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Real Estate and Marital Property Questions & Answers

Wisconsin Law

The Wisconsin Marital Property Law, which became effective on January 1, 1986, has a significant impact on the ownership of real estate. The following was developed to address a number of questions which may arise in the context of real estate ownership in Wisconsin.

In order to understand the effects of marital property on the ownership of real estate, the following terms and concepts are important:

Ownership of Property

Under the Marital Property Law, the ownership of property of married persons domiciled in Wisconsin is determined by how and when the property was acquired and not by how it is titled.

Management and Control

The right to manage and control property in ways such as selling, leasing or mortgaging property belongs to the individual or individuals whose name or names appear on the title.

Marital Property

All property owned by spouses is presumed to be marital property unless it is proven to be of a different classification. Income earned from any property that accrues during marriage is marital property. Each spouse owns an undivided 50 percent interest in all marital property.

Individual Property

Property acquired prior to marriage or property acquired by gift or inheritance is individual property. Individual property is owned solely by the spouse in whose name it is titled.

Deferred Marital Property

Property acquired before January 1, 1986, will upon death be of one of the spouses be treated as marital property if it would have been marital property if it had been acquired after January 1, 1986, and if the surviving spouse makes an election to have it treated as marital property.

Mixed Property

Mixing marital property with individual property or deferred marital property results in the mixture being treated as marital property unless the non-marital component can be traced out of the mixture. Because all income earned by individual property is marital property, it is very easy for individual property to become mixed property.

Marital Property Agreements

The Marital Property Law gives couples great flexibility to vary its impact. Couples may agree to alter the ownership or management and control of property in a manner other than indicated under the law.

Here are some frequently asked questions pertaining to the Marital Property Law and real estate:

I am married and purchasing real estate. How should I title it?

There are several options: a) in one name only. The titled spouse will manage and control the property. However, if the funds used to acquire it are marital property (such as wages) then the property will be marital property and the ownership of the property will be shared. b) In the names of "H and W". Both spouses must join together to manage or control the property. c) In the names of "H or W". Either spouse may manage and control the property. d) in addition to the above, a couple may specify in the title whether the asset will be marital property or survivorship marital property.

What is the difference between marital property and survivorship marital property?

Each spouse has an undivided 50 percent interest in marital property and each may will a 50 percent interest to whomever each chooses. On the other hand, survivorship marital property is an asset which passes automatically to the surviving spouse at death and does not go through probate. It cannot be willed to another, but it passes free of the claims of most creditors.

If real estate is purchased with marital assets and it is not specified in the deed whether it is marital property or survivorship marital property, what will it be?

If it is a homestead, it will be survivorship marital property under the Wisconsin Marital Property Law. If it is not homestead property, it will be marital property.

If I enter into a purchase of real estate from the individual whose name is on the title, might I have a problem if the property turns out to be marital property and the untitled spouse objects to the sale?

There will be no problem if the property is not a homestead, as the law protects purchasers. However, if the property is homestead, both spouses must sign the deed conveying the property.

I presently own property in a joint tenancy with my wife. How will the new law affect this?

A joint tenancy established prior to 1986 will continue to have the same attributes. However, where there is a joint tenancy involving appreciated non-homestead property, a couple may want to convert the asset to marital property through a marital agreement and a retitling of the asset for certain tax reasons.

Are there any tax planning techniques I can utilize with real estate under the new law?

Yes, marital property receives a full adjustment in basis to the date of death value of one of the spouses, while a joint tenancy or tenancy in common between spouses established prior to January 1, 1986, would receive only a one-half basis adjustment on the death of a spouse. Therefore, if a couple owns highly appreciated property in joint tenancy or tenancy in common or individually, they may wish to convert it to marital property in order to reduce or eliminate capital gains taxes paid upon the sale of the property.

May managing or repairing individual property such as an apartment building create a marital property interest?

Yes, if one of the spouses works on the property and their work is substantial and uncompensated and the appreciation is substantial, the appreciation will be marital property.

Is there anything which can be done to keep the income generated by an individual property asset from becoming marital property?

A spouse may unilaterally sign a notarized statement which changes the classification of the income of non-marital property from its present treatment as marital property to individual property. Such a unilateral statement avoids mixing as to income generated after the statement is executed. A unilateral statement is effective in the event of a death, but is not of effect in the event of a divorce.

Does a marital property agreement alter the ownership and/or management of real estate?

It may as between spouses, but it will not be binding on third parties such as buyers or creditors unless they have knowledge of the agreement.