

MARITAL PROPERTY FIRST-YEAR PROPERTY STYLE

1. What are the property consequences of getting married? Think about it; we'll come back to it. Here are the things to think about:
 - a. Death
 - b. Taxes
 - c. Liability for debt
 - d. Divorce
 - e. Pensions (both private and public systems, e.g., Social Security)
2. G → A. A is
 - a. a man
 - b. a womanmarried to B. (Assume that same-sex marriages are not legally recognized.) How does the fact that A is married to B affect the interests of both A and B:
 - a. at common law prior to the Married Women's Property Act (MWPA)?
 - b. at common law after the MWPA?
 - c. under community property?
3. G → "to A, B, and C as joint tenants." (Problem #19, p. S231) A → D, and then dies survived by his widow E to whom he was married at the time of the initial grant. What if E were a widower rather than a widow?
4. G → le. A → rdr B. (Problem #18, p. S228). A and B are married to C and D. The life estate is not subject to dower or curtesy but is to *iure uxoris*. The rdr is not subject dower or curtesy because not seised.
5. G → "A and B, husband and wife." (Problem #20, p. S231) B → D.

How does this come out if the jurisdiction has passed a MWPA?
[We dealt with this yesterday; now we add the conveyance to D.]
6. (Hans Linde replaces O'Connell) *Beal*—marital property for the unmarried? What form of action is this? The court does not say. There are some suggestions that it was a partition proceeding, and that would make sense, but since partition did not take place, it is probably a quiet title action, which had the effect of being an action for an accounting. Apparently Oregon will allow some form of accounting even when there is no partition; many states will not. What are the principles?

- a. Intent of the parties is to prevail.
- b. Equity will adjust the contributions. In this case:
- c. While they were living together, equal shares despite the fact that Raymond paid almost all of the carrying charges. (Barabara is, however, entitled to a contribution for the greater amount of the down payment that she paid.)
- d. After Barbara moved out, she must pay half of the carrying charges but gets an offset for the rental value.

7. *Jezo* (1964)— A man in the building business followed the practice of keeping all the assets of the business in joint tenancy with his wife. She made some contributions from her own funds and did some work in the office (for which she was paid), but according to accountants no more than 15% of the purchase price of the assets came from her funds. After forty years of marriage, the husband sued for divorce, but the suit was dismissed on the ground of condonation. He then sued for partition and argued that the assets should be divided on an 80/20 basis. The wife argued for 50/50.

Here’s what the court said: “The rule is, therefore, that the interests of joint tenants being equal during their lives, a presumption arises that upon dissolution of the joint tenancy during the lives of the cotenants, each is entitled to an equal share of the proceeds. This presumption is subject to rebuttal, however, and does not prevent proof from being introduced that the respective holdings and interests of the parties are unequal. The presumption may be rebutted by evidence showing the source of the actual cash outlay at the time of acquisition, the intent of the cotenant creating the joint tenancy to make a gift of the half interest to the other cotenant, unequal contribution by way of money or services, unequal expenditures in improving the property or freeing it from encumbrances and clouds, or other evidence raising inferences contrary to the idea of equal interest in the joint estate.”

In grappling with the application of these principles within a marriage, the Wisconsin court held that, except as dower or curtesy rights were involved, the parties should be treated the same as unmarried individuals—using the court’s term “strangers.”

8. *Beal* and *Jezo* contrasted. The underlying principle in what both *Beal* and *Jezo* courts were doing is sometimes called a “resulting trust.” Where the deed shares do not correspond to the contributions that each party made to creating those shares, the party who contributed less will be deemed to hold a portion of his/her share in trust for the one who contributed more. Particularly in the case of married couples or close relatives, however, this has to be balanced against the possibility that the party who contributed more intended to make a gift to the party who contributed less.

In *Jezo*, the court remakes the shares on the basis of the original contributions. In *Beal*, the court keeps the shares but calls for contributions between the parties. This difference can lead to a substantial difference in result when the value of the asset changes. The *Jezo* approach gives a greater proportion of the increase (or decrease) in value to the party who gets the larger share; the *Beal* approach does not. Under the *Beal* approach the parties share equally in any increase or decrease in value.

Today in Wisconsin, Mr. Jezo probably would have gotten his divorce; Mrs. Jezo could not rely on inchoate dower, but the property would have been subject to “equitable distribution.” For more about what probably would happen in Wisconsin today, see below. All of these assets would probably have been subject to a new form of marital property, very much like community property.

9. Here’s what has happened in Wisconsin:

(1) The creation of a joint tenancy is determined by the intent expressed in the document of title, instrument of transfer or bill of sale. Any of the following constitute an expression of intent to create a joint tenancy: “as joint tenants,” “as joint owners”, “jointly”, “or the survivor”, “with right of survivorship” or any similar phrase **except a phrase similar to “survivorship marital property”**.

(“Survivorship marital property” is marital property as defined under the 1986 (ch. 766) statute with the additional feature that it is not divided upon the death of the first to die but passes entirely to the surviving spouse.)

(2) If persons named as owners in a document of title, transferees in an instrument of transfer or buyers in a bill of sale are described in the document, instrument or bill of sale as husband and wife, or are in fact husband and wife, they are joint tenants, unless the intent to create a tenancy in common is expressed in the document, instrument or bill of sale. **This subsection applies to property acquired before January 1, 1986, and, if ch. 766 does not apply when the property is acquired, to property acquired on or after January 1, 1986.**

(Ch. 766 was put into the law in 1986. It completely rewrites the Wisconsin system of marital property making it close to, perhaps the same as, community property.)

(2m) Domestic partners. If persons named as owners in a document of title, transferees in an instrument of transfer, or buyers in a bill of sale are described in the document, instrument, or bill of sale as domestic partners under ch. 770, or are in fact domestic partners under ch. 770, they are joint tenants, unless the intent to create a tenancy in common is expressed in the document, instrument, or bill of sale.

(Ch. 770 was put into the law in 2009. It applies only to same-sex individuals who live together, are not more closely related than second cousins, and are not married or in a domestic partnership with someone

else. This is interesting for a number of reasons, not the least of which is that Wisconsin has a defense of marriage constitutional amendment. This is even more interesting because in 2014 Wisconsin's defense of marriage constitutional amendment was held unconstitutional under the federal constitution in *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis.), *aff'd*, 766 F.3d 648, cert. denied, 135 S. Ct. 316 (2014). The SCOTUS ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) makes it likely that this ruling will stick, and may (but who knows?) make Wisc.'s domestic partnership arrangement irrelevant.)

(5) The common law requirements of unity of title and time for creation of a joint tenancy are abolished.

10. *Ciani*. After a considerable amount of pulling and hauling, Mass. has adopted, for the most part, the UPC. As *Ciani* points out, it did not adopt it with regard to spousal share, with predictable results that came to fruition last summer in the case. What would Ms. Ciani have gotten if the UPC spousal share provisions had been adopted? UPC § 2-201 and 2-202. The amount of the elective share of the surviving spouse is determined by how long the marriage lasted, but it can go up to 50%. We do not know how long this marriage lasted. What the surviving spouse gets as an elective share is value, not a legal interest in specific property or a beneficial interest in a trust. It includes the augmented estate, the value of which we do not know. As a piece of statutory interpretation, I have little doubt that *Ciani* is right. As a practical solution to the problem, it is, as the court points out, a mess. What to focus on is legal life estate and the mandatory trust of personal property. The Ciani's should have gone to see a lawyer before they got married. This situation was ripe for the mess that was created.
11. Common law and community property, some notes on where we are and where we're going. [I gave you some well-drafted statutes; I don't expect you to remember all the details; what's the main point?] Why is marital property important? An answer to the question what are the property consequences of getting married:
 - a. Undertaker (death)
 - b. Tax collector (taxes)
 - c. Angry creditor (liability for debt)
 - d. Failed marriage counselor (divorce)
 - e. AARP (retirement, both private and public systems, e.g., Social Security)

Obviously, one could devote a whole course to this. The remarkable thing about this list, other than (e), is that they all deal with times of crisis, not with the normal. The lawyer arrives with the undertaker, the tax collector, the angry creditor, the failed

marriage counselor, and, to a somewhat lesser extent, the AARP. We've focused on a couple of rather specific problems that give you a flavor of it. *Holbrook* deals with divorce, and on the fact that the lawyers who do it aren't always up-to-speed on setting up airtight transactions. *Beal* raises the question of separating marital property from marriage. That problem was anticipated as early as *Haas* and *Moe*. In all three cases, people tried to do something that they could have done easily if they were married and ended up with a real botch. More recent years have seen the rise of the issue of what is marriage.

12. Explain our marital property system to an intelligent foreigner.
 - a. 41 states common-law, i.e., separate marital property; 8 perhaps 9 states community property Louisiana, Texas, Arizona, New Mexico, California, Nevada, Washington, Idaho, perhaps Wisconsin. What's the difference between the two?
 - b. The tension between communitarian and separateness ideas remains. Mary Ann Glendon offers a strong point of view. She wrote that piece some time ago; I'm not sure that she would say the same thing today.

The point of this discussion is that the dividing line between so-called 'common-law, separate property' states and community property states is becoming increasingly blurred. One may legitimately ask how different the common-law states are from the separate property states when in the common-law states: (a) the surviving spouse has the right to a substantial unbarrable share of his/her spouse's estate; (b) the couple has the power to file a tax return that includes both of their incomes, and a considerable financial incentive to do so; (c) the couple may be contractually liable for each other's debts; (d) the couple's property will be subject to 'equitable distribution' in the event of a divorce; and (e) neither of them (by public regulation) may make major changes in their private pension plans without the consent of the other.