gift taxes are imposed.

### Exclusions

In 2017, the annual exclusion allows each donor to exclude \$14,000 from gifts to each donee each year. The annual exclusion is adjusted for inflation in \$1,000 increments. Donors are also allowed to exclude payments for tuition or medical care for the benefit of another person.

#### Annual exclusion

In 2018 the federal gift tax annual exclusion is \$15,000.

For example, if Margaret gave \$15,000 to her son Tom in 2017, and also paid \$6,000 to the University of Wisconsin in 2017 for Tom's tuition, she would be allowed to exclude the \$6,000 of tuition as well as \$14,000 of the gift. Therefore, Margaret has made a \$1,000 taxable gift.

A gift of a **future interest** — an interest that takes effect in the future — does not qualify for the annual exclusion.

For example, a gift to a trust that the trust beneficiary cannot withdraw until a later year does not qualify for the annual exclusion because it is a future interest.

However, special provisions of the law permit certain gifts to trusts for the benefit of minors and transfers under Wisconsin's Uniform Transfers to Minors Act to qualify for the annual exclusion — even though they are gifts of a future interest.

If the other spouse agrees, a gift made by one spouse to a person other than his or her spouse may be treated as though each spouse gave half of the gift.

For example, if a couple wanted to give their child property that was solely owned by one of them, one-half of the property could be considered a gift from the mother, the other half a gift from the father.

For the person who owns the property, this doubles the exclusion amount from \$14,000 to \$28,000 per donee in 2017. If Margaret's husband agreed to treating the \$15,000 gift to Tom as being made one-half by each of them, they would each be under the \$14,000 annual exclusion and neither would have made a taxable gift.

### Deductions

Donors are allowed to deduct the value of gifts to charities and gifts to their spouses to calculate their taxable gifts each year.

For example, if Bill gave \$20,000 to his daughter, \$5,000 to his church, and \$50,000 to his wife in 2017, his 2017 taxable gifts are \$6,000. That is the \$75,000 total gifts reduced by his \$14,000 annual exclusion, his \$5,000 charitable deduction, and his \$50,000 marital deduction.

### Applicable exclusion amount

An applicable exclusion amount allows each individual to transfer \$5.49 million tax-free by gift and/or at death in 2017. The amount is adjusted for inflation each year. Therefore, each individual can give accumulated gifts of \$5.49 million in excess of the annual exclusion before owing any gift taxes in 2017. If an individual has not used up the \$5.49 million when he or she dies, the remainder can be transferred tax-free at death.

Margaret (from an earlier example) does not owe any gift tax on the \$1,000 taxable gift in 2017 to her son Tom because she has not used up her \$5.49 million lifetime exclusion. If Margaret gives her sister Susan \$5,504,000 in 2017, she has made another \$5,490,000 (\$5,504,000 – \$14,000) taxable gift. Her \$5,491,000 total taxable gifts exceed her \$5,490,000 lifetime exclusion by \$1,000, and she will owe \$400 (40% of \$1,000) of gift tax for her 2017 gifts.

### Special circumstances

Certain transfers of property are **not** immediately subject to the gift tax:

- **Money transferred into a bank account** by the donor to himself or herself and another as joint tenants, each having the right to withdraw — This does not become a gift until the other joint owner withdraws funds in excess of his or her contribution.
- **Purchase of U.S. Savings Bonds** in cases where an individual uses his or her funds but puts the bonds in his or her own name and the name of another as joint owners — The gift is not completed until the other party cashes the bonds.
- **Payment of child support or divorce settlements** — Transfers of property or property interests made under the terms of a written agreement between spouses to settle marital rights or to provide for the support of minor children are not subject to gift tax if the spouses divorce each other within 2 years after the date of the agreement.

Donors must report gifts on a gift tax return that is filed by April 15 of the year following the gift. However, a gift tax return does not have to be filed if all three of the following requirements are met:

1. The donor made no gifts to his or her spouse,
2. The donor made no more than \$14,000 of gifts to any one donee, and
3. No gifts were future interests.

While the donor is responsible for paying the gift tax, if any, the donee can be taxed if the donor does not pay.

### Federal estate tax

The federal estate tax is imposed on the estate, not the person receiving the bequest or inheritance. The estate tax is unified with the gift tax in that all taxable gifts the decedent made since 1976 are added to the taxable estate to compute the estate tax.

An applicable exclusion amount allowed \$5 million to pass tax-free for deaths in 2011. The \$5 million is adjusted for inflation for deaths in 2012 and thereafter. This estate tax applicable exclusion amount is reduced by taxable gifts the decedent made after 1976.

In December 2010, Congress retroactively reinstated the estate tax for deaths in 2010 with a \$5 million exclusion and a 35% tax rate. Estates of decedents who died in 2010 could have elected out of the estate tax, but the assets in the estate were then subject to modified carryover basis rules that limit the increase in basis of assets that pass from the decedent to survivors. Those basis rules may increase the gain that is subject to income tax on a subsequent sale of the assets.

The amounts that can pass tax-free — the **applicable exclusion amount** — for 2010 and after are as follows:

Year(s)	Applicable exclusion amount
2010–2011	\$5 million
2012	\$5.12 million
2013	\$5.25 million
2014	\$5.34 million
2015	\$5.43 million
2016	\$5.45 million
2017	\$5.49 million
2018	\$5.60 million
2019	\$5 million adjusted for inflation

For deaths in 2011 and thereafter, the estate of the second spouse to die can claim the unused portion of the \$5 million exclusion from the estate of the first spouse to die. For example, if George died in 2011 leaving \$3 million to his children, and his wife, Gladys, died in 2017, her estate would have a \$7.49 million exclusion — her own \$5.49 million exclusion plus George’s \$2 million unused exclusion.

### Gross estate

The following are included in the value of a decedent’s gross estate for estate tax purposes:

**Individual property** — All property owned by the decedent as individual property is included in the gross estate. This includes real property (real estate) and tangible and intangible personal property.

**Co-owned property** — The decedent’s share of co-owned property is included in the decedent’s estate as follows.

- The decedent’s one-half interest in marital property
- The decedent’s share of property owned as tenants-in-common
- Part or all of the property the decedent owned as a joint tenant with one or more co-owners

**Fractional interest rule** — If the only joint tenant is the decedent’s spouse and the property was acquired after 1976, one-half of the value of the property is included in the decedent’s estate for estate tax purposes.

**Consideration furnished rule** — If the property was acquired before 1977 or if one or more of the joint tenants was not the decedent’s spouse, the full value of the property is included in the decedent’s estate — except to the extent the surviving joint tenant(s) can show they contributed to acquiring the property.

**Certain life insurance proceeds —**

If the deceased person retained **incidents of ownership** in the policy — the power to change the beneficiary, surrender or cancel the policy, or assign, pledge, or borrow on the policy — life insurance proceeds paid to the estate or to named beneficiaries are included in the gross estate.

**Gifts during the decedent's lifetime**

— If the decedent retained a life estate or some control or interest until death, or if the gift takes effect at death, the assets that were given away are included in the gross estate.

**Powers of appointment** — Property over which the decedent at death held a power to transfer to himself or herself, his or her estate, or creditors is included in the gross estate, even though he or she may not have had complete title to such property. Such power is called a **general power of appointment**.

**Annuities paid to a beneficiary surviving the decedent** — Annuities funded by qualified employee retirement plans (to the extent that the employer contributed to the retirement plan) are **not** included.

**Valuation of property** — The personal representative of an estate may elect the time of valuation of the decedent's property interests for federal estate tax purposes. He or she may elect to value property as of the date of death or — if the value of the estate decreases after the date of death, and that decrease in value reduces estate taxes — a date exactly 6 months after death.

Whichever valuation date is chosen, all property must be valued as of that date — **except for** any property sold, distributed, exchanged, or otherwise disposed of during the 6-month period. If the later date is chosen, property disposed of during the 6-month period is valued at the date of disposition.

If certain conditions are met, real property that consists of a family farm or a closely held business may be valued on the basis of its current use rather than on the basis of its highest and best use. But such a valuation may not decrease the value of the gross estate by more than \$1,120,000 in 2017.

However, the Internal Revenue Service (IRS) may recapture tax benefits under this special use valuation if the real property is disposed of to a non-family member or ceases to be used for the qualified use within 10 years after the decedent's death.

**Adjusted gross estate** — Some deductions are allowed in determining the federal estate tax. These deductions include the following.

- Funeral expenses
- Estate administration expenses, including appraiser's fees, personal representative's fees, and attorney's fees
- Losses due to casualty or theft during administration
- Mortgages and liens against the decedent's property
- The decedent's debts and claims enforceable against the estate

**Medical expenses** the decedent incurred may not be deducted if they are taken as an income tax deduction on the decedent's final income tax return.

The gross estate minus these deductions equals the **adjusted gross estate**.

**Taxable estate** — To compute the value of the taxable estate, further deductions are made. These are for:

- Marital deduction
- Value of property transferred to or for the use of charitable, educational, religious or public institutions, or to the government
- The amount of any estate, inheritance, legacy, or succession taxes paid to a state government

The **marital deduction** applies to the value of certain property left to the decedent's surviving spouse. An unlimited amount of property may be transferred between spouses free from estate tax. Under most conditions, to qualify for the marital deduction, the surviving spouse must receive:

- a) The outright title to the property interests, or
- b) Rights in the property that would cause the property to be included in his or her estate, if not disposed of or altered during his or her lifetime.

In other words, the marital deduction will not apply to transfers of property interests that would escape taxation in the surviving spouse's estate.

The personal representative can elect to treat life estates and other terminable interests of a surviving spouse as property qualifying for the marital deduction. If the election is made, the full value of the property in which the surviving spouse received a life estate will be treated as if it passed to the surviving spouse. Therefore, none of the value will be taxed on the death of the first spouse.

However, on the second spouse's death, the full value of the property is included in his or her estate. If the life estate is transferred during the surviving spouse's lifetime, the full value of the property is treated as a gift.

The federal estate tax is due 9 months after the date of death. However, if the decedent owned an interest in a closely held business and the value of that interest is greater than 35 percent of the decedent's adjusted gross estate, then the estate tax payment on the closely held business can be deferred for 5 years, and paid in 10 annual installments thereafter. Interest at the rate of 2 percent per year must be paid on the unpaid taxes due on the first \$1,490,000 in the estate in 2017. Interest at the rate for unpaid income taxes must be paid on the rest of the unpaid estate taxes.

## Federal income tax

Property transferred by lifetime gifts or at death is not income for income tax purposes. However, in planning property transfers, it is important to consider the federal income tax that the person who receives the property will have to pay if he or she ultimately sells it.

If the property is transferred by gift during his or her lifetime, the donee's basis for depreciation and determining gain (capital or ordinary) is the same basis the property had in the donor's hands, in most cases, increased by part of any gift tax the donor paid. The donor who has several choices of property to select from for making a gift should remember to consider the tax implications.

However, property transferred on death (other than some deaths in 2010) receives a new basis at the market value on the date of death. This factor means that in some instances, a lifetime gift of low tax basis property would not be as wise a choice as retaining it for transfer at death. It is sometimes a mistake to urge estate appraisers to estimate low in fixing estate property values because:

- Estate taxes may not be as burdensome as the income tax on capital gains payable by the recipient when he or she sells the property.
- A higher basis gives more depreciation allowances.

Congress included a provision to prevent abuse of the unlimited gift and estate tax marital deductions. The provision disallows the adjustment in basis to date of death value for property that is given to the decedent within 1 year of death and passed back to the donee or the donee's spouse upon the decedent's death.

Without the provision, the spouse of a person who is about to die could transfer property that had a low basis to the person who is about to die. Because of the unlimited marital deduction, there would be no gift tax consequences. At death, the property could pass back to the original owner — again with no transfer tax consequences because of the unlimited estate tax marital deduction.

However, the property would have an income tax basis equal to the property's value on the date of the decedent's death. Therefore, there would be a tax-free step-up in basis on the date of the decedent's death. The provision prevents that tax-free step-up.

## Marital property

By converting to the marital property system in 1986, Wisconsin gained a federal income tax advantage for surviving spouses. Before the change, if a married person died owning property that was acquired after 1976 and was held as joint tenants with his or her spouse, the surviving spouse received a date of death basis in only the one-half of the property that passed through the decedent's estate.

Wisconsin's marital property rules qualify under the community property provision of the income tax rules, which gives the surviving spouse a date of death basis in both halves of the property owned as marital property.

A married couple owns a farm with an income tax basis of \$300,000 and a fair market value of \$1,000,000 on the date the wife dies. If they owned the farm in joint tenancy created after 1976 and before 1986, the husband's basis in the farm after his wife's death would be: \$150,000 (his basis in his one-half) + \$500,000 (his basis in the one-half that passed through his wife's estate) = \$650,000. If the husband sold the property for its \$1,000,000 fair market value, he would have to pay income tax on \$350,000 on the gain.

By contrast, if they owned the farm as marital property, the husband's basis after his wife's death would be \$1,000,000. If the husband sold the property for its \$1,000,000 fair market value, he would have no gain subject to income tax.

### Carryover basis for some deaths in 2010

For deaths in 2010, the personal representative of the decedent's estate could have elected to not subject the estate to the federal estate tax and instead subject the heirs and beneficiaries who receive assets from the estate to a modified carryover basis rule. Under that rule, assets received from the decedent at death have an income tax basis equal to the lesser of the decedent's income tax basis in the asset or the fair market value of the asset on the decedent's date of death. The personal representative of the estate could have elected to increase the basis in those assets by a total of \$1,300,000 plus the amount of the decedent's unused losses (such as capital loss carryovers and net operating loss carryovers) on the decedent's date of death. For assets passing to a surviving spouse, the personal representative could have elected to increase the basis by an additional \$3,000,000. However, the basis of any asset could not have been increased to more than its fair market value on the date of the decedent's death.

### Sale of principal residence

The recipient's income tax basis in a home may not matter if the recipient uses the home as a principal residence because of a rule that excludes gain realized on sale of a home.

An individual who sells a **principal residence** — the home he or she has owned and lived in for 2 of the last 5 years — may exclude from income tax up to \$250,000 of capital gain realized on that sale or exchange.

Married taxpayers filing a joint return can exclude up to \$500,000. This exclusion may be used once every 2 years. A partial exclusion is available for some taxpayers who move because of change in health or employment.

This eliminates two provisions of the old law. One provision allowed a person to roll gain into a replacement residence. The other provision allowed taxpayers over age 55 a \$125,000 one-time exclusion from capital gains taxes.

## Wisconsin taxes on property transfers

Wisconsin gift and inheritance taxes have been repealed. **Since January 1, 1992, there is no Wisconsin gift or inheritance tax. Wisconsin's estate tax expired at the end of 2007. Therefore, Wisconsin currently does not impose a tax on transfers of property by gift or at death.**

## Estate planning tools

### Wills

A will is an important estate planning tool. Because it is so important, it is generally wise to have a lawyer write it. A will can simplify estate settlement, speed up probate, save legal costs and taxes, and help survivors adjust. A few hours and dollars spent preparing a will provides peace of mind and easier property transfer.

A **will** is a written document telling how the will's maker — the **testator** — wants his or her property distributed at death. In Wisconsin, any person who is mentally competent and 18 years of age or older may make a will. A will determines who receives what probate property and how they receive it — such as outright or in a trust.

For example, a person can make a will to provide educational funds for children or distribute assets for specific care of heirs or to friends and charities.

A will can also name a competent, experienced **personal representative**, set up an income-producing trust, designate a guardian to care for minor children, and take advantage of possible savings on estate taxes.

A **probate estate**, controlled by a will, generally includes two kinds of property: real and personal.

**Real property** includes land and improvements on land. Cars, furniture, clothing, equipment, money, bank accounts, stocks, bonds, and other belongings constitute **personal property**.

Some assets are not included in a testator's probate estate and may not be disposed of by his or her will. These include:

- A surviving spouse's 50 percent of marital property.
- Property held as survivorship marital property or joint tenancy with the right of survivorship — The surviving tenant or spouse owns this property automatically.
- **Life insurance proceeds** — Unless the estate is named as beneficiary, or named beneficiaries have pre-deceased the insured, these are distributed to the beneficiary named on the policy — and potentially to the surviving spouse if there is a marital property component.
- **U.S. Savings Bonds or bank accounts jointly titled or payable-on-death (POD) to a designated beneficiary** — Payments are made to the surviving joint owner or person named as the POD beneficiary on the bonds or bank accounts.
- **Death benefits from government or private pension, profit sharing, or IRA plans** — These are paid to the beneficiary designated — and potentially to the surviving spouse if there is a marital property component.

### Formalities of a will

Under Wisconsin law, any person of sound mind who is 18 years of age or older may make and revoke a will. In order to be validly executed, the will must be in writing.

The will must also be executed with the following formalities:

- The will must be signed by:
  - the **testator** — the person making the will — or
  - the testator with the assistance of another person with the testator's consent.
- If the testator is unable to sign, the will must be signed in the testator's name by some other person at the testator's express direction and in his or her conscious presence. If such a **proxy signature** is used, the signing must take place or be acknowledged by the testator in the conscious presence of the witnesses.
- The will must be signed by two or more witnesses within a reasonable time after witnessing any of the following:
  - The testator's signing of the will.
  - The testator's implicit or explicit acknowledgement of the testator's signature on the will, within the conscious presence of each witness.
  - The testator's implicit or explicit acknowledgement of the will, within the conscious presence of each witness.

Wisconsin does not recognize handwritten wills as a substitute for this requirement that the testator's signature must be witnessed.

To avoid any issue regarding the proper execution of the will, it can be made **self-proving**. This means the will cannot be challenged for lack of compliance with the formalities of signing.

To make a will self-proving, the testator and witnesses sign a notarized affidavit certifying that the testator intends the document to be his or her will, that the testator signed the will willingly or willingly directed another person to sign, that the specific requirements of will execution were met, and that the testator had proper mental capacity.

This self-proving approach is entirely voluntary, but is certain to prevent any challenge to the will on the ground that it was not properly executed.

The law has further provisions governing situations in which a witness to a will is an **interested witness** — that is, a person who will benefit from the will. If a beneficiary of the will signs as a witness, any beneficial provisions in the will for the witness (or the witness's spouse) are presumed invalid to the extent that they exceed what the witness or spouse would have received if the testator had died intestate.

Thus, it is best to avoid any legal problems by having witnesses who have no interest in the will. If you have questions about witnesses, ask an attorney.

#### Wills

- By will, each spouse may dispose of one-half of the marital property and all of his or her individual property.
- The surviving spouse has no claim on this property.



**Who needs a will?**

Any person who owns an interest in any real or personal property and wants to direct its transfer upon death needs a will. This is true for both men and women, married or single, with or without children, wealthy or of modest means, whether or not they hold title to the property.

**Single persons without children** need wills to designate the recipients of their property or property they stand to inherit.

**Married persons** need wills. Each spouse should have his or her own will. Even if one spouse has few assets, he or she most likely would inherit from the other. If the second spouse to die leaves no will, all of the property of both spouses would pass to the family of the second spouse alone, rather than to heirs of both spouses. This factor is more important if the couple has children from previous marriages. Dying without a will also may subject the estate to additional probate costs.

If a person dies without a will, his or her probate assets are distributed according to the law of intestacy (see Property distribution when there is no will, page 17).

When one spouse dies and leaves a will, the surviving spouse receives whatever the will provides. However, the surviving spouse already owns a one-half interest in the marital property and, at death, may be eligible to elect an interest in any deferred marital property the deceased spouse owned.

Wills are especially important for **people with minor children**. In the will, a testator may nominate a guardian of the person for minor children. The child's other parent, if living, has a legal right to be the child's guardian unless he or she is unfit or incapable of acting in this capacity.

In Wisconsin, children over age 14 may tell the judge whom they wish to act as guardians, even though their parents named guardians in the will. The judge is not bound by the child's request or the guardians named in the will, but considers both when naming guardians.

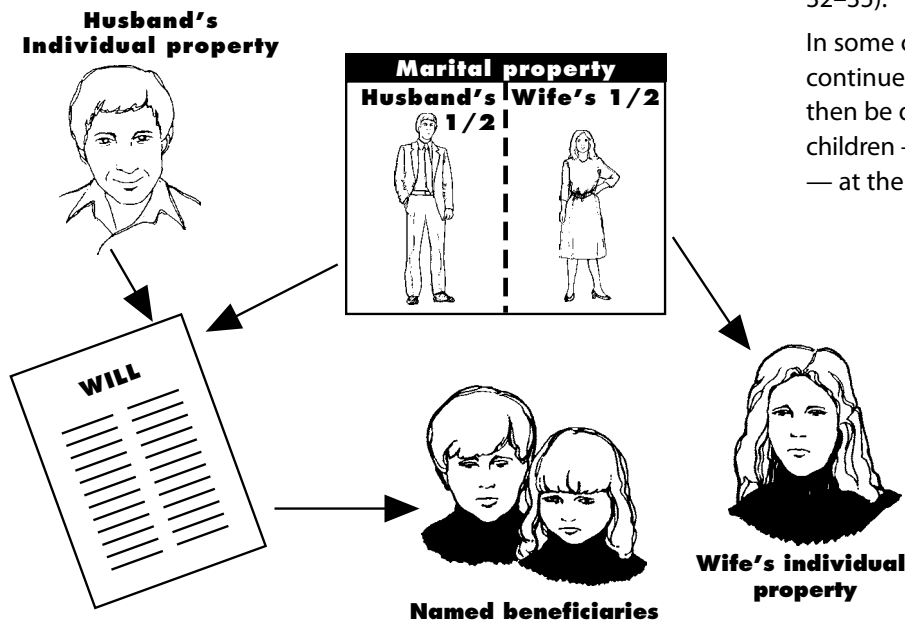
**Partners in non-traditional families** need wills to ensure that the legal protections automatically provided for married persons and their children will apply to surviving partners and their children. Dying without a will means that the estate will be distributed to the deceased partner's family of origin.

**Single parents** must also provide for their children's economic security by creating a testamentary trust to manage the children's inheritance until they are old enough to handle their own financial affairs.

A **guardian of the person** acts as a substitute parent in guiding the minor's education and personal development. One person may act as both guardian of the person and guardian of the estate for the minor, or the testator may appoint a separate guardian of the person and guardian of the estate.

Parents may prefer the option of placing into a trust property that would pass to minor children at a parent's death. Trusts allow a trustee more flexibility in using the property to benefit the children until they reach the age the trust specifies, at which they will inherit (see Trusts, pages 32–35).

In some circumstances, trusts may continue for the child's lifetime and then be distributed to that child's children — the testator's grandchildren — at the child's death.



**Single persons with adult children** need a will to help their estates bypass unnecessary legal expenses and red tape, thus enabling more of the property to pass to the beneficiaries.

**Children need not be beneficiaries**

A will may exclude children from any inheritance — except that minor children may share in an estate through allowances to the family and for support and education. It is not true that a parent must leave a child at least a nominal sum.

Mentioning all children in a will has been a common practice intended to prevent a child from coming into court to prove that he or she was forgotten and thus entitled to a share. Under *Wisconsin Statutes*, it is not necessary to do this. But it may still be a good idea.

**Getting started**

The estate planning process is complex, no matter how small the estate. It is in the beneficiaries' best interest that a lawyer experienced in estate planning draft the will. A good lawyer knows how to state wishes clearly using proper legal language. Consulting with an attorney is particularly important in situations such as the following.

- Some beneficiaries may require special care.
- If an estate exceeds \$5,490,000 (in 2017), a lawyer may help a client avoid estate taxes by establishing special types of trusts.
- If the estate is complex or a beneficiary will assume a family business, an attorney can clearly state necessary instructions.
- If there is a disinheritance, professional advice reduces the likelihood of a successful court challenge.

Spouses and children can be very helpful in planning and consultation. Discussing plans with your family can help resolve conflicts and avoid future battles.

Depending on the complexity of your financial situation and estate plan, drafting a will may require a team of experts — tax advisor, accountant, bank or trust officer, investment counselor, insurance representative, and attorney. For tips on how to choose members of this team, see *Planning ahead*, pages 48–49.

**Steps to making a will**

**1. Determine ownership of all real and personal property.**

The title to property a single person owns determines if ownership is sole or joint.

Married people in Wisconsin cannot rely on title alone. Property is classified as individual, marital, or mixed, depending on when the property was acquired and what source of funds was used. The deceased person's (decedent's) will can transfer only the decedent's one-half interest in marital property.

For married couples who want to leave all their property to the surviving spouse, property classification creates no problems. However, if either spouse has children from a previous marriage or if either spouse wishes to transfer substantial amounts of assets to someone other than the spouse, property classification becomes very important (see *Ownership under the Wisconsin Marital Property Act*, page 6).

Therefore, married people need to list not only the property and how it is titled, but also when and how the property was acquired and the source of funds used for purchasing it. Identify life insurance policies that you own or that insure your life, individual retirement accounts (IRAs),

pension and profit-sharing accounts, and government program benefits payable to survivors, and any death benefits paid by an employer.

Also identify interest in a family farm, other family land or trust property, and any inheritance you may receive in your lifetime. Distinguish probate and nonprobate assets to determine what property can actually pass through the will.

Record the numbers, values, and locations of insurance policies, stocks, bonds, and bank accounts. Note when policies were purchased or accounts were opened, especially if some of these assets were owned before marriage.

Record the purchase price, market value, and year of purchase for all real estate. List all mortgages, notes, and other accounts receivable. Make sure that mortgages on property and other liens are recorded with the county clerk of courts.

The Wisconsin Digital Property Act creating Wisconsin Statute, Chapter 711-**Digital Property**, went in to effect on April 1, 2016, and addresses who gets to access your accounts, who may never access your accounts, and the information to which they may have access.

Under the Act the term **digital property** is an electronic record in which a person had a right or interest. Examples of digital property include e-mail accounts, social media accounts (Facebook, LinkedIn, Twitter), online shopping accounts, and cloud storage accounts (DropBox, Shutterfly, Google Drive).

The Act governs the disclosure of digital property to a personal representative of a deceased person's estate, agent under a power of attorney, trustee, or conservator or guardian of a protected person (a **fiduciary**).



The Act allows owners of digital property to designate who gets or doesn't get information by using an online tool provided by an electronic communication company or in a will, trust, power of attorney, or any other governing instrument. It is important to understand that simply sharing passwords with family members is not the same as granting a fiduciary authorized access.

The law also provides that digital property may be classified as marital property, designating your accounts as assets in the event of a divorce, or subject to a marital property claims upon death. Consider conducting your own digital audit and determine how you want your digital property preserved, if at all, and include these decisions in your estate planning.

## **2. Determine family goals and integrate your objectives into a total estate plan.**

Objectives might include providing immediate income for a spouse or partner, children, or other family members; saving estate taxes and probate expenses; or providing for the continuation of a farm or other family business.

## **3. List beneficiaries.**

List everyone who will be beneficiaries under the will. Record their birth dates, Social Security numbers, and addresses.

On a separate list, indicate any charitable institutions to receive bequests.

## **4. Decide what to leave beneficiaries and when they should receive it.**

It is wise to make bequests in terms of percentages of the estate rather than specific dollar amounts. The value of an estate can change considerably from the date the will is executed to the date of death.

Many people struggle with this phase of estate planning, trying to leave

equitable portions to all concerned. Formal equality and fairness are not necessarily synonymous. A widow with an estate worth \$90,000 might divide her estate equally among her three children by leaving each \$30,000. But if she had paid for the oldest child's college education and launched the middle child in business while the youngest child stayed home to help out, she may want to favor the youngest child at the time of her death.

## **5. List questions you want to discuss with an attorney.**

Be prepared to discuss options with your attorney.

For example, many people have questions about setting up trusts in wills. A **trust** is a fund or some other form of property held by the trustee for the benefit of another person. One of the most common reasons for establishing a trust is to avoid estate taxes, although with the increased level of tax-free transfer amounts and because many trusts do not accomplish this goal, a trust may not be an effective method of tax avoidance. Another is to provide steady income or a future legacy for a minor or disabled child or young adult (see Trusts, pages 32–35).

## **6. If there are minor children, select a guardian of the person and guardian of the estate for each minor child.**

A **guardian of the person** rears the child, while a **guardian of the estate** — often a lawyer or financial expert — handles the child's inheritance and dispenses money to the guardian of the person as needed.

Be sure to discuss choices with the guardian nominees and designate alternatives in case your first choices cannot serve.

## **7. Select a personal representative to be responsible for settling all affairs.**

A **personal representative** assembles the decedent's property, inventories the estate, pays debts and funeral expenses, files estate and income tax returns, pays taxes due, sells property as needed to meet obligations, distributes the remaining property according to the will, and submits a final report to heirs and the probate court.

The personal representative is compensated for expenses incurred in managing and settling the estate. In addition, he or she receives a service fee equal to 2 percent of the value of the property for which he or she is accountable.

The personal representative may be a surviving spouse, another family member, friend, financial institution, or trust company. Be sure the personal representative is trustworthy and capable of managing financial affairs.

It is wise to choose a personal representative in the same community as the attorney, for the two will need to correspond frequently while they settle your estate. It is also recommended to name a backup personal representative, in case the first is unable or unwilling to serve.

**Note:** Personal representatives, trustees, and guardians usually are required to post surety bonds unless the will states otherwise. The bond is proportional to the estate size and is paid as an estate expense. Bond requirements may be waived.

## Letter of last instructions

Many people may want to make comments about the disposition of their affairs that do not belong in the will itself. These comments can be put in an informal **letter of last instructions** to the family. The letter may contain personal thoughts about a person's life or family. It should include any special wishes regarding funeral arrangements.

Because a will is often read after the funeral, placing funeral instructions in a will is not a good idea.

Family adjustment may be easier if the letter of last instructions includes information survivors need to know in order to take over the decedent's affairs. List the names, addresses, and phone numbers of people who should be notified upon death. State where to find personal papers, will, and birth and marriage certificates. List the numbers and locations of bank accounts and insurance policies.

If you have family pets, indicate how you want them cared for and who should receive them. Discuss this with the recipients to be sure they are willing and know where you keep veterinary records.

Be careful not to leave out an item on the assets list that might cause a dispute or hinder the estate's settlement. Keep the assets list up to date.

A letter of last instructions is not binding and is no substitute for a will. It contains information intended to make planning easier for survivors. Because it is not a legal document, it may be changed any time without witnesses. Keep the letter in an accessible place.

Include in your letter of last instructions:

- Location of will.
- Reasons for action taken in will.
- Funeral and burial or cremation instructions and releases for donation of organs or body.
- Location of birth, baptismal, circumcision, or baby-naming certificates; marriage and divorce certificates; Social Security card; tribal enrollment number and certificate of Indian blood degree; naturalization and citizenship papers; membership certificates in societies or organizations; safe deposit box and keys; pension plans and employment benefit documents; financial institution savings and checking accounts; stocks and bonds; real property and deeds; insurance policies; other property.
- Father's name and mother's birth name.
- Instructions about business interests.
- Advisors' addresses and phone numbers — lawyers, accountants, tax preparers, etc.

## Reviewing your will

Keep an unsigned copy of the will at home for periodic review. Review your will whenever your family, economic situation, or health changes, if tax or property law changes affect estate planning decisions, or if you move to another state.

## Making changes to your will

To make minor changes to a will, you can execute a codicil or an amendment. A **codicil** is a legal document and must be signed and witnessed just like a will.

Testators often wish to make specific bequests of tangible property, such as jewelry, family heirlooms, and other furniture and furnishings in the house, and to change these bequests from time to time.

To avoid incurring the cost of a codicil, the law permits a testator to attach a separate list of such tangible property to his or her will and to change this list in the future. Changing the list can be done without the formality of signing a codicil. To be legal, the following are required:

- The will must refer to this separate list.
- Only tangible personal property may be transferred by this method. Cash, bank accounts, and stocks and bonds are excluded.
- The separate list must describe the items and recipients with reasonable certainty.
- The separate list must be signed and dated.

For more information to help you determine whom you want to receive your tangible personal property, review "Who Gets Grandma's Yellow Pie Plate?" at: [www.yellowpieplate.umn.edu](http://www.yellowpieplate.umn.edu)

It is time to make a new will when the old will no longer meets your objectives. Old wills may be destroyed to prevent disputes about which document is truly the **last will and testament**.

To destroy an old will, the testator should burn it, tear it up, cancel it, or obliterate it, with the intention to revoke it.

## Effect of marriage or divorce on a will

Anyone who already has a will and is about to be married or divorced should review the will with an attorney for necessary changes.

Upon divorce, all provisions are automatically and fully revoked that favor a former spouse or the former spouse's relative(s) — including any individual related to the former spouse by blood, adoption, or marriage and after the divorce is not related to the decedent by blood, adoption, or marriage.

If a person marries after he or she has made a will, the surviving spouse is entitled to a share of the decedent's probate estate. The value of this share is equal to the share the surviving spouse would have received had the decedent died without a will (intestate).

For purposes of this provision, the estate is reduced by the value of all bequests in the will to the decedent's children (or their issue) who were born before the marriage to the surviving spouse and who are not also the surviving spouse's children.

Marriage does not revoke the will if:

- The will indicates an intent that it not be revoked by a subsequent marriage.
- The will makes provisions for the surviving spouse by transfer outside the will — for example, as a beneficiary of life insurance or a retirement account — and this transfer was intended to be in lieu of a provision in the will.
- The will was drafted under circumstances indicating that it was in contemplation of the marriage.
- The testator and spouse have entered into a contract before or after marriage that makes provisions for the spouse or states that the spouse has no rights in the testator's estate.

Because of the likely uncertainty of the old will's status under the law, the wise choice is to make a new will that takes into account the new circumstances. Then you can be sure to include intended beneficiaries.

## Where to keep your will

Keep the signed original in a safe place, and let family members know the location. If a bank is going to serve as the personal representative, it may hold the will. The **Probate Registrar's Office** in the county courthouse also keeps wills for a filing service fee of about \$10.

A safe deposit box is often the preferred place. However, in some counties, you may need a court order to gain entry to the box after a death.

A ruling by the Wisconsin Supreme Court prohibits an attorney from keeping the original will unless a client specifically asks the attorney to keep it. Attorneys will usually keep copies, which may help a family locate a decedent's most recent will.

## Cost of a will

Legal fees for drafting a will vary with the complexity of the estate and the family situation. Attorneys may charge a flat fee for a simple will.

It is appropriate to talk to more than one attorney and to ask each for an estimate before choosing an attorney. Look for an attorney experienced in estate planning and drafting wills.

If you have a large and complex estate, you may wish to ask a family attorney to make a referral to an estate planning specialist. However, the specialist may charge a higher fee than the family lawyer.

For a complex estate, the attorney should provide a detailed statement of work performed and a contract for fees, stating the hourly rate or other basis for payment.

## Wisconsin Basic Will and Basic Will With Trust

In 1984, the Wisconsin Legislature enacted statutes that created the Basic Will and Basic Will With Trust. These wills provide a relatively simple, inexpensive means for people to dispose of some kinds of property after death.

Use these will forms with caution. Be certain you understand the implications of the language in the forms. These wills are relatively inflexible, and do not include some options that might do a better job of carrying out your wishes.

Before using these forms, consider the following facts.

- **Basic Wills are generally designed for intact, traditional families.**

The language assumes that the surviving spouse is also the parent by birth or adoption of any surviving children. These forms are not well-suited for those who have a child or children from a previous marriage or a nonmarital child.

For example, a person may be survived by children and a spouse who is not the biological parent of those children. If such a person leaves everything to his or her spouse, then that property will become part of the spouse's estate when he or she dies. The spouse has no legal obligation to provide for stepchildren in a will. And intestacy laws do not pass property to stepchildren.

Unless the person makes specific gifts to the children from a previous marriage in the Basic Will, those children may never share in the probate property.

- **Basic Wills provide for naming one person who will serve as both guardian of the person and guardian of the estate for minor children.**

Basic Wills also provide for naming one person as a **successor guardian** — also called an **alternate**. If a parent does not want the same person to serve in both capacities, it will be necessary to add a codicil to the Basic Will.

The Basic Will With Trust offers the option of placing property in a trust, with a trustee to manage its use and serve as a guardian of the estate for the children.

■ **Basic Wills are not adequate for a person who owns a business as a sole proprietor or as a partner.**

Often, a person in such position will need to arrange to have the business continued under professional management or to have a partner buy out the decedent's share in the partnership.

■ **Basic Wills may not be adequate for persons whose assets approach the upper limits of state and federal tax exemptions.**

Persons in this situation need advice from professionals in order to make use of general credits and exemptions that minimize property tax at death.

Currently, during lifetime or at death, any person may give up to \$5 million (adjusted for inflation) without paying federal gift or estate tax.

■ **Basic Will With Trust provides two trust options, designated by property disposition clauses (a) and (b) for special circumstances.**

**Clause (a)** is designed especially to meet the needs of families with minor children. The income and principal for the trust can be used for the children's basic support needs.

The trust can distribute more money to a child with greater needs than one who has fewer needs. When the trust terminates, the remaining principal and any accumulated income is distributed to the children

or their descendants. This provision can be useful when both parents die simultaneously, such as in a traffic accident.

However, a person with disabled children may not want to use the Basic Will With Trust because it allows trust property to be used for the basic support needs of the beneficiaries. This jeopardizes government benefits that the disabled child is otherwise entitled to, such as Supplemental Security Income (SSI).

A special trust, generally referred to as a **supplementary trust**, can avoid these problems. If you have a child with special needs, it is essential that you consult an attorney and that you not use the Basic Will.

**Clause (b)** is appropriate in very special circumstances. This clause should only be selected after a person first consults an attorney about its tax and trust management implications.

■ **Basic Will With Trust cannot set up a living trust.**

A living trust is created independently of a will to reduce probate costs or provide tax shelters (see page 33).

## Trusts

A trust is a legal arrangement whereby a person called the **grantor** or **settlor** transfers property ownership to a trustee who is assigned to manage and invest the property to earn income and grow principal. The **trustee** — another person, bank, or trust company — distributes income and principal to beneficiaries in accordance with the trust's provisions.

The trust itself is a written document called a **trust agreement**, signed by the trustee and the settlor. This spells out the terms of the trust, such as the name of the trustee and any successor trustee, the name of the beneficiary and any successor beneficiary, the trustee's responsibilities regarding

trust asset management, the beneficiary's rights to receive trust income and principal, and rights the settlor reserves to revoke or amend the trust agreement. Some trust agreements are short and simple; others are complex and long.

The trust beneficiary has no control over trust operations. His or her entitlement to the trust's assets are spelled out. However, the beneficiary does have a right to information about the trust and how it is being managed. In extreme cases, the beneficiary can petition a court to remove the trustee if the trust is improperly managed.

The trust agreement should specify a successor beneficiary, in case the beneficiary dies before receiving his or her share.

For example, the trust agreement may state that the trust assets be paid to the settlor's child until the child reaches age 30, at which time the trust ends and the assets are distributed to the child. If the child dies before age 30, the trust continues for the child's children (settlor's grandchildren) until the grandchildren reach age 30.

A trust can:

- reduce estate taxes and income taxes in some — but not all — cases.
- save on estate administration expenses.
- protect capital assets for financially inexperienced or spendthrift beneficiaries.
- provide competent business or investment management.
- provide flexibility in protecting beneficiaries from unforeseen problems, such as mental incompetence or financial misfortune.
- relieve an older person from the responsibilities of managing an estate.

- make gifts to minors without the need for a court-appointed guardian of the estate.
- withhold transfer of principal to beneficiaries until they reach the age at which the settlor believes them to be capable of managing their property.

Trusts can be broadly classified as either living trusts or testamentary trusts:

- A **living trust** is established during the settlor's lifetime.
- A **testamentary trust** is created by will and comes into being at the death of the testator (also called the **settlor**).

### Living trusts

A living trust may be set up for a specified period of time. It may last for part or all of the settlor's lifetime, and it may continue after the settlor's death.

A living trust may be **revocable**, which means the settlor can change the terms or cancel the trust, or it may be **irrevocable**, which means the settlor can never change its terms or cancel it. Revocable and irrevocable trusts serve very different purposes.

### Revocable living trusts

The revocable living trust is one of the most flexible estate planning tools available. Many people use it to avoid probate — that is, as a substitute for a will. A revocable living trust also can serve as an asset management plan in case the settlor becomes incapacitated.

In Wisconsin, a revocable trust can also be drafted to hold individual property and segregate that property so that it will not be mixed with other assets.

If a person decides to set up a living trust, he or she should have an attorney write the terms in a trust agreement. The agreement will state the trust's purpose, identify trust property, name the beneficiaries,

designate a trustee to manage the property, and state the conditions that will terminate the trust.

To be revocable in Wisconsin, a trust agreement must expressly state that the settlor retains the power to revoke.

Assets usually are placed in the living trust as soon as the trust agreement is completed and signed. The settlor will change the title of all property being placed in the trust from his or her name to the name of the trust.

For example, title would be changed from "Sue Smith" to the "Sue Smith Revocable Living Trust, Sue Smith, Trustee." Depending on what assets the settlor places in the trust, this process may include preparing a new deed for real estate, changing the title on bank accounts, or changing title on limited partnership interests.

Because Wisconsin is a community property state, a married Wisconsin resident who uses a revocable trust must include terms specifying how the ownership interests will be dealt with during the marriage and after the spouse's death. Wisconsin spouses may need to reclassify their property in order to use the revocable living trust. Gifts, unilateral statements, and marital property agreements are commonly used to reclassify property.

When a husband and wife agree, they can sign a joint revocable living trust — one document that applies to both husband and wife — whereby they are both the settlors and trustees. An attorney can help explore other options available for married persons.

If a settlor neglects to put some property into the revocable living trust or acquires property later, those assets can be added to the trust following the settlor's death by use of a simple **pour-over will**, drafted at the same time as the trust agreement. The pour-over will states that anything not

placed in the trust during lifetime will be placed in it at death.

Although the pour-over will is subject to probate, Wisconsin probate law provides for relatively simple procedures — such as transfer by affidavit, summary settlement, or summary assignment — to settle small estates. These procedures require some paperwork on the part of the personal representative, who may need some consultation with an attorney.

Property can also be transferred to a living trust by a marital property agreement signed by the husband and wife.

To avoid probate, a settlor should transfer all property to the living trust during his or her lifetime.

The settlor must also be aware of the tax consequences of a revocable living trust. Since the settlor retains ownership and control of the assets placed in the trust, those assets are subject to the same estate tax laws as assets subject to a testamentary trust under a will. The assets are included in the taxable estate, and any amounts over \$5 million (adjusted for inflation) are subject to federal estate tax.

If the settlor is the trustee or co-trustee of a revocable living trust, he or she will continue to report the income from the trust on an individual income tax return.

If another individual or institution is named as trustee, the trust may be considered a separate tax entity and have a separate tax ID number. The settlor will continue to report the trust income on his or her individual return. But in certain circumstances, the trustee may file an independent income tax return for the trust, even though the trust pays no income tax.

There are advantages to a revocable living trust:

- It can avoid the delay and costs of probate, although informal probate in Wisconsin is neither difficult nor costly.
- Its terms are not a matter of public record.
- The back-up trustee can manage the settlor's affairs in case of illness or incapacity.

However, certain disadvantages must also be weighed:

- Time, effort, and expense are required to transfer assets to the trust.
- It may be difficult to refinance real estate placed in the trust.
- The initial costs of setting up trusts are usually higher than those for writing a will.

Revocable living trusts will not change the necessity of paying creditors after death or filing estate tax or income tax returns.

### Irrevocable living trusts

The irrevocable living trust is used when the person setting up the trust has a very specific objective.

For example, an irrevocable living trust might be used to support an ailing family member, fund a favorite charity, or give assets to family members the settlor believes are too young to manage the property themselves (see Testamentary trusts, to the right).

Unlike a revocable trust, the settlor usually does not act as the trustee of his or her irrevocable trust. Because of income and estate tax reasons, the settlor usually names another individual or institution as the trustee. The trustee manages the trust assets and distributes the income. The assets placed in the irrevocable trust are no longer the settlor's property, but are considered gifts to the trust's beneficiaries.

If the trust includes a **present interest**, gifts to the trust qualify for the \$14,000 (in 2017) annual exclusion for each beneficiary, and will not incur a federal gift tax. If two spouses set up the trust, each spouse is entitled to the annual gift tax exclusion.

While the revocable living trust usually makes distributions only to the settlor until after the settlor's death, the irrevocable trust often distributes income to children and other third party beneficiaries.

At the settlor's death, the trust is already in operation and the trustee continues to manage the investments and make beneficiary distributions. The trust agreement may include more provisions that will be triggered only at the settlor's death.

For persons with estates larger than \$5 million a major advantage of an irrevocable living trust is that the assets placed in it are removed from the settlor's taxable estate — if there is an independent trustee. There may also be some income tax savings, since trust income is taxed at the beneficiaries' tax rates if it is distributed to them. Income the trust retains is taxed at the trust's tax rates. Often, wealthy people will fund an irrevocable trust with life insurance designed to pay death taxes.

Since the tax laws regarding irrevocable trusts are complex, and since you cannot change the trust even if you have made a mistake, it is strongly recommended that you consult an attorney if you are considering using such a trust. The cost of drafting the agreement depends on its complexity, the estate's value, and the attorney's hourly rate.

### Testamentary trusts

A **testamentary trust** is created in a testator's will rather than in a separate trust agreement. A testamentary trust often provides for minor children.

If a parent dies without a will, property passing to a minor child is subject to a guardianship. The guardianship terminates when the minor child reaches the age of majority at age 18, at which time the property is distributed to the child.

As an alternative, a will can create a testamentary trust for the benefit of minor children. This kind of trust has several advantages:

- The trust does not need to terminate at age 18, but it can continue for a much longer period, including the entire lifetime of the child.
- The trustee can ensure that money is used for the parents' goals — such as college education — rather than being given to the child before he or she is old enough to use it wisely.
- A trust can provide that distributions are based on the needs of children at different ages and education levels.
- Trusts for minor children give the trustee more flexibility for controlling taxes, avoid estate administration costs if a child dies while still a minor, and have no more operating costs than a court-appointed guardianship.

A person creating a testamentary trust retains lifetime ownership and control of his or her property. Thus, all of that property is included in his or her estate at death. If the net taxable estate — including assets that are transferred to the testamentary trust — exceeds the federal applicable exclusion amount, the excess is subject to federal estate tax (see page 22).

## Selecting a trustee

Selecting a trustee is a crucial part of trust planning. A **trustee** can be an individual or an institution such as a bank or trust company. Some people prefer to use an institution — to assume stability in the trustee's role, to provide competent investment advice, and to deal with the beneficiaries.

However, institutional trust departments may prefer to deal only with trust funds of \$150,000 or more. They may not wish to handle a small trust. Their annual management fees — usually about 1 percent of the trust assets — may be inadequate for the work required.

In some living trusts, the settlor can be the initial trustee. In addition, the settlor may wish to designate his or her spouse as co-trustee. By being the initial trustee, the settlor can maintain full control of the trust until his or her death or incapacity. At that time, the successor trustee assumes the powers and duties as trustee.

## Marital property agreements

A **marital property agreement** is a written agreement signed by a husband and wife or a couple about to marry, to take effect upon marriage. Traditionally, the latter were called prenuptial agreements and were used primarily in second marriages.

Under the Wisconsin Marital Property Act, agreements are now used before and during marriage to adjust the ownership or management of assets and responsibility for debts.

For a couple whose needs and circumstances are not adequately met by Wisconsin's marital property rules, a marital property agreement provides broad freedom to fashion property contracts tailored to their unique situation. The Marital Property Act encourages marital property agreements, expands their traditional scope, and enhances their enforceability.

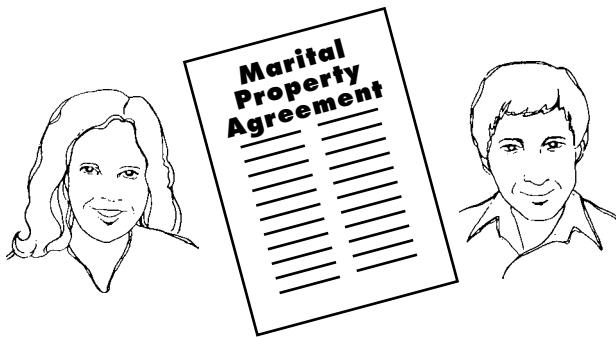
## Scope of marital property agreements

The following areas may be included in marital property agreements:

- Classification of assets as marital or individual
- Management and control of assets during the marriage
- Spouses' obligation for debts
- Property disposition at a spouse's death
- Disposition of spouses' property upon divorce
- Spousal support rights and obligations
- Many other miscellaneous matters

While marital property agreements offer great flexibility, the Wisconsin Marital Property Act provides that some obligations cannot be varied by agreement. These include child support obligations, spousal support (if the agreement would leave a spouse without adequate and necessary support during the marriage or result in eligibility for public assistance upon divorce), and the duty of good faith regarding the management of marital property.

A couple also cannot use a marital property agreement to defraud their creditors or *bona fide* purchasers of marital property. Nor can a couple retroactively reclassify income for tax purposes or retroactively renegotiate responsibility for debts.



### Marital property agreements

Most effects of the marital property law may be varied by marital property agreement.

## Formalities

Few formalities are required for entering into a marital property agreement. The agreement must be in writing and signed by both spouses. It need not be witnessed or notarized, but must be voluntarily executed.

A number of factors are considered relevant to whether an agreement is **voluntary** — that is, has each spouse:

- had separate representation or the opportunity to hire separate legal counsel?
- had adequate time to review the agreement?
- understood the agreement and his or her rights absent the agreement?
- received **reasonable disclosure** of the other's income, assets, expenses, and liabilities?

In a departure from general contract law, a valid marital property agreement does not require each party to promise something of benefit to the other party. The marital property agreement will be enforced even though one of the parties does not give up anything as a result of the agreement.

A marital property agreement may be **revoked** or **amended** only in writing, signed by both spouses, and subject to the same formalities including reasonable financial disclosure.

To be upheld by a court, a marital property agreement must be **fair** and **reasonable** when it was made. The issue of both spouses having separate representation is relevant to whether the agreement was voluntary and fair. However, neither spouse is required to hire a separate lawyer.

Separate attorneys are recommended when an agreement provides for:

- dividing ownership of assets at divorce, or
- opting out of the marital property classification system of ownership — that is, keeping all property as individual property, even property acquired during the marriage.

Separate attorneys may not be needed when a couple wants an **opt in** agreement, so long as the agreement does not include divorce provisions. Such an agreement makes all their property marital property.

## Impact of marital property agreements at divorce

Marital property agreements are usually drafted to govern ownership of a couple's property during marriage and at death. An agreement may include provisions that state how the property will be divided in case of divorce. Wisconsin courts have held that a marital property agreement must be **equitable** at the time of divorce.

If a court finds that an agreement providing for property distribution at divorce is **not** equitable, the court will:

- invalidate those provisions of the agreement, and
- distribute the property at its discretion, following Wisconsin divorce statute mandates.

The Wisconsin divorce statute presumes equal division of property other than gifts and inheritances. However, it permits unequal distribution if the court finds that such a result is fair, after considering factors such as length of the marriage and future needs of the spouses and their children.

For the divorce provisions of a marital property agreement to be enforced by a divorce court, the provisions may need to take the following factors into account.

For example, an agreement that starts out with a significantly unequal distribution but permits progressively more sharing as the marriage continues would more likely be upheld by a divorce court than would an agreement that retains a significantly unequal distribution even after many years of marriage.

Spouses who are considering entering into an agreement with divorce provisions should each consult independent legal counsel.

## Statutory terminable property classification agreements

Two sections of the *Wisconsin Statutes*, Sec. 766.588 and 766.589, provide marital property agreement forms.

**The Section 766.588** agreement provides a form for spouses to classify their property as marital property.

**The Section 766.589** agreement provides a form for spouses to classify their marital property as the owning spouse's individual property.

Both sections contain:

- provisions explaining the agreement
- a notice to persons signing the agreement
- forms for drafting and terminating the agreement and providing financial disclosure

Because spouses may enter into these agreements without consulting an attorney, either spouse may terminate the agreement **unilaterally**.



The Legislature hoped to provide individuals with an easy, inexpensive means of classifying their property. In fact, however, the forms should be used with caution and with an attorney's advice. Be aware of the following conditions:

- If the agreement is to be a statutory terminable property classification agreement as defined by the statutory sections, **the language of these agreement forms cannot be altered in any way.**

If the language is altered, the agreement may still be treated as a general marital property agreement under Section 766.58. And there is a very important difference between them — statutory agreements can be terminated by either spouse, but other marital property agreements can only be terminated by a later agreement between the two spouses.

- The termination of the agreements provided by the forms is a **prospective termination.**

This means that any property classified by the statutory agreement while it was in effect remains in that classification after termination. Since a spouse can terminate unilaterally, this provision allows for the possibility of abuse. A spouse may enter an agreement, benefit from its operation for a number of years, and then terminate it.

- If the financial disclosure form that accompanies these agreement forms is not completed, **the agreement terminates automatically 3 years after the date both spouses sign the agreement.**

However, the agreement is enforceable and classifies the couple's property during that 3-year period, even if one spouse has failed to disclose property or financial obligations.

If a spouse is unhappy with an agreement after a number of years and proves inadequate disclosure, a court could find the agreement automatically terminated 3 years after both spouses signed. This could result in a number of years during which property was not being classified in accordance with the terms of the agreement.

Statutory terminable property classification agreements may be useful for individuals who will be residing in Wisconsin for a relatively short time and want an easy way to prevent marital property from entering their economic lives. These forms may also be useful as a stopgap measure by a couple who wants to keep their property classified as individual until they are able to work with an attorney to draw up a general marital property agreement under Section 766.58 of the *Wisconsin Statutes*.

### Will substitute agreements

Marital property agreements can also be used as **will substitute agreements** — sometimes called **Washington wills** — to avoid probate. Couples may use a marital property agreement to provide that, upon the death of either spouse, any property interest of that spouse automatically passes to the survivor or other designated beneficiary without probate.

Marital property agreements can also provide that property owned by a decedent is automatically transferred to his or her living trust upon death, without probate.

Such an agreement acts as a substitute for a will, and saves the expense and delay of probate. However, it is still necessary to secure appropriate documents that terminate the decedent's interest in all property that passes under this will substitute.

Persons considering a will substitute agreement should proceed with caution for these reasons:

- A will substitute agreement may be revoked only by mutual consent in a marital property agreement executed later.
- If a spouse's later incompetence makes it impossible for him or her to amend or revoke the agreement, the couple may be bound by the agreement. While a guardian for the incompetent spouse may enter into a marital property agreement on behalf of the ward, the guardian may not be willing to amend or revoke the agreement.
- Will substitutes transfer both probate and nonprobate property.
- If a nonprobate asset such as a life insurance policy later names other beneficiaries, the will substitute may control.
- Later wills or beneficiary designations that attempt to make other dispositions of property will be ineffective unless the surviving spouse acquiesces.
- For couples with large estates, the all-to-the-survivor disposition that often occurs in a will substitute agreement may fail to maximize federal estate tax savings by not making use of a **credit shelter trust** or other trusts that escape taxation at the surviving spouse's death.

## Other estate planning tools

### Unilateral statements

Under the Wisconsin Marital Property Act, income generated by assets owned by spouses — including individual property — is classified as marital property. The spouse who owns an asset that is not marital property can change this through a **unilateral statement** that classifies the income from the non-marital asset as his or her individual property.

*Wisconsin Statutes* determine who will receive the property of a resident who dies without a valid will.

After the owner signs the statement and the signature is notarized, the owner must deliver a copy to his or her spouse. A unilateral statement will not be enforced if the owner conceals it from the spouse.

There are three significant **limitations** on the use of unilateral statements:

**1. They can only be used to classify the income from non-marital assets as individual property.**

They cannot be used to classify earned income such as wages or salary or unearned income from marital property. If an asset is marital property, its income is marital property. A unilateral statement cannot change this result.

**2. They cannot retroactively reclassify income.**

They only apply from the date they are signed. Any income acquired before signing the statement is marital property. If that marital property has been mixed with the non-marital asset, the entire mixture may become marital — unless the non-marital component can be **traced** and proven.

**3. They do not apply at divorce.**

As a result of these limitations, unilateral statements have received limited use as an estate planning tool in Wisconsin.

### Gifts

When a person owns property that exceeds reasonable lifetime needs, he or she may consider making lifetime gifts to reduce the total gift and estate taxes.

**Gifts** are lifetime transfers of property for less than full consideration. Some gifts are exempt from federal and state gift taxes.

In general, a donor can give up to \$14,000 each to an unlimited number of beneficiaries yearly without incurring any federal gift tax. A program of giving that extends over several years can transfer a substantial amount of property without incurring gift tax.

Gifts of property that are likely to appreciate in value will remove the future appreciation from the donor's estate. However, a lifetime gift of low tax basis property may create a sizable income tax for the recipient when the property is sold.

Since most people do not have an estate tax liability, it is often better tax planning to retain highly appreciated property until death, at which time it will receive a new basis equal to its fair market value on the date of death for income tax purposes.

Gifts may also save income taxes by transferring income-producing assets to children or other donees who are in a lower income tax bracket than the donor.

In general, the total tax paid by donor and donee will be less if the income from those assets is taxed to the donee. However, if the donee is under age 19 (or 24 for full-time students), that child's unearned income in excess of \$2,100 (in 2017) may be taxed at the parents' highest marginal income tax rate. The effect of this law is to reduce the usefulness of gifts as an income tax shifting device in the case of donees subject to these rules.

It is possible to shift some income from a family business and some value of the donor's estate by making a gift of corporate stock shares or capital interest in a partnership. Gifts must be complete and without strings attached. If the donor retains possession and use of the gift property, its value will be included in the donor's estate at death, and income from the gift is included in the donor's income.

Certain gifts to charitable and to religious, scientific, educational, and other specified organizations are favorably treated for tax purposes. The donor is permitted an income, gift, or estate tax deduction upon making the gift. The organization does not pay tax on receipt of the gift.

### Gifts to minors

Because the gift, death, or income tax consequences of a small gift are inconsequential, gifts of small amounts can be given to minors directly since there is not much at stake and not much is lost if the gift is used unwisely. However, for larger gifts, the donor may be concerned that the minor will make some poor choices for using the gift.

To make a gift to a minor and yet maintain some control, the donor may use a guardianship, the Uniform Transfers to Minors Act, or an irrevocable trust. In general, a guardianship is **not** recommended for gifts (see Guardianship, page 47).

### Uniform Transfers to Minors Act

One convenient way to make a moderate-sized gift to a person under age 21 is to use the Uniform Transfers to Minors Act (UTMA). Under UTMA, a **minor** is defined as any person under age 21. The UTMA allows a person to give property to a minor by transferring it to a **custodian** who holds and administers the gift for the minor until the minor reaches age 21.

UTMA authorizes gifts to minors (during the donor's life or at death) of securities, life insurance policies, annuity contracts, money, or real property.

The major advantage of using UTMA rather than a trust to give assets to a minor is that the gift can be made easily. A donor will not incur the legal expenses of setting up a trust or filing separate trust income tax returns.

The donor registers the asset or deposits the funds in his or her own name or in the name of another adult or a trust company as **custodian** for the minor under the act. The assets are then vested in the minor, and the transfer is irrevocable.

Although the minor has the beneficial interest in the account or property, the custodian has full power and authority to manage the account or property. A bank should act only according to the direction of the custodian or a court order. When the minor reaches age 21, the assets are turned over to him or her.

The custodian holds and manages the assets under a standard of care "that would be observed by a prudent person dealing with the assets of another." The custodian has broad discretion in managing the assets and may expend them for the minor's benefit. Contrary to popular belief, the assets can be used for expenses other than the minor's education.

Under UTMA, a parent may name himself or herself or be named by a third party as custodian, thereby retaining control over the assets. However, the parent must not use the assets to pay his or her obligation of support of the child.

A parent should be aware that if he or she is the custodian of property he or she gave to a minor child and dies before the child, the property is included in the parent's estate for estate tax purposes. Normally, the income the assets generate is taxed as income to the child.

Most UTMA custodianships terminate when the minor beneficiary reaches age 21. However, two types of UTMA transfers will terminate when the minor reaches age 18:

- Custodianships established by a third party in payment of a debt the third party owes to the minor beneficiary (damage from a car accident, for example)
- Custodianships established by a personal representative or trustee — unless the personal representative is specifically empowered to create the custodianship

All UTMA accounts terminate upon the death of the minor beneficiary.

The assets in the account are included in the minor's probate estate and are distributed according to the rules of intestate succession (see the Appendix).

People who want to transfer large amounts of property or cash to a minor should get professional advice to help them weigh the tax advantages of UTMA and various kinds of trust arrangements.

### Irrevocable trust

An irrevocable trust with an independent trustee may be appropriate for larger gifts to minor children.

An irrevocable trust removes the assets transferred to the trust from the settlor's taxable estate and can remove any income earned by the trust assets from the settlor's taxable income. Besides these tax advantages to the settlor, an irrevocable trust can relieve the settlor of investment responsibility, avoid passing assets through the settlor's probate estate, provide for management continuity, and protect the minor from any tendencies to spend the money foolishly.

An irrevocable trust for a minor must be carefully drafted to avoid negative tax consequences. For example, the settlor should not serve as the trustee. Under certain circumstances, the parent can serve as trustee.

A person with substantial assets who wants to use a trust to pass property to a minor should seek professional advice regarding the gift, death, and income tax consequences of an irrevocable trust.

### Installment sales

The installment sale is a useful device for sellers of appreciated property such as farmland, because it allows a seller to spread taxable gain over a period of years for income tax reporting purposes.

Gain (but not loss) realized from an installment sale is postponed until the year payments are actually received.

The installment contract offers advantages for parents who want to begin lifetime transfers of land to their children. The installment contract allows parents to retain an interest in the land as security by keeping the title. It can provide a steady, annual cash flow for the duration of the contract that is neither subject to Social Security tax nor treated as

earned income for reducing Social Security benefit payments. It allows property management to be transferred to the children/buyers. It allows buyers to acquire an interest in land with a low down payment.

The installment contract can reduce estate taxes by freezing the value of the asset at the price in the contract. Further increases in land values after the contract is signed do not increase the size of the parents' estates. Payments received from the contract can be consumed or given away to further reduce the estates.

In certain situations, installment sales may involve gift tax, estate tax, and income tax consequences. To determine if an installment sale is the best device to use as part of an overall estate plan, compare its tax consequences to the tax consequences of transferring the appreciated property by gift or by disposition at the owner's death.

Before using the installment sale to pass on property to other family members, discuss it with a professional who is knowledgeable in estate planning.

### Life insurance

Life insurance is one way to increase the value of an estate and to provide cash for supporting survivors or settling the estate. There are two basic types of life insurance:

- **Term life insurance** offers a death benefit only.
- **Whole life insurance** combines a death benefit with a savings plan.

Most life insurance companies offer a variety of insurance policies that provide a mix of the characteristics of the two basic types. An independent life insurance agent can give you information about the many products.

When considering which to buy, analyze your situation. Consider the financial needs that will be created by the insured person's death, such as the need to replace his or her income, to buy his or her interest in a business, or to pay estate taxes. Then consider the sources for meeting those financial needs such as savings accounts, other liquid investments, or loans.

The life insurance proceeds paid on the insured person's death **do not** create taxable income to the beneficiary. Dividends paid to policy holders are tax-free as long as they are a return of premiums paid. If the total dividends the policy holder received exceed the total premiums paid, then the excess is taxable. And if dividends are left with the company to earn interest, the interest earned is subject to income tax.

Insurance proceeds are included in computing the insured person's estate for estate tax purposes if the insured person owns the policy at his or her death. However, policy ownership can be transferred during lifetime, thereby avoiding both federal and state estate taxes.

If a policy has a value of more than \$14,000 (for 2017) when it is given to another person, the transfer must be reported as a gift on a gift tax return.

Family members often want to know if creditors can make claims against a life insurance policy. If the estate is the named beneficiary of the life insurance policy, the proceeds are subject to the claims of creditors. If anyone other than the estate is the named beneficiary, the proceeds are paid to that beneficiary and not subject to the claims of the creditors. However, if marital property earnings were used to pay premiums for the life insurance policy, a formula may be used to determine a spouse's marital property interest in the proceeds.

Life insurance is treated as a special asset under the Marital Property Act, so life insurance ownership is governed by special rules. These rules are presented in the section on Additional classification rules on page 9, in Ownership under the Wisconsin Marital Property Act.

### Private annuity

A **private annuity** is usually entered into between family members to achieve gift and estate tax savings. As with a **commercial annuity**, the annuitant pays cash in exchange for a promise by the obligor to make periodic payments for the remainder of the annuitant's life.

With a private annuity, the **annuitant** will usually be the parent, and the **obligor** will be the child rather than an insurance company. Furthermore, with a private annuity, property other than cash may be used to acquire the annuity — farmland, for example. The parent/annuitant transfers property to the child/obligor at the outset.

The annuitant in a private annuity assumes some risk. If the child dies or becomes bankrupt, the payments may be lost with no recourse to the parent.

However, this lack of security provides the tax-saving feature of the private annuity. If the child's promise to pay is secured, then the parent may have to pay taxes on the gain from the property transfer as though it were a sale.

Like the installment sale, a private annuity may have gift tax, estate tax, and income tax consequences. So discuss this option with a competent professional adviser before undertaking the transaction.

The private annuity may be unfair if the parents of several children set up the annuity with only one child as obligor.

If the parent dies prematurely, the obligor might obtain the property at a fraction of its value. If the parent lives to an unusually old age, the payments may exceed the value of the property.

### Reverse mortgages

A reverse mortgage allows a homeowner age 62 or older to convert a portion of the equity in his or her home into cash. Older persons who want to stay in their homes but need to increase their cash flow, cover healthcare costs, renovate the house, or pay off other debts are the typical users of these mortgages.

The most common types of reverse mortgages are proprietary reverse mortgages, which are private loans backed by companies that make them, and federally-insured reverse mortgages, known as Home Equity Conversion Mortgages (HECMs), available and insured by Federal Housing Administration (FHA). Homeowners are required to meet with a counselor from an independent government-approved housing counseling agency to learn about the different types of HECMs, possible alternatives, loan costs, and financial implications.

The homeowner must live in the home and pay off any existing mortgages on the property. The amount of money available depends on age, current interest rate, mortgage insurance premiums, and the lesser of the appraised value of the home, sales price, or the HECM FHA mortgage limit (\$636,150 in 2017). The older the homeowner and the higher the home equity, the more money a reverse mortgage will yield. The money received from a reverse mortgage is a loan advance and not taxable income. Borrowers generally choose to receive money in the form of a lump sum (using a fixed-rate loan) or through a line of credit (which carries a variable rate). As of September 30, 2013 there

is a limit on the amount of money that can be withdrawn, to ensure borrowers can meet their housing obligations, such as taxes, insurance, and maintenance, in an effort to reduce default rates.

Lenders are repaid when the homeowner moves out of the home or (by the heirs) when the owner dies. Heirs keep the remaining equity after the reverse mortgage is paid. A reverse mortgage cannot get “upside down,” so heirs will never owe more than the home is worth.

Caution is advised when entering the world of reverse mortgages. Understanding the implications and consequences of the loan is critical. Reverse mortgage lenders can require repayment at any time if the homeowner fails to pay the property taxes, to maintain and repair the home, or to keep the home insured.

### What happens to a reverse mortgage after death?

- Q.** My father took out a reverse mortgage five years ago. He was remarried two years ago and died unexpectedly this year. Who is responsible for paying the reverse mortgage on the house?
- A.** Whoever inherits the house must pay off the reverse mortgage, which is due when the borrower dies. Interest charges will continue on the unpaid loan balance, so it is advantageous to whoever inherits the house to repay the loan as soon as possible.

### Planning for incapacity

A thorough estate plan includes planning for disability as well as for death. Advances in medical care mean that more of us will live longer, and many of us will live with some sort

of physical or cognitive incapacity. We need to be realistic about this possibility and plan accordingly.

The first and most important piece of a plan for possible disability is the execution of **advance directives** for health care and financial management, covered on pages 44–47.

The second step is to consider how to handle the costs of care, which can be considerable. Long-term care may be needed for chronic illnesses, such as dementia or Parkinson’s disease, or for care needed as a result of a stroke or other type of debilitating condition.

**Long-term care** can be provided in one’s home, in various assisted living settings, or in skilled nursing homes.

The cost for long-term care varies, depending on the type of care. **Home care** is charged on an hourly basis.

**Assisted living** costs can range from \$2,500 to \$6,000 per month, depending on the severity of the condition and geographic location of the facility. **Nursing home care** can cost between \$7,000 and \$8,500 or more per month, again depending on the care received and geographic location of the facility.

**Long-term care insurance** can be purchased to cover all or a portion of the costs of long-term care. In shopping for such insurance, consider not only the amount of the premium but also factors such as the dollar amount of coverage provided, whether the coverage is indexed to inflation, whether there is a maximum amount of coverage that the policy provides, and whether the policy is exhausted after a specific number of years of care. Compare the breadth of coverage available for your own health situation and your (and your doctor’s) best prediction of what you are likely to need.

**Medicare** is an insurance-based model that only pays for limited long-term care services. Generally, these are rehabilitative nursing home stays following 3 days of hospitalization. Medicare provides full coverage during the initial 20 days of nursing home care. In 2017, the patient is responsible for \$164.50 a day for days 21 to 100 during each benefit period. (Medicare Advantage plans may have different terms and limits.)

You will want to consider having a Medicare Supplement insurance policy to pay the per day co-pay. After the set number of days, Medicare and most supplementary policies will no longer pay.

Note that the benefit may not continue for the set number of days if you no longer meet the “Medicare Level of Care” standards. It is important that you understand the supplementary policy that you have. If the supplementary policy is a true Long-Term Care Insurance Policy, it will only pay under conditions where Medicare would have paid, but for the set number of days requirement.

If you have enough assets to cover the costs of care for you and your spouse from the income those assets generate, your pension or retirement plans, and your Social Security entitlements, you may not need long-term care insurance.

If you will have a cash short-fall when you attempt to pay for care, consider whether you are willing to liquidate assets to finance your care. If not, you need insurance.

It may be more important to your welfare to have long-term care insurance than to have life insurance. While life insurance provides a benefit to your heirs after your death, long-term care insurance protects your ability to live comfortably throughout your

lifetime. Some life insurance policies offer a “reverse premium” option, permitting you to withdraw a portion of your cash value if you are diagnosed with a terminal illness — an option that lets you have the best of both worlds.

**Medicaid** is a government benefit program for people who have developed a health problem requiring long-term care and who have neither insurance nor the assets to pay for care.

The Medicaid program imposes strict limitations on income and assets that may be held by the individuals who apply for governmental assistance to pay their medical expenses. The level of care available through Medicaid is not as high as the level of care available through private pay.

Medicaid patients are not accepted in many facilities, and others offer only a limited number of Medicaid beds. So you may have much less choice of a facility. Generally, neither Medicaid nor Medicare will cover the costs of a single room or other amenities.

People sometimes worry about exhausting their own financial resources for their health care, leaving little or nothing for their heirs. Ways to plan for exhausting assets can include life estates, annuities, and various kinds of trusts and gifts of limited amounts.

In such situations, some people choose to **divest** themselves of their property, giving it away so that they qualify for Medicaid. The government imposes strict regulations on the assets that you may retain and on the time period that must elapse after divestment before you are eligible for Medicaid. The rules are complex and change frequently, so it is generally necessary to develop a divestment plan with an attorney if you choose to divest.

If you have a Medicare Advantage Plan, check with your insurance provider to determine your medical coverage. Check current information on providing for long-term care such as Medicaid, asset levels, income, and divestments.

Center for Medicare and Medicaid Services: [www.medicare.gov](http://www.medicare.gov)

### Spousal impoverishment

Both state and federal spousal impoverishment prevention provisions protect the **community spouse** — the spouse who remains at home — from becoming poor when her or his spouse is **institutionalized**; that is, resides in a nursing home or receives long-term care services from within the community.

These provisions include asset and income protections that allow:

- the institutionalized spouse to become eligible for Medicaid without exhausting the couple’s financial resources, and
- the community spouse
  - to maintain her or his financial independence during the other spouse’s institutional care and
  - to retain a significant share of the couple’s marital assets, regardless of title.

The community spouse may also be entitled to receive monthly income from the institutionalized spouse.

### Asset protections

Upon the first continuous period of institutionalization, a couple's total liquid assets from all sources is determined and added together, regardless of title. Neither Wisconsin marital property law nor any marital property agreement the couple signed apply and thus have no effect for Medicaid purposes.

Certain resources are considered exempt and are not counted in assessing assets. Exempt resources include:

- the couple's household goods and personal property regardless of value
- the house used as the community spouse's primary residence provided she or he continues to reside there or for as long as either spouse intends to return to the house
- at least one motor vehicle
- certain prepaid burial arrangements for each spouse
- a life insurance policy for the institutionalized spouse that has a face value of \$1,500 or less

A retirement fund owned by the community spouse, including funds held in a work-related pension plan or IRA, may also be exempt.

After computing total assets, the community spouse is entitled to retain a **community spouse resource allowance (CSRA)**. This amount is adjusted for inflation each January.

The institutionalized spouse can retain a certain limit of liquid assets, but must not exceed that limit in order to maintain Medicaid eligibility. In any month that the institutionalized spouse's assets exceed the limit, he or she will be found ineligible for Medicaid and can be billed for care at the private pay rate.

If a couple has more assets than the CSRA plus the institutionalized spouse's liquid assets limit, the couple is required to spend the excess funds on daily living expenses, the nursing home spouse's care, bills, and other permitted expenditures, until the couple's assets equal the CSRA plus the institutionalized spouse's liquid assets.

As soon as is practical after Medicaid eligibility has been established, assets must be transferred to the community spouse's name. Any assets in excess of the liquid asset limit that remain in the institutionalized spouse's name at the time of the first annual review of Medicaid eligibility may cause eligibility to be terminated.

Once Medicaid eligibility has been established, none of the community spouse's resources are considered available to the institutionalized spouse.

### Income protections

Spousal impoverishment provisions allow a community spouse to receive a certain level of monthly income in order to maintain financial independence. This amount of income is known as the **minimum monthly maintenance needs allowance (MMMNA)**. The federal government establishes the MMMNA annually.

If the community spouse's income is below the limit, she or he can increase her or his income up to the MMMNA in one of two ways:

- The first way to increase the community spouse's income is to allocate some or all of the institutionalized spouse's income to the community spouse.

- If an income allocation is not sufficient to increase the community spouse's income to the MMMNA, then either spouse can request the second way — an increase in the CSRA, above the standard allowance, for the strict purpose of protecting assets that generate income.

For some community spouses, both of these ways will be needed to increase their incomes to the MMMNA.

Contact the benefits specialist in your county Aging Department for specific up-to-date information on the maximum value a community spouse can retain, monthly income allowed, and ways to increase insufficient monthly income allocations.

### Estate recovery and lien laws

As people become eligible for Medicaid, they want to know: "Can the state take my house?" As a general rule, it cannot as long as the Medicaid recipient is alive. But it's good to know the rules relating to the state's ability to recover amounts paid on your behalf for Medicaid. While a Medicaid recipient is in a nursing home, a lien can be filed if it can be shown that there is no reasonable likelihood the recipient will ever return home — unless a spouse, disabled child, or child under age 21 is living in the home, or a sibling with an ownership interest has lived in the home for at least a year before the recipient was institutionalized.

The state cannot force the sale of the home during the recipient's lifetime, even if a lien has been filed. At the Medicaid recipient's death, the state may not enforce a lien as long as any of the following survive the recipient: The spouse, child under 21, or disabled child of any age who resided in the home during the prior 2 years and provided care that delayed admission to a nursing home or hospital, or



sibling who resided in the home for at least a year before the recipient was institutionalized.

Under certain circumstances, the state may file a claim against a recipient's estate to recover Medicaid payments made while the recipient was hospitalized or in a nursing home.

Lien recovery rules are complicated. You may want to review your particular circumstances and alternatives with an attorney.

### Divestment

Significant changes in Medicaid laws have made permissible transfers of financial resources more difficult, and penalties for disqualifying divestments have increased.

Disposing of your assets for less than fair market value within 60 months of applying for Medicaid is considered **divestment**. The 60-month rule is phased in for non-trust divestments by individuals who apply for Medicaid before January 1, 2014. Transfers between spouses are not considered divestments.

**Divestment penalties** can occur when you give away, transfer, or sell any asset for less than fair market value.

Divestment may make an applicant ineligible for Medicaid benefits. It is important to be aware of these rules and to have accurate and up-to-date information about any changes.

Questions about financial planning or transfers of property, the use of commercial or private annuities, self-canceling installment notes, and life estates should be referred to an attorney who specializes in this area of law.

## Advance directives

### Power of attorney for finances

Wisconsin adopted the new Uniform Power of Attorney for Finances and Property Act effective September 1, 2010, in *Wisconsin Statutes* chapter 244. A **durable power of attorney** is the popular name for a special agency relationship that becomes effective immediately upon signing and is not terminated by the incapacity of the principal (person giving the power). The principal vests the **agent** — sometimes called the **attorney-in-fact**, who can be anyone and not necessarily an attorney-at-law — with special powers to act for or on behalf of the principal in various financial matters.

Historically, a power of attorney became inoperative upon the principal's incapacity. Since the power was a voluntary grant from the principal to the agent, the law automatically revoked it if the principal lost the capacity to revoke. As a result, it was useless when needed most — during the principal's incapacity.

In 1981, the law was changed so that powers of attorney can be made **durable** — that is, they can become or remain effective during the principal's incapacity. As such, they are powerful instruments for establishing financial management during incapacity.

A properly drafted durable power of attorney can also help avoid **guardianship** — a court proceeding that establishes incompetency and places the incompetent person's (ward's) assets under court supervision (see Guardianship, page 47).

### Advance directives

Current statutory powers of attorney are available by mail or online: Power of Attorney for Finance and Property, Power of Attorney for Health Care, Declaration to Physicians (living will), and Authorization for Final Disposition.

These are updated by the Wisconsin Department of Health Services.

For each statutory form, send a stamped, self-addressed business envelope (No. 10) to:

**Division of Public Health  
Attn: POA  
P.O. Box 2659  
Madison, WI 53701-2659**

These are also available online at:  
[www.dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm](http://www.dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm)

The power of attorney should be given to someone close, reliable, trustworthy, and competent to manage your affairs, such as a child or spouse. In other cases, the power may be given to a corporate entity.

If the power of attorney grants the agent the authority to do all acts that a principal could do, the agent has the general authority to carry out 13 specific powers described in chapter 244. The authority to make gifts; create, amend, revoke, or terminate an inter vivos trust; create or change rights of survivorship, and create beneficiary designations are not included in the general authority and must be written as special instructions.

The power of attorney is effective immediately upon signing, unless the principal specifically states that it become effective at a future date or occurrence that will activate the powers, such as his or her incapacity.

In addition to delegating the powers of financial management, a durable power of attorney may be used to appoint a guardian in the event one is needed.

In the past, the durable power of attorney for finances was used to delegate health care powers to the agent. These could have included the powers to sign medical consents, authorize surgical procedures, employ and discharge medical personnel, and release and obtain medical records.

This practice has become less common — and is not recommended — since Wisconsin has enacted legislation creating separate powers of attorney for health care.

The statutory Power of Attorney for Finance and Property names the principal, agent, and any successor agents. The principal must sign the power of attorney, or another individual, in the principal's conscious presence and at the principal's direction, must sign the principal's name. A principal's signature is presumed to be genuine when acknowledged before a notary. It must be notarized. You can nominate a guardian of the person and a guardian of the estate, and an alternate if the first agent is not able or willing to serve.

Since some third parties such as investment firms, U.S. military services, and Social Security may not permit use of this document, check for special requirements they may impose.

Keep a copy with your legal papers. Give a copy to your agent and custodians of your assets, such as financial institutions. If you revoke these powers, you must inform any third party who received a copy or has acted under it.

**Caution:** Any time you give a power of attorney to someone, be aware of the extent of the powers you are giving and be sure the person is someone you trust not to abuse these powers.

### Power of attorney for health care

Legislation enacted in 1990 allows individuals to appoint a person to act on their behalf if they are unable to make health care decisions. Planning in advance of need permits a person to maintain autonomy over future health care decisions and prevents possible court involvement.

Wisconsin has **no** next-of-kin statute delegating decision-making power to family members. If you become unable to make health care decisions, the court will appoint a guardian to make decisions for your benefit. These decisions may not be those you would make.

To avoid this situation, a Wisconsin resident must authorize an agent to act on his or her behalf. The power of attorney for health care authorizes the agent to make specific health care decisions in all medical circumstances when the patient cannot.

Appoint as your **agent** a person you trust, such as a friend or family member. You cannot appoint a doctor or anyone involved in your health care — unless that person is a relative. An assertive person who shares values similar to yours and lives in your geographic area will be in a good position to monitor your health care actively, ask the right questions, and ensure that your wishes are followed. It is also a good idea to indicate an alternate agent in case the original health care agent is unable or unwilling to serve.

Discuss the responsibilities with whomever you select, clearly indicating your preferences and the kinds of decisions he or she may have to make.

A power of attorney is a voluntary relationship with an individual personally selecting the substitute decision-maker. In a power of attorney for health care, the health care agent “stands in the patient's shoes” when making decisions, authorizing treatment plans according to the patient's previously expressed wishes.

In contrast, a court-appointed guardian is not presumed to know what the patient would want, and therefore must act only in the patient's best interests as defined by the courts.

Statutory forms are available, but you do not have to use these for the power of attorney for health care to be legal or for your health care providers to be protected when honoring them. However, any document you sign must meet all basic legal requirements.

In some areas of the state, local health care providers have developed forms specific to their institution's guidelines. Check with your physician for what is applicable where you live.

The power of attorney for health care can be drafted to be all-encompassing and can include instructions often found in a living will. The power of attorney for health care does not cancel a previously executed **living will** or **Declaration to Physicians** (the statutory living will form).

However, if you have a living will, it should be consistent with the power of attorney for health care. It is possible for the documents to contradict each other.

In Wisconsin, you must take particular care to be consistent in both documents in specifying under what conditions you do or do not want “feeding tubes.” If you do not eliminate the potential contradiction, while the power of attorney for health care document supersedes the living will, the confusion may result in neither document being honored.

Some experts advise that you leave blank the “Statement of Desires, Special Provisions or Limitations.” By doing so, you avoid creating inconsistencies. A better idea is to discuss your wishes in depth with your agent.

If you choose to use the state form, make decisions (checkoffs) about:

1. Admission to nursing home or community-based residential facility for other than recuperative or respite care. Note that if you check yes, you are helping avoid guardianship.
2. Provision to withhold or withdraw **feeding tubes** — medical tubes through which nutrition or hydration is administered into the vein, stomach, nose, or mouth.
3. Health care decisions for pregnant women.

If you do not specifically authorize your agent to make these decisions, the law prohibits your agent from acting in these areas.

In addition to authorizing your agent to act in these respects, you may also specify criteria to use in judging when you are incapacitated, what decisions your health care agent may **not** make, and whether to make anatomical gifts. Unless otherwise specified in the document, two physicians or one doctor and one licensed psychologist determine incapacity. Mere old age, eccentricity, or disability — singly or together — are insufficient to make a finding of incapacity.

Two persons are required to witness the power of attorney for health care. They cannot be relatives, persons who are entitled to or have a claim to your estate, your doctor, or others directly involved in your care. A chaplain or social worker may serve as a witness.

Give a copy of the document to your physician and a copy to the person you are appointing as health care agent. You may choose to give copies to family members, your attorney, and the person who holds power of attorney for your financial matters. In most counties, a copy may also be deposited for safekeeping at the **county probate office**. As with the financial power of attorney, it is important that you review and re-execute your health care power of attorney every five years or so, to ensure that third parties will accept the document.

### **Access to medical, hospital, and health care records**

Written consent is required to authorize your agent, personal representative, power of attorney for health care, family member(s), or designee to ensure they have access to review and receive your medical, hospital, and health care records, including any “protected health information” as defined by the Federal Health Insurance Portability and Accountability Act (HIPAA). This release document must specifically designate your person(s) of choice as your “personal representative” with all the authority granted to a personal representative under HIPAA and all applicable state and federal laws.

### **Living will (Declaration to Physicians)**

A living will is a written document that expresses a person’s beliefs regarding the use of medical treatments, feeding tubes, and procedures to prolong life if the patient has an incurable injury, terminal illness, or is in a **persistent vegetative state**.

**Life-sustaining procedures** include machines to help breathing, medications to maintain the heart and blood pressure, blood transfusion, kidney dialysis, and other similar procedures.

The person signing the document may direct whether life-sustaining procedures and feeding tubes should be used in terminal or vegetative conditions (as determined by two physicians).

The statutory form **cannot** be used to authorize withholding or withdrawing any treatment or life-sustaining measures if it will cause pain or discomfort.

The **declarant** — the person who makes a living will — must be of sound mind and at least 18 years of age. The living will must be written and signed by the declarant in the presence of two witnesses. If the declarant is physically unable to sign the document, it must be signed in the declarant’s name by one of the witnesses or some other person at the declarant’s express direction and in his or her presence.

Witnesses may not be related to the declarant by blood, marriage, or adoption, entitled to any portion of the declarant’s estate, or directly financially responsible for the declarant’s health care. While a witness cannot be a health care provider or an employee of the health care provider or of the inpatient health care facility serving the declarant, a witness **can** be the facility’s chaplain or social worker.

A living will is important in two respects:

- It makes the declarant's physician aware of his or her desires regarding the use of life-sustaining procedures and feeding tubes.
- Its guidance relieves the survivors of the guilt involved in making life-and-death decisions.

If you are considering advance directives related to health care, carefully compare the living will and the power of attorney for health care.

Health professionals generally recognize the power of attorney for health care as the more comprehensive document. It allows decisions to be made by an agent you have appointed and directed to deal with a broad range of health care issues, including nursing home admission and pregnancy restrictions (see Power of attorney for health care, page 45).

As with the power of attorney for health care document, copies of a living will are also considered valid. Any living will continues to be valid, but only the new statutory form incorporates the new rules. Give a copy of the document to your health care provider.

For a statutory form of the living will (Declaration to Physicians) and power of attorney for health care, send a self-addressed, double-stamped, business envelope (No. 10) to:

**Division of Health  
Attn: POA  
P.O. Box 2659  
Madison, WI, 53701-2659**

These forms are also available online:

**[www.dhs.wisconsin.gov/forms/  
advdirectives/adformspoa.htm](http://www.dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm)**

Or contact your physician for a copy of these forms from their institution.

### **Do not resuscitate orders**

Capable adults have the right to make their own health care decisions. If they cannot communicate their treatment preferences, their Declaration to Physicians (Wisconsin statutory living will) and power of attorney for health care can be used.

However, the wishes expressed in these documents may not always be available, may not clearly apply to a given situation, and cannot be used by non-physicians such as paramedics and first responders. Because of this, those providing care may in good faith initiate or withhold treatment that may be medically inappropriate or contrary to the patient's wishes.

Having a power of attorney for health care or living will does not affect the actions of emergency service providers.

In Wisconsin, if you do not want first responders or emergency services to attempt CPR (cardiopulmonary resuscitation), speak with your physician about obtaining a written "do not resuscitate" order.

A Do Not Resuscitate (DNR) bracelet is another advance directive that only deals with CPR. Emergency personnel are trained to look for this bracelet and will comply with the patient's wishes. This bracelet does not replace the need for or importance of the power of attorney for health care.

The person requesting the Wisconsin DNR bracelet must be at least 18 years old, and the person's physician (licensed in Wisconsin) must determine that the person meets one of three criteria. These criteria are:

1. The person has a terminal condition.
2. The person has a medical condition such that, were the person to suffer a cardiac or pulmonary failure, resuscitation would be unsuccessful in restoring cardiac or respiratory function or the person would expe-

rience repeated cardiac or pulmonary failure within a short period before death occurs.

3. The person would be caused significant physical pain or harm that would outweigh the possibilities that resuscitation would successfully restore cardiac or respiratory function for an indefinite period of time.

### **Authorization for final disposition**

The Authorization for Final Disposition statutory form is designed to allow persons to appoint a representative to make decisions about the final disposition of their bodies after death. The representative has control to carry out the declarant's preferences for such arrangements as funeral, memorial service, burial, viewing, cremation, cemetery, and donation of body.

The document is legally binding when correctly completed and signed by the declarant, representative, and two witnesses or a notary public.

### **Guardianship**

A court declares **guardianship** when a person known as the **ward** is under age or declared incompetent. Based on the ward's age or medical testimony of the ward's doctor, the court determines that the ward is incompetent and appoints a guardian to administer the ward's assets and debts. A guardian may also be given decision-making power for health care and well-being.

A guardianship is typically established when a minor under age 18 receives property or when an elderly person becomes incompetent. A court may appoint both a:

- **guardian of the person**, who is responsible for the ward's physical well-being

- **guardian of the estate**, who is responsible for the ward's assets and debts

The guardian must file an inventory of all the ward's property, as well as an annual accounting of all receipts and disbursements of the ward's property.

Once established, a guardianship ceases upon the ward's death or when the ward reaches age 18. In rare circumstances, a guardianship may also be terminated if the ward regains his or her competency.

Guardianship can be an expensive, time-consuming, humiliating process. In the case of minors, it can be avoided by using a trust. In the case of the elderly, it can be avoided by using properly drafted durable powers of attorney (see pages 44–45) or a trust.

Under special circumstances, guardianship may still be desirable to obtain funding for services in your own home or placement in a community-based residential facility (CBRF).

## Planning ahead

### Choosing a lawyer

Lawyers provide a wide range of services, from simple will drafting to defending complex lawsuits. Many people think that lawyers are only for the rich and powerful and avoid finding a lawyer until they absolutely need one.

However, legal help is available without enormous fees or frustration. A good lawyer helps clients avoid legal problems before they arise, thus saving them money. Lawyers can give basic information about rights and remedies under the law and engage in preventive counseling to help clients avoid lawsuits.

Not all legal problems require an attorney's services. To narrow your issues and focus your concerns, seek information from a government agency, insurance agent, banker, accountant, or marriage counselor before going to a lawyer.

#### **The State Bar of Wisconsin**

provides lawyer referral and legal information toll-free:

(800) 362-9082

In Madison, call: 257-4666

Or visit their web site:

<http://www.wisbar.org/forpublic/ineedalawyer/pages/i-need-a-lawyer.aspx>

An attorney's services may be necessary when you are writing or probating a will, defending against criminal or traffic charges, defending or pursuing civil lawsuits, seeking or contesting a divorce, buying or selling a house, creating a small business, settling or litigating insurance claims, changing your name, or thinking about tax planning.

Estate planning demands knowledge of many areas, including property law, tax law, and probate law. Frequently, attorneys who work in estate planning will be specialists in these areas. If you need planning beyond the scope of a simple will, attorneys such as a family lawyer or litigation lawyer may not feel qualified to give you advice.

However, a trusted family lawyer can refer you to an estate planning specialist. Whether you need a specialist depends on the size and extent of your estate and special family circumstances.

Selecting a lawyer for estate planning may involve meeting with a number of lawyers in person and selecting one with whom you feel comfortable. Some lawyers are willing to talk to you by telephone for 15 minutes or so at no charge. Others prefer an office conference and charge an initial consultation fee, usually for a half-hour or an hour. During that time, you should be able to get the information you need about the type of work the lawyer does.

Don't be afraid to ask questions. Remember that you are doing the hiring. You are under no obligation to hire a lawyer after this initial interview. But you should not expect to get specific advice until you contract with the lawyer to work for you. Be sure to inquire about the lawyer's fees and how they will be computed.

## Selecting a financial advisory team

Choosing reliable financial advisors is an important step in formulating a financial plan. The individual or couple engaging in financial planning must determine which components of the plan require outside help, depending on their own experience and knowledge. Many individuals and firms offer specialized information.

To get started, you may consult the phone book under listings such as banks, attorneys, accountants, insurance agents, investment advisors, financial planners or consultants, tax advisors, and tax preparers. Some of these advisors will even list the services they provide. Some may offer low-cost or free seminars on financial topics.

A better idea is to work from referrals. Ask for recommendations from trusted professionals with whom you have contact, as well as from friends, work colleagues, and family.

Check with your high school, technical school, college, or university for course listings. Your county UW-Extension office is also a good source of family financial management information.

Compare costs and services. An advisor should be honest, well-informed, and have the time and interest to answer your initial questions. Before talking with an advisor, list the services you need.

If the services required are extensive, meet in person to see what it would be like to work with that person.

Although it is not appropriate to seek free financial advice at an initial meeting or telephone interview, it is appropriate to ask many questions and to make it clear that you are in the process of deciding whom to hire. Don't feel pressured into engaging the advisor based on the first interview.

The following questions may be useful to ask a financial advisor:

- What services do you (or your institution or agency) offer, and how much do they cost?
- How will I be billed for the services?
- Is there an initial fee or retainer for engaging your services?
- Do you earn a commission if I buy certain products or make certain investments?
- How long have you (or your agency or trust department) been in business?
- What is your background in this field — both experience and education?
- Do you have the official certification offered in your field?

You will also want to ask specific questions about the type of service you are investigating. For example, if you are talking to a banker about a loan, ask how long the bank takes to approve loans and whether accounts or minimum deposits are required.

If you are considering buying insurance, an agent should be willing to explain cost and coverage differences between companies, as well as the company's policies and coverage. If you are seeking the services of a tax professional, ask if the firm or advisor provides year-round services and if the fee for preparing a tax return includes the cost of an audit.

**Financial planners** usually offer to coordinate all aspects of their client's financial life — budgeting, insurance, investments, taxes, and retirement and estate planning. Some individuals are certified and use the designation **Certified Financial Planner (CFP)<sup>®</sup>** when they have passed a series of tests offered by the College of Financial Planning in Denver, Colorado.

Always ask whether a planner is certified and about his or her educational background and experience in the field. Find out if you will be charged an hourly rate or a flat fee, or if the planner will be paid a commission on products you buy such as insurance or investments.

**adjusted gross estate** — Value of the gross estate minus certain allowable deductions.

**advance directive** — Legal document by which competent adults can retain some control over decisions made on their behalf in the event they are no longer able to do so. Advance directives for health care, such as living will and power of attorney for health care documents, authorize medical decisions. Others, such as living trust and power of attorney for finances documents, authorize financial decisions.

**affidavit** — Written statement sworn to before an authorized official.

**agency** — Relationship between two or more people permitting one person to act on behalf of another. This often refers to power to withdraw funds from a bank account, called an agency account.

**agent** — Person authorized to act for another.

**annuity** — Right to receive money at regular intervals for the life of the recipient or for a specified period of time.

**appreciation** — Increase in value due to inflation or improvements made on property.

**attorney-in-fact** — Agent for power of attorney for finances can be anyone (and not necessarily an attorney-at-law) with special powers to act for or on behalf of the principal in various financial matters. See agent.

**basis** — Amount paid for an asset. Basis is used to calculate income tax gain upon sale of the asset.

**beneficiary** — Person who receives a share of a decedent's estate through a will, trust benefits, or life insurance proceeds.

**bequest** — Property distributed by a will.

**bona fide** — Good faith, as in purchasing marital property.

**closely held business** — Sole proprietorship or a partnership or a corporation of which the shareholder owns 20 percent or more, and there are 15 or fewer partners or shareholders.

**codicil** — Amendment to a valid will, made separately and with the same formalities as the will itself.

**completed transfer** — Wisconsin gift and inheritance tax concept that created a joint ownership that required the signatures of all joint owners of a joint tenancy to transfer ownership to a third party.

**consideration** — Payment in money, services, or trade.

**decedent** — Person who has died; the deceased person.

**deferred marital property** — Property acquired during marriage but before Wisconsin's marital property laws applied to the couple, and which would have been marital property had it been acquired under Wisconsin's marital property system; that is, property acquired during the marriage but before January 1, 1986, or before the couple established domicile in Wisconsin. Such assets are treated as individual property during the marriage. The surviving spouse may elect to treat these assets as marital property at the owner spouse's death. This is a subset of unclassified property.

**determination date** — Date on which marital property law begins to apply to a married couple. For Wisconsin residents married on or before December 31, 1985, it is January 1, 1986. For couples moving into Wisconsin after January 1, 1986, it is the date they both establish a domicile in the state. For Wisconsin residents who marry after January 1, 1986, it is the date of their marriage. For same-sex couples, the determination date may be determined by when they were married, where they lived, or the October 6, 2014 U.S. Supreme Court ruling on the legitimacy of same-sex marriage in Wisconsin.

**digital property** — An electronic record in which a person has a right or interest

**estate** — Decedent's property. The probate estate refers to the property subject to probate; the taxable estate refers to property subject to estate taxes. See also gross estate, life estate.

**fee simple** — Ownership of land with unrestricted right to lease, sell, mortgage, or transfer in any way during one's lifetime.

**fiduciary** — One who holds something in trust for another; trustee. See personal representative.

**future interest** — Right, title, or legal share in property that takes effect in the future, such as the right to receive the interest income from a trust.

**gift** — Lifetime transfer of property for less than full consideration.

**good faith duty** — Duty of each spouse under the Wisconsin Marital Property Act to act sincerely, honestly, and in a manner believed to be in or not opposed to the best economic interests of the marriage and the property interests of the other spouse.

**gross estate** — Total value of all property, real or personal, that the decedent owned at the time of death.

**heir** — One who inherits property.

**improvements** — Valuable additions made to property (usually real estate) amounting to more than mere repairs.

**incidents of ownership** — Power to change beneficiaries, surrender, cancel, assign, pledge, or borrow on a life insurance policy.

**incomplete transfer** — Wisconsin gift and inheritance tax concept that created a joint ownership in a joint tenancy that did not require the signatures of all named joint owners to withdraw or transfer.



**individual property** — Assets that belong entirely to one spouse only. This includes: (a) assets acquired before the marriage; (b) assets acquired during the marriage by gift or inheritance from a third party to one spouse; (c) assets that spouses agree are individual in marital property agreements; and (d) assets proven to be individual assets.

**intangible personal property** — Property rights represented by a document such as a stock certificate, bond, or promissory note that is merely evidence of value.

**inter vivos gift** — Made during the owner's lifetime.

**interest** — (a) Right, title, or legal share in property; (b) Price paid for borrowed money or received from savings.

**intestacy** — Circumstance of having died without a valid will. Wisconsin laws of intestacy determine who will receive the property of a Wisconsin resident who dies intestate.

**intestate** — Having died without a valid will. Wisconsin intestate succession designates the order of heirs when there is no will (see Appendix).

**issue** — Offspring: children, grandchildren, and others directly descending from a common ancestor.

**joinder** — If title of property owned by two or more people is held in the conjunctive — if **and** rather than **or** connects the names — all parties manage and control the asset. All parties must sign the appropriate documents to sell, lease, encumber, or dispose of the property.

**joint tenancy** — Title in the names of two or more people where, upon the death of one owner or joint tenant, the property automatically passes to the surviving owner(s) or joint tenant(s).

**lien** — Claim against property as security for payment of a debt.

**life estate** — Ownership in land or interest in a trust limited to the lifetime of a particular person, usually the person who owns the property.

**life tenant** — Person who owns the life estate.

**liquidity** — Money or assets easily converted to cash upon death to pay estate taxes, administration expenses, and family expenses.

**litigation** — Dispute in a court of law.

**living trust** — Trust established during the creator's lifetime.

**management and control** — Right to buy, sell, use, or otherwise deal with property.

**marital deduction** — Deduction(s) that can be taken in determining gift and estate tax liabilities when property is transferred to a spouse.

**marital property** — Assets acquired during the marriage as a result of efforts of one or both spouses. This includes: (a) wages, commissions, and bonuses; (b) assets purchased with wages and income and appreciation of those assets; (c) income (dividends and interest) of all property spouses own, including their individual property; (d) substantial appreciation of individual property through substantial labor of either spouse; (e) assets that the spouses agree are marital property in marital property agreements; and (f) assets that cannot be proven to be individual.

**mixed property** — Assets that are part individual and part marital property, if the individual component can be traced (otherwise considered marital). An example of a mixed asset is a \$10,000 boat purchased with \$5,000 of individual cash and \$5,000 of marital cash.

**net intestate estate** — The decedent's net estate that is not disposed of by will.

**net probate estate** — All property subject to probate administration after allowable expenses, debts, and deductions are subtracted.

**nonprobate property** — Property not subject to probate. This includes: (a) jointly owned real property, joint bank accounts, and joint certificates of deposit; (b) life insurance proceeds paid to a named beneficiary; (c) U.S. Savings Bonds registered to co-owners; (d) U.S. Savings Bonds, bank accounts, and certificates of deposit in the decedent's name made payable-on-death (POD) or transfer-on-death (TOD) to another; and (e) most property held in trust.

**personal property** — All property not permanently in place but temporary or movable. In general, this includes all property that is not real property. Tangible personal property includes belongings such as cash, cars, furnishings, appliances, and clothing. Intangible personal property includes contracts such as partnerships or corporations, or claims against them, such as mortgages or checking and savings accounts.

**personal representative** — Person or corporate fiduciary appointed by will or the probate court to administer the decedent's probate estate; special administrator of an estate, formerly called the executor of a will.

**power of appointment** — Limited power to control property disposition or transfer without complete ownership.

**power of attorney** — Legal right to act in another's behalf.

**principal** — (a) Person giving the power of attorney to an agent, empowering that agent to act on his or her behalf; (b) Capital or main body of an estate or financial holding, as distinguished from the interest or revenue from it.

**probate** — Court-supervised procedure during which title of property a decedent owned is transferred to the appropriate recipient(s), the decedent's debts are paid, and any estate taxes are paid.

**probate estate** — Real and personal property a decedent owned solely as a tenant-in-common or as marital property that is not disposed of at death by contract or operation of law. See net probate estate.

**property** — Property may include: (a) personal property, such as cars, clothing, jewelry, stocks, bonds, furniture, and digital property; and (b) real property, such as homes, vacation lots, and condominiums. Under Wisconsin marital property law, there are two basic property classifications — marital and individual. Mixed, deferred, and survivorship marital property are variations of the basic types.

**real property** — Land and permanently attached improvements.

**remainder interest** — Right to own property after a life estate terminates.

**representation** — Method of estate distribution where the issue of a deceased heir divide that person's share of the estate.

**reverse mortgage** — Homeowner converts a portion of his or her home equity into cash without having to sell the home or pay additional monthly bills.

**right of survivorship** — Ownership rights that result in acquiring title to property by surviving other co-owners. This usually refers to rights that exist in property held in joint tenancy or as survivorship marital property.

**securities** — Evidence of a debt or property, such as a stock certificate or a bond.

**summary assignment** — Procedure used to settle small estates when no spouse or minor children survive and assets exceed liabilities.

**summary settlement** — Procedure used to settle small estates when a spouse or children survive or assets are less than liabilities.

**surety bond** — Security for fulfilling an obligation.

**tangible property** — Property that itself has value rather than merely evidence of value.

**taxable estate** — Adjusted gross estate minus the marital deduction and certain charitable donations.

**taxable transfer** — Transfer of property subject to gift, inheritance, or estate tax.

**tenancy-in-common** — Title in the names of two or more people with no right of survivorship. That is, each person owns an undivided interest in the entire property, and that interest passes by will, trust, marital property agreement, or intestate succession.

**term insurance** — Life insurance without a savings feature that is in effect for a specified time period.

**testamentary trust** — Trust created by a will.

**testator** — Maker of the will.

**title or title document** — Evidence of ownership, such as a deed, certificate of title, bill of sale, etc.

**tracing** — Process of showing that all or part of an asset was acquired with property that was originally individual property and remained such over time.

**trust** — Form of property ownership where title of the property is held by a trustee (individual or corporate fiduciary) who has the duty to administer the trust for the benefit of the people named as the trust's beneficiaries. A trust is established by a written agreement between the trustee and person who is transferring property to the trust.

**UTMA** — The Uniform Transfers to Minors Act allows a person to give property to a minor child by transferring it to a custodian who holds and administers the gift for the minor until the minor reaches age 21.

**unclassified property** — Property acquired during marriage and before the later date: January 1, 1986, or the date the couple established domicile in Wisconsin. Unclassified property includes both deferred marital property and deferred individual property.

**unilaterally** — Under Wisconsin marital property law, without a spouse's permission or agreement.

**WMPA** — The Wisconsin Marital Property Act, which took effect on January 1, 1986.

**whole life insurance** — Life insurance combined with a savings plan that stays in effect until death unless cancelled or surrendered.

**will** — Legal statement directing the distribution of a person's property upon death. Also last will and testament.

## **AARP**

Membership organization for those 50 years and older:

(866) 448-3611 (Wisconsin)  
(888) 687-2277 (national office)  
(877) 434-7598 (TTY)

[www.aarp.org](http://www.aarp.org)  
[www.aarp.org/espanol](http://www.aarp.org/espanol) (Spanish)

## **Alzheimer's Association**

(800) 272-3900 (24-hour helpline)  
(312) 335-8700 (national office)  
(866) 403-3073 (TDD)

[www.alz.org](http://www.alz.org)

## **Bureau of Indian Affairs (BIA)**

Probating estates for all American Indians owning trust property; important documents include tribal enrollment information, certificate of Indian blood degree, family history information including names and death dates of all spouses, children and grandchildren. The BIA can help draft wills for those owning trust property. For all tribes in Wisconsin, contact:

**Great Lakes Agency  
Bureau of Indian Affairs  
916 W. Lakeshore Dr.  
Ashland, WI 54806  
(715) 682-4527**

## **Center for Medicare Advocacy, Inc.**

(860) 456-7790  
[www.medicareadvocacy.org](http://www.medicareadvocacy.org)

## **Centers for Medicare and Medicaid Services**

(800) 633-4227, (877) 486-2048 (TTY)  
[www.cms.gov](http://www.cms.gov)

## **Coalition of Wisconsin Aging Groups (CWAG)**

Provides information and advocacy on legislative issues. CWAG's Elder Law Center provides legal services and resources through benefit specialists. Information on Medicaid (Medical Assistance in Wisconsin, or Title 19) also available.

(800) 422-2596  
(608) 224-0606 (Madison)

[cwagwisconsin.org/elder-law-center](http://cwagwisconsin.org/elder-law-center)

## **eXtension**

eXtension is an online source of objective, research-based knowledge:

<http://articles.extension.org/pages/8626/financial-security-estate-planning>

## **Greater Wisconsin Agency of Aging Resources (GWAAR)**

1414 MacArthur Rd., Suite A  
Madison, WI 53714  
(608) 243-5670  
[www.gwaar.org](http://www.gwaar.org)

## **Internal Revenue Service**

(800) 829-1040  
(800) 829-4059 (TDD)  
(800) 829-3676 (IRS forms and publications; allow 2 weeks)  
[www.irs.gov](http://www.irs.gov)  
[www.irs.gov/es/spanish](http://www.irs.gov/es/spanish)

## **Justice in Aging**

(202) 289-6976  
[www.nsclc.org](http://www.nsclc.org)

## **National Academy of Elder Law Attorneys**

(703) 942-5711  
[www.naela.org](http://www.naela.org)

## **Probate forms**

Available from your county Register in Probate office:  
<https://www.wicourts.gov/forms1/circuit/index.htm#probate>

## **Social Security Administration**

(800) 772-1213  
(800) 325-0778 (TTY)  
[www.ssa.gov](http://www.ssa.gov)

## **State Bar of Wisconsin**

Lawyer referral, legal information, and publications:  
(800) 728-7788  
(608) 257-3838 (Madison)  
[www.wisbar.org](http://www.wisbar.org)

## **UW-Madison Division of Extension**

Your connection to university faculty, research, and resources, located in every county:

<https://extension.wisc.edu>  
Find your county Extension office:  
<https://counties.extension.wisc.edu>

## **Division of Extension publications**

Educational programs and publications on family financial management:

*Our Family Records* (B2369)

Available at the Learning Store:  
(877) 947-7827  
<https://learningstore.extension.wisc.edu>

## **"Who Gets Grandma's Yellow Pie Plate?"**

Information on inheriting tangible personal property:  
[www.yellowpieplate.umn.edu](http://www.yellowpieplate.umn.edu)

## **Wisconsin Department of Health Services (DHS)**

(608) 266-1865  
TTY: 711 or (800) 947-3529  
[www.dhs.wisconsin.gov](http://www.dhs.wisconsin.gov)

## **Advanced directives**

These forms (living will, power of attorney for health care, power of attorney for finance and property, authorization for final disposition) are available at [www.dhs.wisconsin.gov/forms/advdirectives](http://www.dhs.wisconsin.gov/forms/advdirectives), and through

**Power of Attorney  
Division of Public Health  
P.O. Box 2659  
Madison, WI 53701**

## **Wisconsin Department of Revenue**

State tax forms, information, publications:  
[www.revenue.wi.gov](http://www.revenue.wi.gov)

## **Wisconsin Office of the Commissioner of Insurance**

125 S. Webster St., Madison, WI 53703  
(608) 266-3585 (Madison)  
(800) 236-8517 (statewide)  
711 (TDD; ask for 608-266-3586)  
[oci.wi.gov](http://oci.wi.gov)

## **Wisconsin Registrar of Deeds Association**

[www.wrdaonline.org](http://www.wrdaonline.org)

Reference to products and services is neither intended to endorse them nor to exclude others that may be similar. These are listed as a convenience to readers. Availability is subject to change.

If you do not have a computer, try your public library. Most libraries have computers connected to the Internet available for free.

# Appendix

## Order of intestate succession in Wisconsin

Wisconsin laws of intestacy determine the order of heirs when a Wisconsin resident dies **intestate** — without a valid will (see Intestate succession flow chart on the next page).

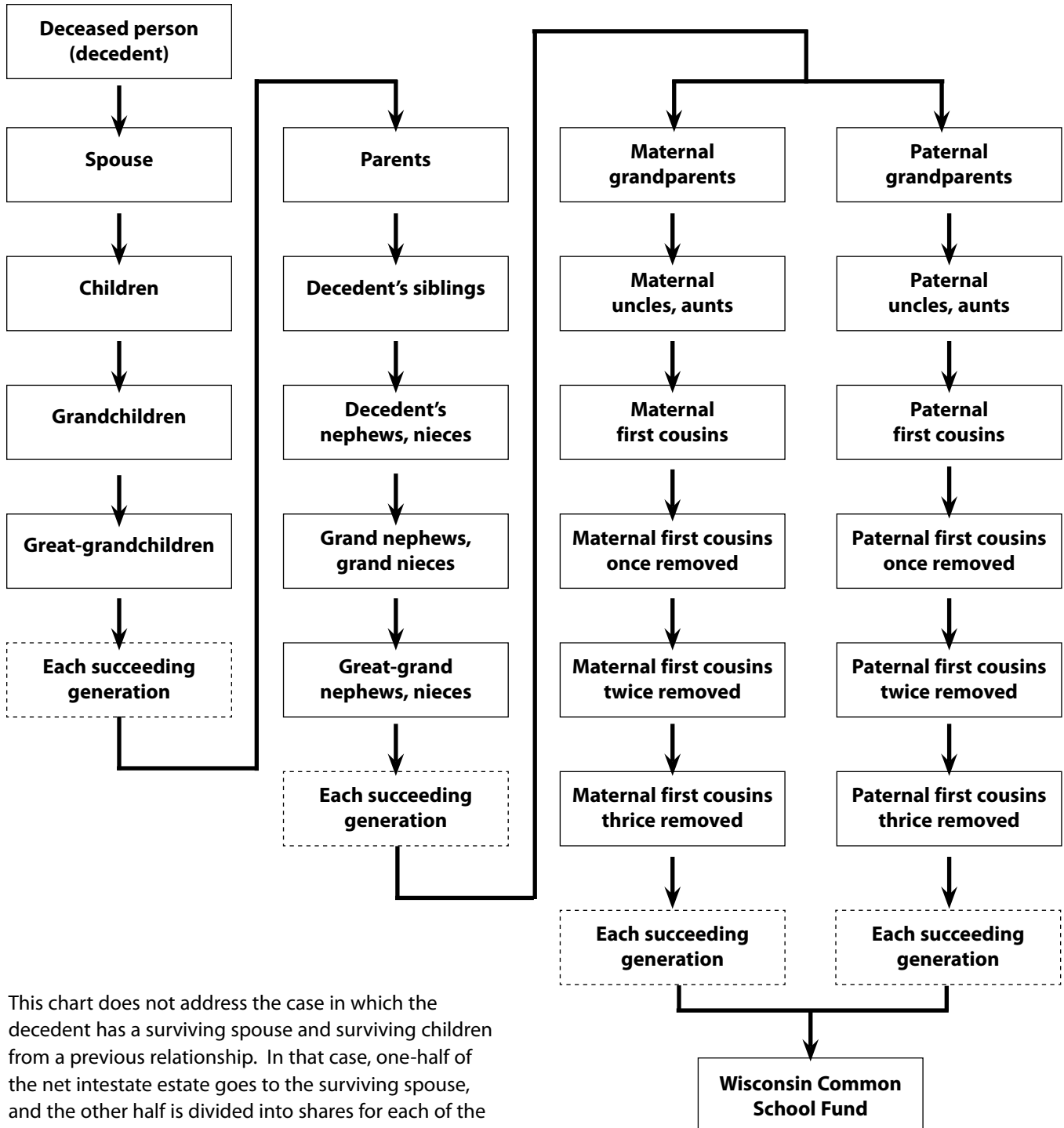
1. If no children survive or if the only surviving children are also the surviving spouse's, the **surviving spouse** takes all.
2. If the decedent's surviving children are not the surviving spouse's, the **surviving spouse** receives one-half of the marital property and one-half of the decedent's property. The remaining estate is shared equally by **all of the decedent's children**. Issue of a deceased child take that child's share.
3. If no spouse survives, the estate is divided into equal shares for each of the **decedent's children** who survive or has issue who survive. Issue of a deceased child take that child's share.
4. If neither the decedent's spouse nor issue survive, the **decedent's parents** take all.
5. If no spouse, issue, or parent survives, the estate is divided into equal shares for each of the **decedent's siblings** who survive or has issue who survive. Issue of a deceased sibling take that sibling's share.

6. If there is no surviving spouse, issue, or parent of the decedent and no issue of the parents:
  - One-half of the estate goes to the **decedent's maternal grandparents** equally and the other half goes to the **decedent's paternal grandparents** equally.
  - If only one **maternal grandparent** survives, one-half goes to that grandparent. The other half goes equally to the decedent's paternal grandparents.
  - If only one **paternal grandparent** survives, one-half the estate goes to that grandparent and the other half goes equally to the decedent's maternal grandparents.
7. If there is no surviving spouse, issue, or parent of the decedent, no issue of the parents, and no maternal grandparents, one-half goes to the **maternal grandparents' issue**. Similarly, if there are no paternal grandparents, one-half goes to the **paternal grandparents' issue**. The deceased grandparents' share is divided among issue as the estate is divided among the deceased parents' issue (see #5).
8. If there is no surviving spouse, issue, or parent of the decedent, no issue of the parents, and no maternal grandparents or issue of maternal grandparents, the **paternal grandparents or their issue** take all. If the maternal grandparents or their issue survive but there are no surviving paternal grandparents or their issue, the **maternal grand-parents or their issue** take all.

9. If there is no surviving spouse, issue, parent, or grandparent of the decedent and no issue of parents or grandparents, the estate goes to the **State of Wisconsin** and is added to the capital of the Common School Fund administered by the Board of Commissioners of Public Lands.

# Intestate succession flow chart

This chart shows the order of distributing the **net intestate estate** (after debts and taxes are paid) when a Wisconsin resident dies without a valid will.



This chart does not address the case in which the decedent has a surviving spouse and surviving children from a previous relationship. In that case, one-half of the net intestate estate goes to the surviving spouse, and the other half is divided into shares for each of the decedent's children.



## Extension

UNIVERSITY OF WISCONSIN-MADISON

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