

Issues Unique to Cabins in Wisconsin

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Issues Unique to Cabins in Wisconsin

I. Special issues for the Minnesota resident wishing to preserve family cabin located in Wisconsin.

A. Real estate transfers.

Author's Note and Acknowledgment. This Section IA on real estate transfers is used with permission by Wisconsin attorney Jesse S. Ishikawa of the Reinhart, Boerner, Van Deuren, S.C. law firm located in Madison, Wisconsin. You are referred to his article in the 2005 MN CLE Real Estate Institute Section 35.

1. Real property taxes.

- a. Background. In Wisconsin, real property taxes are determined by the mil rate multiplied by the assessed value of the real property. Property tax assessments typically are fixed no later than June 1 of every year. The mil rate is not fixed, however, until December of every year. At that time, the real property taxes are levied and the property tax bills are issued, typically around December 10. The property taxes are payable the following year. Although practice varies based on the municipality, typically the property owner can pay the taxes either in one installment due February 28 of the following year, or in two installments, the first of which is due January 31 of the following year and the second of which is due July 31 of the following year.
- b. Example. Blackacre has an assessed value of \$100,000. The assessment is known June 1, 2008. The mil rate is known in early December and is set at 27/1000, resulting in a 2008 real estate tax bill against Blackacre of \$2,700.00. The \$2,700.00 2008 tax bill will be due either in a lump sum due on February 28, 2009 or in two installments, the first due on January 31, 2009 and the second due on July 31, 2009.
- c. Customary payment features.
 - (i) It is customary in Wisconsin that all real estate taxes for the year prior to closing be paid in full at closing.
 - (ii) It is also customary in Wisconsin that all real estate taxes for the year of closing be prorated on a daily basis to

closing, with the seller being responsible for all real estate taxes through the end of the day immediately preceding the closing date, and with the buyer being responsible for all real estate taxes from the closing date through the end of the year. Since, however, the real estate taxes for the year of closing won't be known until December, if the closing occurs prior to the issuance of the tax bill for the year of closing, the custom is for the contract to require that:

- (a) Real estate taxes be prorated based on actual taxes for the preceding year;
 - (b) Real estate taxes be prorated based on the most recently available rate times the most recent assessed value of the property; or
 - (c) Either of methods (a) or (b) with a provision for re-proration post-closing once the actual amount of real estate taxes for the year of closing is known.
2. Special assessments. It is the custom in Wisconsin to require that special assessments that are levied, assessed or for improvements that are commenced prior to the date of the purchase and sale contract are to be paid by seller, with all other special assessments paid by buyer. This is a negotiable point and buyers do try to push for having the cut-off date be the closing date rather than the date of the purchase and sale contract. It is also common to have the seller warrant that it has no notice or knowledge of pending special assessments.
3. Title insurance charges. It is the custom in Wisconsin for the seller to pay the cost of an owner's policy of title insurance and for the buyer to pay the cost of the mortgagee's policy of title insurance. Typically the mortgagee's policy can be obtained for an additional cost of \$75 to \$250. The cost of special endorsements is typically borne by the buyer. Title insurance rates in Wisconsin are unregulated and as a result it pays to shop around.
4. Wisconsin real estate transfer fee.
- a. General. Under Section 77.25, Wis. Stats., a real estate transfer fee of \$3.00 per \$1,000.00 of value (generally the same as the

purchase price) must be paid as a condition to the recording of any conveyance.

- b. Transfer return. A Wisconsin real estate transfer return must be completed and filed with the register of deeds. This is used both to assess the transfer fee and to provide information to the local tax assessor regarding the sales price for use in subsequent real estate tax assessments.
 - c. Exceptions. There are certain exceptions to this requirement, the most common of which are transfers by will, transfers by foreclosure sale, and transfers between certain family members, transfers between family members and their wholly-owned corporations, partnerships and limited liability companies, and leases of less than 99 years. There is no exception for an entity-to-entity transfer, even if both entities are owned by the same person.
5. Recording fees. The fee for recording a document in Wisconsin is \$11.00 for the first page and \$2.00 for each additional page. It is customary for the buyer to pay all recording fees, except for those payable for recording documents necessary to clear title.
6. Real estate disclosure report requirement.
- a. Section 709.01, Wis. Stats. requires that with certain exceptions (conveyances by personal representatives, trustees, conservators and court-appointed or court-supervised fiduciaries, who in any case have never occupied the property transferred), all persons who transfer real property that includes 1 to 4 dwelling units, must comply with certain disclosure requirements, which require that the seller complete and deliver to the buyer a report. Under Section 709.08, the buyer may waive in writing its right to receive the report.
 - b. Under Section 709.02, a prescribed disclosure report must be furnished within 10 days after acceptance of a contract of sale or option contract to the prospective buyer. A buyer who does not receive a report within the 10 days may, within 2 business days after the end of the 10-day period, rescind the contract of sale or option by delivering a written notice of rescission.

- c. Under Section 709.05, if a buyer receives a report after submitting a contract of sale or option contract may rescind within 2 business days after receiving the report if:
 - (i) the report discloses a "defect" (defined in Section 709.03) to mean a condition that would have a significant adverse effect on the value of the property, that would significantly impair the health or safety of future occupants of the property or that, if not repaired, removed or replaced, would significantly shorten or adversely affect the expected normal life of the property); or
 - (ii) the report is incomplete or that contains an inaccurate assertion that an item is not applicable and who is not aware of the defects that the owner failed to disclose.
- d. If, following delivery of the report but prior to acceptance of the contract, the seller learns of any condition that would change a response on the completed report, the seller must furnish to the buyer an amended report. See Section 709.035. Amendments to the disclosure report revive the buyer's right to rescind for a period of 2 business days following delivery of the amendment.
- e. The buyer may NOT rescind the contract if the buyer receives a complete report before submitting the contract of sale or option contract to the owner. See Section 709.05(2)(a).
- f. The buyer may NOT rescind the contract once the buyer has closed. See Section 709.08.
- g. Disclosure form. The form of the disclosure required by Chapter 709 is set forth in Section 709.03, Wis. Stats.

7. Residential leases.

- a. Chapter 704 and Wis. Admin. Code Chapter ATCP 134 contain various and sundry requirements regarding residential leases. These include requirements requiring that water heaters be set no higher than 125 degrees Fahrenheit, that the landlord notify the tenant of automatic renewal provisions, that an out-of-state landlord designate an in-state agent for service of process, that the landlord abide by certain record-keeping requirements, that the landlord make certain specified disclosures to the tenants, that the

landlord provide check-in and check-out forms, that the landlord not charge more than \$20.00 for credit reports, and the like.

- b. Under Bairl v. McTaggart, 201 Wis. 107 (2001), inclusion in a lease of a clause prohibited under Wis. Admin Code § ATCP 134.08 rendered the entire lease unenforceable. Under § ATCP 134.08, no residential lease may:
 - (i) Authorize the eviction or exclusion of a tenant from the premises, other than by judicial eviction procedures.
 - (ii) Provide for an acceleration of rent payments in the event of tenant default or breach of obligations under the rental agreement, or otherwise purport to waive the landlord's obligation to mitigate damages.
 - (iii) Require payment, by the tenant, of attorney's fees or costs incurred by the landlord in any legal action or dispute arising under the rental agreement.
 - (iv) Authorize the landlord or any agent of the landlord to confess judgment against the tenant in any action arising under the lease.
 - (v) Relieve, or purport to relieve the landlord from liability for property damage or personal injury caused by negligent acts or omissions of the landlord.
 - (vi) Impose, or purport to impose liability on a tenant for:
 - (1) Personal injury arising from causes clearly beyond the tenant's control.
 - (2) Property damage caused by natural disasters, or by persons other than the tenant or the tenant's guests or invitees.
- c. In addition, cities, counties and villages sometimes have their own ordinances that provide further restrictions on leasing practices.
- d. Many local boards of realtors have their own approved standard forms of residential leases.

B. Marital [community] property.

1. Background. The 1983 Wis. Act 186 created the Wisconsin Marital Property Act, which is now codified as amended as chapter 766 of the Wisconsin Statutes. The Wisconsin Marital Property Act (herein the "Act") is based significantly on the provisions of the Uniform Marital Property Act, 9A U.L.A. 103 (1998). The Act's effective date was January 1, 1986. The marital property regime applies to married couples at the determination date, a term defined in Section 766.01(5) as follows:

"Determination date" means the last to occur of the following:

- a. Marriage.
- b. 12:01 a.m. on the date that both spouses are domiciled in Wisconsin.
- c. 12:01 a.m. on January 1, 1986.

Generally, marital property consists of wealth created by a spouse's efforts as well as income earned or accrued from a spouse's property during a marriage and after the determination date. Each item of marital property is owned and presents an undivided one-half interest by the spouses. Wis. Stat. § 766.31(3). All property of spouses is presumed to be marital property and is so classified unless proven to be classified otherwise. Wis. Stat. § 766.31(1), (2).

2. Until the commencement of the determination date, which requires both spouses to become domiciliaries of the State of Wisconsin, the Act does not apply. Wis. Stat. § 766.01(5)(b). The Act ceases to apply when one or both of the spouses are no longer domiciled in Wisconsin. Wis. Stat. § 766.03(3). However, the cessation of the application of Chapter 766 because a spouse is no longer domiciled in Wisconsin does not by itself affect any property, right, interest, or remedy acquired under Chapter 766 by either spouse or by a third party. Wis. Stat. § 766.03(3).
3. Predetermination date property.
 - a. Property owned by spouses at a determination date that is either January 1, 1986 or the date when both spouses first are domiciled in Wisconsin is referred to as "predetermination date property." This property is also sometimes referred to as unclassified property. Each item of predetermination date property has its

own characteristics determined under predetermination date law as modified by the Act. Predetermination date property is not a type of individual property.

- b. The general rule for predetermination date property is "except as provided otherwise in this chapter, the enactment of this chapter does not alter the classification and ownership rights of property acquired before the determination date." Wis. Stat. § 766.31(8).

However, for every general rule, there always seems to be exceptions.

- (i) Exception. "The as if individual rule." The first exception to the general rule is that the property is to be treated as if it was individual property during the marriage. Wis. Stat. § 766.31(9).
- (ii) The second exception is that when a spouse who owns or retains certain interests in predetermination date property dies and is survived by the other spouse, the deferred marital property election may apply. Under Wisconsin law, the deferred marital property election applies only at death and not upon dissolution. See Wis. Stat. Ann. § 766.75 Legis. Council Notes - 1985 Act 37, §§ 141 to 143 (West 1993).
- (iii) The third exception is the "income rule," meaning that unless another exception applies, income earned or accrued by a spouse during marriage and after the determination date and attributable to predetermination date property is classified as marital property.

One important exception to this income rule is that distributions to a spouse from a trust created by a third party is the individual property of the spouse to whom it is distributed unless the trust provides otherwise. Wis. Stat. § 766.31(7)(a). Planning tip: This Wisconsin Statute is an advantage to the use of a cabin trust over other techniques for holding family cabin property.

4. Deferred marital property.
 - a. In Wisconsin, deferred marital property is predetermination date property that would have been marital property had the act applied to the couple at the time the property was acquired. Wis. Stat. §§ 851.055, 861.018(2). Wisconsin law allows the surviving spouse to elect to receive a one-half interest in the couple's augmented deferred marital property estate, which consists of both spouses' probate and non-probate deferred marital property, regardless of where the property was acquired, but where the property is located (including real estate located outside of Wisconsin) and includes transfers made to third parties in the two years preceding the death of the first spouse to die. See Wis. Stat. § 861.02-.05. The surviving spouse's augmented deferred marital property estate election is satisfied with a pecuniary amount, rather than on a proportionate basis from each item of property subject to the election. See Wis. Stat. § 861.06-.07. The surviving spouse has no right of election against the deceased spouse individual property, marital property, or deferred individual property. See Wis. Stat. § 861.02.
 - b. *Example 1.* Assume that while the spouses were married but before the determination date (and thus before chapter 766 applied to the spouses), a husband purchased stock titled in his name and used his wages (a marital property asset if chapter 766 had then applied) for the purchase. During marriage and after the determination date (and assuming no reclassification by means provided by the Act), he owns all of the incidents of ownership in that asset that he would have owned if chapter 766 had never been adopted, except that in the absence of a unilateral statement, a court decree or marital property agreement to the contrary, or an interspousal gift, the dividends generated during marriage and after the determination date are classified as marital property. At the husband's death he is survived by his wife. The stock and its dividends accumulated before the determination date and still owned at the husband's death are deferred marital property subject to his wife's elective right under section 861.02.
 - c. *Example 2.* Assume that the husband in Example 1 purchased the stock with property that would have been individual property rather than marital property had chapter 766 then applied. At death, he can dispose of all of the stock and half of the dividends earned and accumulated after the determination date free of any

elective right; the value of the dividends held by the husband at his death but accumulated before the determination date are in his augmented deferred marital property estate subject to his wife's section 861.02 election. In the absence of a unilateral statement, a court decree or marital property agreement to the contrary, or an interspousal gift, half of the dividends held by the husband at his death but accumulated during marriage and after the determination date are owned by his wife.

5. Unintended encroachment of marital property.

- a. Hypothetical. Minnesota domiciled parents transfer their Wisconsin cabin to a LLC and give their three children each a 25% membership interest. One child, a married Wisconsin resident, Bucky, is named as the Manager. Bucky's wife, however, ends up doing all the management activities without remuneration. Five years later, Bucky's wife wants out of the marriage and seeks her marital property interest in the cabin. Does she have a good case? If so, what could have been done differently to keep the cabin held as Bucky's individual property?
- b. Analysis. Bucky's wife does have a good case to claim that the appreciation is a mixed asset. Substantial appreciation of either spouse's property other than marital property due to the substantial undercompensated labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity (often referred to as *efforts*) of *either* spouse in connection with that property is marital property resulting in a mixed asset. Wis. Stat. § 766.63(2). One simple solution would have been to fairly compensate Bucky's wife for her management work.

C. Use of Wisconsin governing law for joint cabin trust.

1. Community property laws are ideally suited for joint revocable trusts. However, as indicated previously in this Article, the Act does not apply to property unless both spouses are domiciled in Wisconsin.
2. Still, there are some advantages available to using a Wisconsin law governed trust for the design of a joint trust, intended to hold Wisconsin real estate.
 - a. No Rule Against Perpetuities. If it is the goal of the trust grantors to keep the property in the family trust for a period longer than the

Minnesota Rule Against Perpetuities would otherwise allow, Wisconsin law is more accommodating. The common law rule against perpetuities is not in force in [Wisconsin]. Wis. Stat. § 700.16(5).

- b. Asset Protection Planning. Wisconsin has no statute comparable to Minnesota Statute 501B.89, which causes a beneficiary's interest in a discretionary trust to be treated as an available asset for eligibility purposes. In fact, the opposite is true. In a Court of Appeals decision dating back to 1994, where a trust created by a third person stated that the principal of the trust, even though available in the trustee's discretion to provide for the needs of beneficiary, the court held that the trust is not an asset to be considered in determining supplemental security income (SSI) related medical assistance (MA) eligibility. Richland County Department of Social Services vs. State of Wisconsin Department of Health and Social Services, 183 Wis.2d 61, 515 N.W.2d 272 (1994).

II. Advantages of changing domicile to Wisconsin to preserve Wisconsin family cabin.

A. Income tax.

State income tax rates are slightly lower in Wisconsin.

Minnesota

Wisconsin

Top bracket is 7.85%

Top bracket is 6.75%

See Appendix A

See Appendix B

B. Capital gains tax.

State capital gains tax rates are much lower in Wisconsin.

Minnesota

Wisconsin

Same rate as income tax;
top bracket is 7.85%

60% exclusion; top bracket
is 2.7%

C. Estate tax.

Wisconsin estate taxes are now "re-coupled" with the federal pick-up tax resulting in there being no Wisconsin estate tax presently, while Minnesota estate taxes remain "decoupled."

Minnesota

\$1,000,000 exemption

Wisconsin

Tax equals federal pick-up tax which presently does not exist. Therefore, there is currently no Wisconsin estate tax. Wis. Stat. §§ 72.01(11m), (11n) and 72.02.

For an illustrative series of examples:

Appendix C shows a \$3,500,000 estate of a Minnesota unmarried resident client which includes a \$1,500,000 Minnesota lake home.

Appendix D is the same facts as in Appendix A, except the \$1,500,000 lake home is located in Wisconsin.

Appendix E now shows the client changing his state of domicile to Wisconsin with the lake home also remaining situated in Wisconsin.

D. Marital property laws.

1. Joint trusts have been used frequently and with tax-favorable results for many years in community property states.
2. Upon the death of the first spouse to die, community property will enjoy a full step-up in basis to all the community property; not just the first spouse to die's half interest. Internal Revenue Code § 1014(a) and (b)(6).

E. Medical assistance laws.

1. Life estates. Life estates are unavailable assets under Wisconsin law. Wis. Dept. of Health Servs., Pub. No. PHC 10030, Medicaid Eligibility Handbook § 16.8.1.5 (2009). Life estates are not subject to recovery or liens. Medicaid Eligibility Handbook § 22.1.4 (2009). See Appendix F for Life Estate Table.
2. Home equity exemption limit. A person shall be ineligible for medical assistance for nursing facility services or other long term care services if the

equity in his or her home and the land used and operated in connection with the home exceeds \$750,000. This home equity limitation does not apply if any of the following persons lawfully resides in the home:

- a. The person's spouse;
- b. The person's child who is under age 21 or who is disabled.

Wis. Stat. § 49.47(4)(bc).

3. Shorter look back period. Except when a trust is involved the Wisconsin look back period remains at 36 months. If a trust is involved the look back period is 60 months. Medicaid Eligibility Handbook § 17.3 (2009).