

SUBJECT: Wisconsin's Marital Property Act

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INTRODUCTION

This release applies to all credit unions. It is an introduction to the Wisconsin Marital Property Act ("MPA"), focusing on credit-granting and collections issues.

Parts of this release are based on a 1998 information memorandum prepared by the Wisconsin Legislative Council, entitled "Wisconsin's Marital Property Law: An Overview."

EXECUTIVE SUMMARY

Wisconsin's Marital Property Act was designed to assure equality between spouses. It provides them with equal rights to manage and control their property. It also assures them equal access to credit by requiring creditors to recognize that spouses share rights over certain property and income.

The principal feature of the MPA is that, by operation of law, both spouses have an equal ownership interest in certain property – generally, property acquired by either or both spouses during marriage, including income. This is "marital property." There are some exceptions, such as gifts or inheritances, which are the individual property of the spouse who receives them. Under the MPA, the name on title to property does not determine who owns it. It does help determine, however, who has a right to control the property – that is, whether one spouse, acting alone, can pledge an item of property as collateral, sell it, or otherwise deal with it.

Couples are free to make agreements between themselves that change whether property is classified as individual or marital. Such an agreement can reduce the types of property that may be available to a credit union to satisfy a bad loan – but only if the agreement was made known to the credit union before the loan was made.

The MPA provides that any obligation incurred by a spouse during marriage (i.e., until the date a court grants a final judgment for divorce or legal separation), is *presumed* to be incurred "in the interest of the marriage or the family." This is sometimes called a "family purpose" obligation. If a spouse applies for credit during marriage, and the debt will be incurred in the interest of the marriage or the family, then the credit union *must* determine the applicant's creditworthiness based on *all* marital property available to satisfy that debt, in the same way that it would consider the property that is

available to satisfy an unmarried applicant's debt. This requires the credit union to consider the incomes of both spouses. For example, a spouse who does not work outside the home may apply for credit without the other spouse and still claim the other spouse's income, and all of their marital property, on the credit application. A credit union that fails to consider all available marital property in this situation may be fined up to \$1,000.

But if only one spouse incurs a debt, who can the credit union collect from in case of a default? An obligation incurred in the interest of the marriage or the family may be satisfied from all marital property, no matter which spouse holds the property, and from all other property of the spouse who incurred the debt (regardless of how titled). The individual property of the spouse who did not apply for the loan (such as inheritance money the spouse has received) is not available, but his/her income (which is marital property) can be garnished.

Of course, when a loan is secured by collateral, that collateral is available to satisfy the debt no matter which spouse holds it. And if both spouses are parties to a loan, all of their individual and marital property is available to satisfy the debt. Generally, though, a credit union cannot require both spouses to sign when only one has applied for a loan.

If either or both spouses move out of Wisconsin, or they divorce, or a spouse dies, the credit union's collection rights may be affected. For example, after divorce, the incomes the spouses earn are no longer considered marital property. So, if one spouse incurs a debt in the interest of the marriage or the family during the marriage, the other spouse's income cannot be garnished after a divorce to satisfy the debt. There are exceptions to this rule, depending on the way the divorce court divides responsibility for the spouses' debts.

A compliance checklist is attached as Exhibit A.

KEY POINTS

The MPA is not always easy to understand, so parts of this release are fairly technical. At a minimum, though, the individual responsible for compliance should be familiar with these key points:

Classifying Property

- The MPA presumes that all property owned by spouses is marital property. This includes income either spouse earns during marriage.
- Each spouse has a one-half interest in marital property as soon as it is acquired.
- Some types of property, most importantly gifts and inheritances, are the individual property of the spouse who received them.
- The name(s) appearing on the title to property does not determine whether it is marital or individual property, but it does affect who can manage and control the property. For example, spouses can manage and control an account in the name of "John and Mary" only by acting together.

Classifying Debts / Collections

- Any obligation incurred by a spouse during marriage (i.e., between the marriage date and the date a final judgment for divorce or legal separation is granted), is *presumed* to be incurred "in the interest of the marriage or the family." This is sometimes referred to as a "family purpose" obligation, but that term may create some confusion.
- An obligation, incurred by one spouse in the interest of the marriage or family may be satisfied from all marital property, no matter which spouse holds the property, and from all other property of the incurring spouse (regardless of how titled). The non-obligated spouse's individual property is not available (regardless of how titled).
- A non-applicant spouse does not become personally obligated just because the other spouse incurs a debt in the interest of the marriage or family. It only means that the credit union can reach the couple's marital property – no matter which spouse holds it – for collection purposes.
- During marriage, income earned by the non-incurring spouse can be garnished to satisfy obligations the other spouse incurred in the interest of the marriage or family, because each spouse's income is marital property.
- After divorce, income earned by the non-incurring spouse cannot be garnished to satisfy obligations the other spouse incurred during the marriage in the interest of the marriage or family, unless the divorce judgment provides that the non-incurring spouse is responsible for that particular obligation to the credit union.
- If both spouses signed the note, all individual and marital property of each spouse is available to satisfy the debt.

- When a loan is secured by collateral, that collateral is available to satisfy the debt no matter which spouse is holding it.

Granting Credit

- If one spouse applies for “family purpose” credit during marriage, that, if granted, would be incurred in the interest of the marriage or family, the credit union *must* consider *all* marital property (including both spouse’s income streams) available to satisfy the obligation in the same manner that it considers the property that is available to satisfy an unmarried applicant’s debt. Failing to do so can result in a fine up to \$1,000.
- When a person applies for credit, the credit union may ask whether the person is married, unmarried, or separated under a decree of legal separation. Spouses who live separately while their divorce is pending are still married; they are not “legally separated.”
- Regulation B permits lenders in community property states to request the same information about an applicant’s spouse that may be requested about the applicant. The League's Wisconsin loan application has spaces for spousal information, and requests classification of assets as marital, individual, or “other.”
- Marital property agreements, unilateral statements, and certain court orders can re-classify property as marital or individual, affecting the rights of creditors to recover property if a borrower defaults.
- If a spouse applying for credit discloses the existence of a marital property agreement, unilateral statement or court order, and gives the credit union a copy of it before the credit is granted, the credit union is bound by its terms. Otherwise, the credit union is not bound by it unless the credit union had actual knowledge of it by some other means. Wisconsin Consumer Act loan applications must include a notice of this rule. Advances under an open-end plan, and renewals, extensions, or modifications of closed-end plans are not treated as new loans for purposes of this rule.
- The presumption that a married person’s obligations are incurred in the interest of the marriage or family (which means that all marital property will be available to satisfy the debts) is proven conclusively if the borrower signs a statement of family purpose. A sample statement is included in Exhibit C of this release; The League's loan application (#82083) already includes such a statement.
- The Equal Credit Opportunity Act and Regulation B generally prevent creditors from requiring both spouses to sign a note or credit agreement when only one has requested the credit and is qualified under the credit union’s standards for creditworthiness.
- A written “tattletale” notice of an extension of credit must be provided to a non-applicant spouse before the first payment is due on any Consumer Act loan
- A non-applicant spouse can terminate a Consumer Act open-end credit plan at any time by written notice.
- If a credit union increases the finance charge under an open-end credit plan (requiring notice to the borrower), it must provide notice of the change to both spouses. Otherwise, the increase will not affect the interest of the non-incurring spouse in marital property.

DETERMINATION DATE

The MPA uses the term “determination date” to help define when an obligation was incurred or when property was obtained. The determination date is the date on which the *last* of the following three events occurs:

1. Marriage;
2. Both spouses are domiciled in Wisconsin (i.e., physically here and intending to make Wisconsin their home); or
3. January 1, 1986.

CLASSIFICATION OF PROPERTY OWNED BY SPOUSES

The classification of property – either as marital property or individual property – is fundamental to the MPA. Classification determines the ownership of property, what property is available for satisfaction of debts, and how property is treated when a spouse dies. Title to property is irrelevant to how the property is classified; rather, when and how the property is acquired generally determines its classification. *(Title helps determine who can manage and control property. That issue is discussed below.)*

Marital Property

The MPA presumes that all property owned by spouses is marital property. This means that someone wanting to classify the property as something else has the burden of proving it is not marital property. Each spouse has an undivided one-half interest in each item of marital property, regardless of how it is titled, as soon as the property is acquired. Generally, any property acquired by spouses during the marriage is marital property, unless it is received individually as a gift or inheritance. Marital property includes:

1. Income earned or accrued by a spouse or attributable to the property of a spouse during marriage. (Item 7, under Individual Property, below, lists some exceptions to this rule.)
2. Property acquired in exchange for, or with the proceeds of, marital property.
3. Appreciation of non-marital property that is i) substantial and ii) attributable to the uncompensated, substantial effort of either spouse.

Individual Property

If property is classified as “individual,” it is the property of the spouse who acquired it. Under the marital property law, individual property includes:

1. Property a spouse owned before marriage, but only if the spouses were married on or after January 1, 1986, and both spouses have a Wisconsin domicile at the date of the marriage. *(See the discussion of predetermination date property, below.)*
2. Property acquired by gift or inheritance to one spouse during marriage.
3. Property acquired in exchange for, or with the proceeds of, individual property.
4. Property acquired from appreciation of individual property (except that appreciation is marital property if it is attributable to the uncompensated, substantial effort of either spouse).
5. Property designated as individual property by a marital property agreement.
6. Recovery for personal injury (e.g. court award, insurance settlement). However, marital property includes that part of a personal injury recovery that is reimbursement for loss of income during marriage or for expenses paid from marital property.
7. The following income: (a) income to one spouse from a trust created by a third person, unless the trust provides otherwise; and (b) income attributable to property of a spouse, other than marital property, if the spouse has signed a unilateral statement designating that income as his or her individual property. *(Unilateral statements are described in more detail below, under Reclassification of Property.)*

Predetermination Date Property

Property owned by either spouse, or by both, before a couple’s determination date, is called predetermination date property. This does *not* include property that fits the description in item #1 under individual property, above.

So, for example, predetermination date property would include property acquired by a married couple before the MPA’s effective date (Jan. 1, 1986) or property acquired by spouses in another state who subsequently move to Wisconsin.

Each item of predetermination date property has its own particular aspects of ownership, which attached to it under the law that governed before the determination date. During the marriage, predetermination date property is generally treated as if it were individual property, unless doing so would affect the spouse’s ownership rights that existed before the determination date. One important exception to this rule is that income derived from this property after the determination date is marital property unless a unilateral statement or marital property agreement provides otherwise. Additional provisions of the MPA may affect disposition at death.

Mixed Property

Property of spouses may become “mixed” (i.e., a combination of classifications). Because all property of spouses is presumed to be marital property, if marital property is mixed with property having any other classification, the other property is reclassified as marital property – unless the part that is not marital property can be traced (generally, identified by its source, method and time of acquisition). Special rules apply to insurance policies, which will normally be all marital property or a mixed asset, depending on the date of issuance and the source of premiums. *(Life savings insurance is discussed near the end of this release.)*

Example: Husband receives money as an inheritance, which is individual property. He opens a checking account at his credit union, in his name alone, and deposits the inheritance. Later, however, he deposits his paycheck into that account and writes checks to pay various expenses with the money. The wages either spouse earns during marriage are marital property, so he has now mixed marital and individual property in the account. If this sort of mixing goes on long enough, the individual character of the original deposit may be lost. If so, the entire account becomes marital property. Titling the account in his name has *no* bearing on the classification of the account as marital property. He has an undivided one-half interest in the account, and his wife has the other one-half, even though her name is not shown on the title. (Remember, titling does affect management and control. The terms of the parties' account agreement determine who has access to the account. If the wife's name is not on the account, she cannot make transactions regarding the account, even if it is marital property.)

RECLASSIFYING PROPERTY

The marital property law allows spouses to reclassify their property by several means, listed below. These can reduce or enlarge the property that is available to creditors to satisfy debts. The first three means of reclassification listed below *may* have an adverse effect on creditors: The MPA provides that if a spouse applying for credit discloses the existence of a currently effective marital property agreement, unilateral statement or court decree and provides a copy of it to the creditor before the credit is granted, the creditor is bound by it. Otherwise, a creditor is not bound by a provision of an agreement, statement or decree that adversely affects the creditor unless the creditor had actual knowledge, by some other means, of that provision when the obligation was incurred. A notice to that effect appears on the League's Wisconsin loan application (#82083), as is required by law.

Advances under an open-end plan, and renewals, extensions, or modifications of closed-end plans are not treated as new loans for purposes of this rule. For example, if the credit union receives a copy of a marital property agreement (or unilateral statement, or court decree) after a Kwik-Cash agreement is signed, the agreement, statement or decree has no effect on later Kwik-Cash draws. Likewise, if a marital property agreement is received after an auto loan is granted, it will have no impact on the loan or any later refinancing (as long as no new money is advanced).

Marital Property Agreement

The MPA permits spouses and couples intending to marry to enter into marital property agreements. These agreements can affect, among other things: the classification of property, the spouses' rights to manage and control property, disposition of property at divorce, and disposition of property at death.

A marital property agreement must be in writing signed by both spouses. It does not need to be witnessed or notarized. An agreement may be amended or revoked only by a subsequent marital property agreement. While couples and their attorneys are free to draft marital property agreements as they choose, the MPA contains two basic marital property agreement forms. Under a "statutory terminable marital property classification agreement," spouses reclassify all their property as marital property. Under a "statutory terminable individual property classification agreement," spouses classify their marital property as the individual property of the owning spouse. The statutory agreements can be terminated by one spouse at any time. Termination is prospective, however; it does not affect the classification of property acquired before termination.

Marital property agreements may also be used as "will substitutes" to dispose of property at the death of either spouse without probate; however, they cannot affect the property available for satisfaction of obligations at the death of a spouse unless i) that property was not available for satisfaction under the marital property agreement while both spouses were alive and ii) the agreement is binding on the creditor (i.e., the creditor was given a copy or had actual knowledge of the agreement before the obligation was incurred).

Unilateral Statement

The marital property law permits a spouse, acting alone, to sign a statement classifying as individual property the income attributable to all or some of that spouse's property *other than marital property*. Otherwise, income attributable to non-marital property is generally classified as marital property. Income "attributable to property" includes net rents, interest and dividends from stock (such income is distinguishable from other kinds of income, such as wages or other income resulting from spousal labor). The classification of such income by a unilateral statement is prospective only. The unilateral statement must be in writing, with the signature of the spouse authenticated or acknowledged.

Court Order

One section of the MPA permits a spouse to seek a court order against the other spouse to enlarge or reduce the extent of a spouse's obligations, change the classification of property, or limit creditors' collection rights in certain property. As with marital property agreements and unilateral statements, court orders granted under this MPA provision (Wis. Stats. §766.70) cannot adversely affect creditors who did not receive a copy or have actual knowledge of the order before extending credit. Creditors'

rights that existed before the entry of the order are unaffected. Court orders made under other statutes or rules of law may affect creditors' rights differently.

Gifts Between Spouses

Spouses can reclassify property by gift under the MPA, to the disadvantage of creditors. For example, one spouse can give his/her interest in an item or marital or non-marital property to the other spouse and, by doing so, reclassify the item as the other spouse's individual property. Income attributable to that property would also be individual property. Gift transfers between spouses can be done without notice to creditors. So, unless the gift is a fraudulent conveyance, a creditor cannot disregard the reclassification of the asset by gift from one spouse to the other. This can enlarge or reduce the pool of assets available to creditors.

OPTIONAL WAYS OF HOLDING PROPERTY

Before the MPA, title to property – such as a real estate deed, the certificate of title to a car, a stock certificate, etc. – indicated who owned the property and could deal with it. One of the most important changes under the MPA is that, now, all property of the spouses is presumed to be marital property, regardless of who is named on the title document as owner. Under the MPA, the form in which property is held generally does not determine its classification as marital or individual property; instead, the form in which property is held (i.e., whose name(s) appears on the title, if any) affects who can manage and control the property. *(Management and Control rights are discussed in the next section.)*

“And” or “Or” Forms

The MPA specifically permits spouses to hold marital property in a form that designates them by the words “[*name of spouse*] or [*name of other spouse*] as marital property.” They may also hold the marital property in the “and” form. (e.g., “John Smith and Mary Smith as marital property”). Use of either form, however, does not by itself create a survivorship interest; if survivorship is desired, the words “as survivorship marital property” must be used. *(But also see Joint Accounts and Marital Accounts, below.)*

Survivorship Marital Property

Whether property is held in the “and” or the “or” form, if the words “survivorship marital property” are used on the document of title instead of just “marital property,” then the property is survivorship marital property. When one spouse dies, that spouse's ownership rights in survivorship marital property vest solely in the surviving spouse (without probate) and the property then belongs wholly to the surviving spouse. (By contrast, with *marital property*, the surviving spouse retains his or her undivided one-half interest in each item, and the decedent's one-half interest becomes part of the decedent's estate. The surviving spouse's share in each item of marital property is not subject to probate.)

Homestead Property

A homestead acquired by spouses on or after January 1, 1986, and held exclusively between spouses with no third party, is classified under the marital property law as “survivorship marital property” if no intent to the contrary is expressed on the instrument of transfer or in a marital property agreement. Under Wisconsin law, a mortgage (or other conveyance) of a married person's homestead is not valid unless the document is signed by or on behalf of each spouse. The sole exception is for a purchase money mortgage, where only the purchasing spouse need sign the mortgage. *(See ii Release B033, Required Signatures on Homestead Loans, for more information on loans secured by a homestead.)*

Joint Accounts and Marital Accounts

A married couple can establish joint accounts, in either an “and” or an “or” format, designating how many signatures are necessary to transact business on the account. Funds in the account are presumed to belong to the parties without regard to how much each person contributed. As with any joint account, upon the death of one account holder, ownership of the funds on deposit passes to the surviving joint owner(s). Only upon the deaths of all owners of a joint account does the credit union pay the balance of the account to the surviving POD beneficiary(ies), if any are named. *(See ii Release Nos. 0002 and No. 0004 for more information.)*

The MPA established the right to create “marital accounts.” (Wis. Stats. §705.01(4m).) Some credit unions mistakenly believe that married couples' accounts must be marital accounts. In fact, marital accounts are fairly rare, and many married couples prefer to hold accounts jointly. This is because of the way marital accounts are treated when a spouse dies. While both spouses are living, a marital account operates like a joint account; however, upon death, there is a difference: 50% of the funds on deposit are owned by the survivor and 50% are owned by the estate of the decedent. In other words, the surviving spouse does not receive the full balance when the other spouse dies. Wisconsin law permits each party to a marital account to designate one or more payable on death beneficiaries for that 50% of the account that would otherwise go to the decedent's estate. *(See ii Release Nos. 0002 and No. 0004 for more information.)* [The League no longer offers its Marital Account Ownership Agreement \(#82081\), which included special language the Wisconsin Statutes required to create a marital account.](#)

Joint Tenants and Tenants in Common

Under the MPA, spouses can hold property in any form permitted by other laws. Examples of these forms of property ownership are tenancy in common and joint tenancy. The MPA generally does not affect the operation of the following existing and future joint tenancies, including the survivorship feature, regardless of the classification of any property in the joint tenancy:

1. Joint tenancies created before January 1, 1986, exclusively between spouses.
2. Joint tenancies created before January 1, 1986, in which at least one spouse is a tenant.
3. Joint tenancies created after January 1, 1986, in which at least one spouse and a third party are tenants.

Any attempt to establish a joint tenancy exclusively between spouses after January 1, 1986, is treated under the MPA as establishing survivorship marital property, with some exceptions. The MPA provides rules for tenancies in common exclusively between spouses which are similar to those described above for joint tenancies.

For example, any attempt to establish a tenancy in common exclusively between spouses after January 1, 1986 establishes marital property, with some exceptions.

MANAGEMENT AND CONTROL OF PROPERTY OWNED BY SPOUSES

The MPA defines “management and control” of property 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.

To determine which spouse has authority to manage and control a particular item of property under the marital property law, it is relevant to know i) the classification of the property and ii) who “holds” the property, (i.e., whose name is on the title, if any). Although title to property helps determine who can manage and control it, it does not determine who owns it. In the lending context, it is important for credit unions to understand these rules to help determine what signatures are necessary to grant a security interest or transfer ownership.

Under the MPA, spouses may manage and control marital property held in the names of both spouses in the conjunctive (e.g., “John and Mary”) only by acting together.

A spouse acting **alone** may manage and control:

1. The spouse’s individual property.
2. Marital property held in the spouse’s name alone (except for homesteads, as discussed above).
3. Marital property that is untitled but in the spouse’s possession.
4. Marital property held in the names of both spouses in the “or” form (e.g., “John or Mary”).
5. The MPA provides a specific management and control right where: (1) credit is extended for an obligation incurred in the interest of the marriage or family; and (2) the credit extended is unsecured credit (e.g., a signature loan) or credit secured by a “purchase money security interest” (generally, a credit transaction where the collateral is the property being purchased). For the purpose of obtaining such extensions of credit, a spouse acting alone may manage and control *all the marital property*, except certain business-related property held by the other spouse.

A spouse acting alone cannot manage and control property that is:

1. Titled only in the other spouse’s name.
2. Individual property of the other spouse.
3. Property titled in both names with an “and.”
4. Property titled in both names with neither “and” nor “or.”
5. A homestead, as discussed above.

If marital property has been transferred to a trust, the right to manage and control the property is determined by the terms of the trust.

Special rules apply to the management and control of business property held by one spouse but not the other, such as an interest in a partnership, joint venture, or corporation. Contact the League’s Legal Affairs Department for more information.

GRANTING CREDIT

One general goal of the MPA is to ensure that each spouse has equal access to credit. The MPA made it easier for a spouse to get credit without the other spouse.

“Family Purpose” Obligations (incurred “in the interest of the marriage or the family”)

The MPA refers to obligations incurred “in the interest of the marriage or the family.” This has sometimes been termed a “family purpose” obligation. The MPA provides that any obligation incurred by a spouse during marriage (i.e., between the marriage date and the date a final judgment for divorce or legal separation is granted), is *presumed* to be incurred in the interest of the marriage or family. This means that someone wanting to classify the obligation as something else has the burden of proving it is not a family purpose obligation.

Credit unions generally will want to have a statement separately signed by the applicant spouse at or before the time the obligation is incurred, stating that it is incurred in the interest of the marriage or the family. This is conclusive evidence that an obligation is for a family purpose. A sample statement is included in Exhibit C of this release but The League's loan application (#82083) already includes such a statement. Even if the statement is not obtained, the presumption that an obligation is incurred in the interest of the marriage or family should protect a creditor who has relied in good faith on the applicant's representation of a family purpose.

The presumption that any obligation incurred by a spouse during marriage is in the interest of the marriage or family applies whether or not a consumer transaction is involved. If a consumer transaction is involved, however, the MPA provides that the non-incurring spouse has the same rights and remedies under the Consumer Act as the spouse who incurred the debt.

Remember that where (1) credit is extended for an obligation incurred in the interest of the marriage or family and (2) the credit extended is unsecured credit (e.g., a signature loan) or secured by a “purchase money security interest” (generally, a credit transaction where the collateral is the property being purchased), a spouse acting alone may manage and control *all the marital property* (except certain business-related property held by the other spouse).

Credit Applications

If a spouse applies for credit during marriage which, if granted, will be incurred in the interest of the marriage or family the creditor must consider all marital property available to satisfy the obligation in the same manner that it considers the property that is available to satisfy an unmarried applicant's debt. Since creditworthiness is usually judged on the basis of income stream, this requires the counting of the income of both spouses as available to satisfy the debt. This means, for example, that a spouse who does not work outside the home may apply for credit without the other spouse and still claim the other spouse's income and assets, to the extent they fit the definition of marital property, on the credit application. (Of course, the applicant's non-marital property is to be considered, as well.) A credit union that fails to consider all available marital property in determining the applicant spouse's creditworthiness for an obligation incurred in the interest of the marriage or family may be fined not more than \$1,000, as explained in the next subsection of this release.

For this reason, when a person applies for credit, the credit union may ask whether the person is married, unmarried, or separated under a decree of legal separation. The credit union may request any information concerning the applicant's spouse that may be requested about the applicant, in accordance with Equal Credit Opportunity Act regulations. However, verification of this information may be difficult.

Wisconsin Lending Discrimination Law

It is a violation of Wisconsin's lending discrimination statute (Wis. Stats. §138.20) if the credit union fails to considering the marital property of the non-applicant spouse when a married person applies for credit which, if granted, will be incurred in the interest of the marriage or family.

Violators can be fined up to \$1,000. Each individual who is discriminated against constitutes a separate violation.

For more information, see The League's *ii Release No. B041*.

Signatures

Notes and Credit Agreements: The Equal Credit Opportunity Act and Regulation B generally prevent creditors from requiring both spouses to sign a note or credit agreement when only one has requested the credit and is qualified under the credit union's standards for creditworthiness. If the applicant is not creditworthy, the credit union can request a cosigner or guarantor. The applicant's spouse can cosign, but the credit union cannot require that the spouse be the cosigner. These ECOA rules apply whether or not the loan is incurred in the interest of the marriage or family, business or consumer credit. A spouse's signature may be required for business loans only in the same circumstances that it may be required for other loans.

In consumer transactions, the Wisconsin Consumer Act provides that the applicant spouse must receive a copy of the document that evidences the obligation to pay before any payment is due.

Security Agreements: Even where a married applicant applies for individual credit, when a loan is to be secured by a particular piece of property, a credit union may require any person (including the applicant's spouse) who holds an interest in the property to sign any security agreement or instruments the credit union reasonably believes to be necessary under state law to make that property available to satisfy the debt in the event of default. "Security agreement" includes mortgages, collateral pledge agreements, chattel security agreements, or UCC financial statements. *(See the section on Management and Control, above, to help determine who may pledge an item of property as collateral.)*

Integrated instruments: A credit union may not require the spouse to sign an integrated instrument (which combines the note, security agreement and other disclosures in one document) if the non-applicant spouse's signature could not be required on the note. If a spouse's signature is necessary to reach the property relied on and the credit union habitually uses an integrated form, the credit union should have the spouse sign a separate security agreement instead.

An alternative, found on forms provided by many credit insurance companies, is to have a check box or other indication that the signature applies only to the security agreement, not the note.

Required Notices

A creditor is required to give the non-applicant spouse written notice of an extension of credit to the other spouse (a so-called "tattletale notice") before any payment is due if: (1) the credit is extended in a transaction governed by the Wisconsin Consumer Act (generally, most consumer transactions involving installment credit); and (2) the extension of credit may result in an obligation incurred in the interest of the marriage or family. The notice requirement may be satisfied by providing:

1. A copy of the instrument, document, agreement or contract evidencing the obligation to pay (i.e., the loan agreement);
2. A copy of the credit disclosures given to the applicant; or
3. A brief description of the nature of the credit extended.

Notice is also considered given if the non-applicant spouse has actual knowledge of the credit or waives the notice requirement in a signed writing. Wis. Stats. §766.56(3)(c).

Notice is considered given on the date it is mailed. It can be mailed to the address of the non-applicant spouse, as provided to the credit union by the applicant. If the applicant informs the credit union that the couple lives at the same address, the notice can be enclosed in an envelope addressed to the non-applicant spouse or both spouses. Wis. Stats. §766.56(3)(b).

A cover letter is typically provided on the credit union's letterhead, and might read as follows:

CREDIT NOTICE TO SPOUSE

We recently extended credit to your spouse. As required by Wisconsin law, we are enclosing a copy of the credit agreement or disclosure statement which was signed by or provided to your spouse in connection with this transaction.

The penalty for failing to send the notice is \$25. The notice is not required for modifications, renewals, or extensions of an open or closed-end plan.

The notice is required when an open-end consumer plan is started but not for the individual advances under the plan. Under Wis. Stats. §766.56(3)(a), the notice is not needed for "renewals, extensions, modifications or the use of an open-end credit plan."

Notice on application

A notice is required on consumer loan applications stating that no agreement, unilateral statement, or decree is effective against the creditor unless a copy is delivered or actual notice of the adverse provision is received. Failure to include the notice can result in a penalty of \$25 for each applicant spouse unless the failure was unintentional and resulted from a bona fide error. However, in order to establish a bona fide error, a creditor must show that it had adopted a set of procedures that, if followed, would have avoided the error. The League's Wisconsin loan application (#82083) includes the required notice. The explanation of personal obligation required by the Consumer Act is not required to be furnished to the non-applicant spouse.

Also, in regard to an obligation within the Consumer Act incurred in the interest of the marriage or family, a non-applicant spouse may exercise all the rights and remedies available to the spouse who incurs the obligation, such as the rights to prepay, cancel consumer approval transactions, cure defaults, voluntarily surrender collateral, redeem collateral, and bring actions for Consumer Act violations. The non-applicant spouse is not entitled to a separate notice in regard to these rights, however.

Special Rules for Open End Accounts

If a couple married or moved to Wisconsin after January 1, 1986, new advances incurred in the interest of the marriage or family under a pre-existing open-end plan are treated as family purpose obligations.

The spouse of a person who establishes an open-end credit plan under the Consumer Act that may result in obligations incurred in the interest of the marriage or family can terminate the plan by giving written notice of termination to the creditor. The termination does not affect the liability of the spouse who established the plan or the availability of that spouse's interest in marital property or other property to satisfy obligations incurred under the plan, both before and after notice of termination. The terminating spouse's interest in marital property continues to be available to satisfy "family purpose" obligations incurred before the notice of the termination and within 15 business days after the creditor receives the termination notice, up to the credit limit or the balance outstanding on the date of receipt of the termination notice plus \$500, whichever is greater.

If the documentation permits, the lender may accelerate payments on an open-end plan upon termination. The League's Consumer Kwik-Cash agreements (#82033 and #82033-MLA) have such a provision as do the 1/86 and later revisions of the Consumer R.E.A.P.® Agreements (#82085). However, for R.E.A.P.® and any other home equity line of credit granted on or after November 7, 1989, the credit union may not accelerate payments upon spousal termination, and the member must be allowed to continue monthly payments on the outstanding balance.

If a credit union increases the finance charge under an open-end credit plan (requiring notice to the borrower), it must provide notice of the change to both spouses. Otherwise, the increase will not affect the interest of the non-incurring spouse in marital property.

"During Marriage"

The MPA frequently refers to property obtained or obligations incurred "during marriage." Under the MPA, "during marriage" means that period in which both spouses are domiciled in Wisconsin and begins on the couple's determination date. Spouses are considered married until the marriage is terminated by a decree of dissolution, divorce, annulment, legal separation or separate maintenance.

Some applicants, who live apart from the other spouse and may be in the process of divorcing, believe themselves to be "legally separated." They are not. Spouses become legally separated only when the court issues a final judgment of separation. Legal separation is uncommon. Couples in the process of divorcing are likely to have a *temporary* order from the court that will address such issues as the division of property while the divorce process continues. Until the court issues a *final* judgment of divorce, the spouses remain legally married, no matter how long they have lived separately.

PROPERTY AVAILABLE TO SATISFY OBLIGATIONS

This section summarizes the kinds of property the credit union may reach, if necessary, to satisfy an obligation that was incurred by one of the spouses. Bear in mind these key points:

- ***These rules do not apply if both spouses signed the note.*** In that case, all individual and marital property of each spouse is available to satisfy the debt.
- ***A non-applicant spouse does not become personally obligated just because the other spouse incurs a debt in the interest of the marriage or family.*** It only means that the credit union can reach the couple's marital property (which includes wages either one earns during the marriage) for collection purposes. The other spouse's individual property is not available to satisfy the debt.
- ***When a loan is secured by collateral in accordance with the rules on management and control, that collateral is available to satisfy the debt no matter which spouse is holding it.*** The property described in this section may also be available, in addition to the collateral, to satisfy the obligation.

The way in which a debt incurred by a married person is classified will determine what property the credit union may reach to satisfy the debt. Exhibit B provides a chart that summarizes the property of each spouse that can be reached under the different classifications of obligations described below.

Family Purpose Obligations

An obligation incurred in the interest of the marriage or the family may be satisfied from all marital property, no matter which spouse holds the property, and from all other property of the incurring spouse (regardless of how titled). The non-obligated spouse's individual property and pre-determination date property is not available (regardless of how titled). As explained above, a non-applicant spouse does not become personally obligated just because the other spouse incurs a debt in the interest of the marriage or family.

Pre-Marriage Obligations

An obligation incurred by a person before marriage (whether or not in the interest of the marriage or family) may be satisfied from: i) property of that spouse that is not marital property and from ii) that part of the marital property that would have been property of that spouse but for the marriage. The obligation cannot be satisfied from the non-incurring spouse's individual property or that part of the marital property that would have been the non-incurring spouse's but for the marriage (regardless of how titled). Thus, none of the non-incurring spouse's wages can be reached. These rules also apply to obligations incurred during the marriage that are attributable to an obligation arising before the marriage or to an act or omission occurring before marriage.

Pre-MPA Obligations

If a debtor/creditor relationship existed for a married person in Wisconsin when the MPA became effective (January 1, 1986), but enforcement is sought after that date, (even if the obligation was incurred in the interest of the marriage or family) a creditor can recover only from i) property of the obligated spouse that is not marital property and from ii) that part of marital property which would have been the property of that spouse but for enactment of the MPA. The obligation cannot be satisfied from the non-incurring spouse's individual property or that part of the marital property that would have been the non-incurring spouse's but for the passage of the MPA (regardless of how titled). Thus, none of the non-incurring spouse's wages can be reached.

Other Obligations

This category includes obligations incurred after a couple's determination date for a purpose other than in the interest of the marriage or family. It should be rare for a married person to incur an obligation that is not in the interest of the marriage or family. One example may be a spouse who guarantees the debt of a third party outside the family.

But even this is still subject to the presumption that it is incurred in the interest of the marriage or family. These obligations may be satisfied from any property of the incurring spouse that is not marital property and from the incurring spouse's 50% interest in marital property, *in that order*.

Who Can Be Sued?

Under Wisconsin law (§ 803.045), if the obligation was incurred in the interest of the marriage or family, a credit union can bring an action against the non-incurring spouse if it cannot obtain jurisdiction over the incurring spouse. For all other classifications of debt, a credit union can bring an action against the spouse who incurred the obligation or against both spouses. It is usually preferable to name both spouses. In any case, after a credit union obtains judgment, it can proceed against either spouse to recover marital property.

A credit union that has obtained a judgment can conduct what is known as a supplementary examination, in which the debtor is questioned, under oath, regarding sources of income, assets, etc. The credit union can docket the judgment, which then becomes a lien on the debtor's property. It may also be able to garnish wages and financial accounts. Even if the underlying loan was unsecured, a credit union can try to "execute" on the judgment, a process by which the county sheriff can seize certain kinds of property from the debtor to satisfy the judgment. Credit unions should consult with their own counsel regarding collection options, or contact the League's Legal Affairs Department for more information.

Reporting Delinquencies to a Credit Reporting Agency

As explained above, a non-applicant spouse does not become personally obligated just because the other spouse incurs a debt in the interest of the marriage or family. It only means that the credit union can reach the couple's marital property – no matter which spouse holds it – for collection purposes. Because of the differences in personal liability, it appears that a delinquency would be reported to a credit-reporting agency under the incurring spouse's name only, and not under the non-incurring spouse's name.

CHANGES IN STATUS OF SPOUSE

A change in marital status or marital domicile, or the death of a spouse may trigger default in consumer or non-consumer loans if the event materially impairs (1) the borrower's ability to make payments, or (2) the credit union's rights in any collateral on the loan. League forms include these provisions where appropriate.

These changes may also affect the pool of property that remains available to creditors.

Change in Domicile

Marital property (which is defined above) that is removed to another state maintains its classification and continues to be available to creditors. Marital property maintains its classification even if either or both spouses are no longer domiciled in Wisconsin.

However, property acquired by spouses *after* either or both are no longer domiciled in Wisconsin is governed by the law of the new domicile. If one of the spouses establishes domicile outside Wisconsin, the Act no longer applies to the marriage. This can have a practical effect on a credit union's recovery rights that arose while the spouses were domiciled in Wisconsin. A creditor who relied on the earned income of the non-incurring spouse in granting credit may have substantially diminished rights if both spouses or the spouse generating the income moves to a common law property state.

Divorce and Legal Separation

The rights of creditors to recover marital property do not change simply because spouses start a divorce action, even if they are living apart. But a final judgment of divorce or legal separation can have a significant impact on the pool of assets a creditor can pursue to collect a marital obligation. After divorce (just as during marriage), an obligation incurred in the interest of the marriage or family during the marriage may still be satisfied from all marital property and from all other property of the incurring spouse. However, the incomes earned by the former spouses after a divorce are no longer considered marital property. So, the income the non-incurring spouse earns after a divorce is no longer available (i.e., it cannot be garnished) to satisfy family purpose obligations the other spouse incurred during the marriage. This rule has an exception: A final judgment for divorce or legal separation usually divides responsibility for obligation incurred during the marriage, ordering each ex-spouse to pay certain debts. If the judgment provides that the non-incurring spouse is responsible for particular obligations to the credit union, then the credit union can also recover from the non-incurring spouse's post-divorce income (i.e., by garnishing it) and from any other property as if both spouses had incurred the obligation.

If a non-incurring spouse is assigned former marital property assets under a final judgment of divorce or legal separation, that property can be recovered by creditors just as it was during the marriage, but only "to the extent of the value" the property had on the date of judgment. Any post-judgment appreciation belongs to the spouse who receives the assets.

Death of Spouse

In general, upon the death of a spouse:

- The surviving spouse retains his or her undivided one-half interest in each item of *marital property*. The surviving spouse's share in each item of marital property is not subject to probate.
- The decedent's ownership rights in *survivorship marital property* vest solely in the surviving spouse (without probate) and the property then belongs wholly to the surviving spouse.

The MPA makes an important distinction in the way it treats a non-incurring spouse's income after the other spouse dies vs. after divorce. For obligations incurred in the interest of the marriage or family by the deceased spouse from a creditor who regularly extends credit (which includes credit unions), the subsequent income of the surviving spouse can be garnished to satisfy the obligation. By contrast, after a divorce or legal separation, the MPA prohibits a creditor from garnishing the income of the non-incurring spouse, unless the final judgment of divorce or legal separation provides otherwise.

Other effects of the death of a spouse can be complex. The result varies depending on the classification of the obligation and whether it is the incurring or non-incurring spouse that dies first. For more information, contact the League's Legal Affairs Department.

Life Savings Insurance

The MPA contains special provisions regarding life insurance, including provisions regarding the rights of spouses and the classification of life insurance proceeds. These rules apply to life savings insurance. Many credit unions offer life savings insurance as an incentive for savings. The credit union buys the group insurance from TruStage, which matches the amount in the member's savings account, up to the limits of the policy.

Upon the death of an insured member, TruStage generally pays the insurance proceeds to the credit union, which then pays the proceeds to the designated beneficiary, or, if no beneficiary is named, to the same person who gets the member's savings. The marital property law allows a spouse to consent, in writing, to the designation of another person as the beneficiary of a life insurance policy.

The MPA tells insurers how to deal with any claims that may be made against these life insurance proceeds by a member's spouse, ex-spouse, surviving spouse, or person claiming under a deceased spouse's estate. Payments may be delayed if these claims are made and documented within certain time limits.

It is advisable to obtain the opinion of TruStage on all issues related to life savings insurance.

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League publications are designed to provide accurate information with regard to the subject matter covered, with the understanding that the League does not render legal services. If you have general questions regarding this release, please call The League at (608) 640-4050 if local; or (800) 242-0833. For specific legal advice, please consult your credit union's attorney.

Legal Affairs Department

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EXHIBITS

Exhibit A: Marital Property Compliance Checklist

Exhibit B: Property Available to Satisfy Obligations Incurred by One Spouse

Exhibit C: Sample Declaration of Family Purpose

EXHIBIT A: MARITAL PROPERTY COMPLIANCE CHECKLIST

- Does the credit union obtain at or before the time the obligation is incurred, a statement separately signed by the obligated or incurring spouse that the obligation to which the statement refers is or will be incurred in the interest of the marriage or family? [Wisconsin Statutes § 766.55(1)]
- If a spouse applies for credit that will result in an obligation incurred in the interest of the marriage or family, does the credit union in evaluating the spouse's creditworthiness, consider all marital property available to satisfy the obligation in the same manner that the credit union considers the property of an unmarried individual available to satisfy the obligation? [§ 766.56(1)]
- Does the credit union include in every application for the extension of credit under the Consumer Act a notice that no provision of a marital property agreement, a unilateral statement under § 766.59 or a court decree under § 766.70 adversely affects the interest of the credit union unless the credit union, prior to the time the credit is granted, is furnished a copy of the agreement, statement or decree, or has actual knowledge of the adverse provision when the obligation to the credit union is incurred? [§ 766.56(2)]
- If the applicant spouse provides a copy of an agreement or decree referred to in the preceding question prior to the time credit is granted (or in an open-end plan, prior to the time the plan is entered into), does the credit union in determining creditworthiness abide by the terms of any property classification, characterization of an obligation or management and control report contained in the agreement or decree? [§ 766.56(2)(c)]
- At the time of application, does the credit union inquire as to whether the applicant is married, unmarried or separated, under a decree of legal separation? [§ 766.56(2)(d)]
- If the credit union extends credit to a spouse in a credit transaction governed by the Consumer Act and the extension of credit may result in an obligation incurred in the interest of the marriage or family, does the credit union mail a "tattletale" notice to the non-applicant spouse? [§ 766.56(3)(b)]
- If an obligation is governed by the Consumer Act and is incurred in the interest of the marriage and family, does the credit union allow the non-incurring spouse the same rights and remedies allowed under the Consumer Act? [§ 766.565(3)]
- Does the credit union allow a non-incurring spouse to terminate, by written notice, an open-end credit plan where the obligation was incurred in the interest of the marriage or family? [§ 766.565(5)]
- If a credit union increases the finance charge under an open-end credit plan (which requires notice to the borrower under § 422.415), does it provide notice of the change to both spouses? [§ 766.565(6)]

EXHIBIT B: PROPERTY AVAILABLE TO SATISFY OBLIGATIONS INCURRED BY ONE SPOUSE

The property indicated in this chart is in addition to collateral available under a valid security agreement.
If both spouses signed the note, all individual and marital property of each spouse is available.

Obligations Incurred in The Interest of the Marriage or Family		
<u>Incurring Spouse's</u> Individual/Predetermination Date Property All	Marital Property All (regardless of how titled or who generated it)	<u>Non-Incurring Spouse's</u> Individual/Predetermination Date Property None
Premarital Obligations/Pre-MPA Obligations		
<u>Incurring Spouse's</u> Individual/Predetermination Date Property All	Marital Property All All of that generated by incurring spouse None of that generated by non-incurring spouse (regardless of how titled)	<u>Non-Incurring Spouse's</u> Individual/Predetermination Date Property None
Other Obligations		
<u>Incurring Spouse's</u> Individual/Predetermination Date Property All If this property is not enough to satisfy the debt, then ...	Marital Property ...one-half of each MP item (regardless of how titled or who generated it)	<u>Non-Incurring Spouse's</u> Individual/Predetermination Date Property None

EXHIBIT C: SAMPLE DECLARATION OF FAMILY PURPOSE

DECLARATION OF FAMILY PURPOSE

Loan No. _____ Credit Union _____

Amount Requested _____ Borrower _____

The undersigned acknowledges that credit requested from the Credit Union in the amount of _____
_____ (\$_____)

is, or will be, an obligation incurred during marriage and in the interest of the marriage or the family. This statement is made
in accordance with Wisconsin Statute Section 766.55(1).

Date: _____

Borrower