P U B L I C M E E T I N G

of the

SSION ON SEX DISCRIMINATION IN THE STATUTES

on

THE WISCONSIN MARITAL PROPERTY REFORM

GUEST SPEAKER:

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MADISON, WISCONSIN

Held:
March 16, 1981
1100 Raymond Blvd., Room 324
Newark, New Jersey

MEMBERS OF COMMISSION PRESENT:

Senator Wynona M. Lipman (Chairperson)
Assemblyman Elliott F. Smith
Phoebe Seham
Theodosia A. Tamborlane
Greta Kiernan
Clara Allen
Willard Heckel

ALSO:

Alma L. Saravia, Executive Director
Commission on Sex Discrimination in the Statutes

Lucy Cerpa
Commission Intern

Timothy Lee
Senate Minority Office

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SENATOR WYNONA M. LIPMAN (Chairperson): This meeting has been advertised according to all the regulations, so we are going to begin now. Alma, will you call the role, please. Senator Lipman.

SENATOR LIPMAN: Here.

MS. SARAVIA: Ms. Tamborlane.

MS. TAMBORLANE: Here.

MS. SARAVIA: Senator Gagliano. (no response) Assemblyman Burstein. (no response) Assemblyman Smith.

ASSEMBLYMAN SMITH: Here.

MS. SARAVIA: Ms. Allen.

MS. ALLEN: Here.

MS. SARAVIA: Ms. Kiernan (no response) Ms. Seham.

MS. SEHAM: Here.

MS. SARAVIA: Professor Heckel.

PROFESSOR HECKEL: Here.

SENATOR LIPMAN: Today we have a guest speaker with us, Professor June Wiesberger from the University of Wisconsin Law School. She is a Professor of Law there. She got her Jurist Doctorate at the University of Chicago Law School in 1963, and she was admitted to the New York and Wisconsin Bars. She teaches Labor Law and Trusts and Estates, and knows quite a bit about the marital partnership-property concept that we are going to discuss today. I think that we should allow Professor Wiesberger to speak, in order to outline her talk uninterrupted, and then when she has laid it out for us, at least the first part of it, we can ask her questions a little later. This is purely out of regard for the transcribers.

Also, when you ask a question, will you be sure that it is clear so that they can get it all down. All right, Professor Wiesberger.

P R O F E S S O R J U N E W I E S B E R G E R: I have a three-page outline which I am not going to follow directly, but I thought it would be helpful in case you have some questions, to have something in hand that you might refer to. So, I will pass this around with the observation, don't expect me to follow it directly, although from time to time I will be referring to it.

I felt that the most helpful way of presenting an awful lot of material to you is really in two parts. The first part is how Wisconsin got to the point it is at now, because I think you will find in our experience some interesting parallels to where you are at. Perhaps then I will answer questions about the next phase in New Jersey, based on the Wisconsin experience. That way, it puts marital property reform, for which I think there is national interest right now, in a perspective that is important. And, since we also have the afternoon, I thought we would be talking more about the technical parts of our bill, which is a comprehensive bill in excess of 90 pages now, at that point.

But, I think the history and the process is perhaps the most important place to start, and I would like to start on a very personal note so that you will find out how we got involved in marital property reform in Wisconsin, and how, specifically, I got involved in marital property reform, because my major area is labor law, although I do teach Trusts and Estates and have taught it since 1974.

The best place to begin, I think, is to tell you that when I moved to Wisconsin in 1974, Wisconsin had already passed the Federal Equal Rights Amendment. But, they failed to pass the State Equal Rights Amendment. At that point, the legislative sponsors who wanted the State Equal Rights Amendment decided that rather than try again, they were going to take a very different tact. They directed a drafting agency, the Legislative Reference Bureau, which is part of the State Legislature, to go through all of Wisconsin's statutes, to make them sex neutral. So, that should sound very familiar to all of you who are members of the Commission with the same mandate.

The process of doing that -- it was a very comprehensive bill that was drafted, but in the drafting process and in the legislative process that followed, the sponsors of that ominous bill in 1975, deliberately omitted three substantive areas. One had to do with rape reform, and since 1975 Wisconsin has a new sexual assault bill that was passed separately from the Omnibus Bill. The second area that was deliberately omitted from the Omnibus 1975 legislation had to do with divorce reform. And, subsequently, in 1977, Wisconsin passed a Divorce Reform Bill, effective in 1978. So, now, for several years, we have had divorce reform in place and well accepted in the State. The third substantive area that was deliberately omitted from the 1975 Omnibus Bill had to do with the rights of spouses during the on-going marriage, and unlike the first two areas, rape reform and divorce reform, where the omission was for political reasons because the sponsors of reform in that area knew where they wanted to go but thought it would be better achieved through separate legislation rather than incorporate it into the more general legislation, marital property reform was somewhat different. There was general recognition of what problems existed in a common-law state, such as Wisconsin, but there was no consensus and no real knowledge about what alternatives were available that should be incorporated in reform legislation.

So, we started out in 1975 with this major reform with the deliberate omission of marital property rights because of a great deal of uncertainty as to what direction the reform legislation should take. Well, the next key event occurred shortly thereafter. At that time, we had a very active governor's commission on the status of women, and the governor's commission took over the responsibility of coordinating resurgent policy review of these alternatives, and I got into it because I said that I would supervise from the Law School's point of view law students who were getting clinical credits, academic credits, for working with the governor's commission on a variety of projects. This was just one of a laundry list of projects.

The governor's commission, prior to 1975, had started to get interested not only in divorce reform, but in broader reform as a result of a series of "speak-outs" that aoccurred throughout the state, in which women were encouraged to come and identify problems that they thought the law, as it presently existed in Wisconsin, presented to them. And, in addition to problems with divorce, there were a number of people who spoke out, saying they were housewives who had problems getting credit, problems at the death of a first spouse as to inheritance taxes on estate level, particularly farm wives. They were very vocal that they were contributers to the marriage and yet the law, during the marriage and at death, did not recognize either in the property laws or the tax laws, their contribution, which was clearly a very formidable

and material contribution in running that farm, as well as businesswomen and others.

So, the governor's commission was the logical coordinating group. They already had an interest. They already had some material to identify the problem. And, we started, very simply, in our search for alternatives with one student working on one project, that was looking at the Uniform Partnership Act, which covers commercial partnerships. The theory was, well maybe there is something in this existing legislation that has been enacted in all states governing commercial partnerships that would be relevant to a marital partnership concept. That first paper was reviewed in a room at the Memorial Student Union in Wisconsin. It was the popover room, and we now have a series of papers known as the popover papers. And, the first one was the Uniform Partnership Act and how relevant was it, or concepts that were contained in that Act, to our marital partnership concepts. They were then very, very much in the initial stage -- very unformulated. And, basically, as a result of that first session, of the first popover paper, there was a great deal of interest in incorporating partnership concepts of the business world into the marital context. However, there was an initial policy decision made then that has never been changed, and I think it is an important one. If there was going to be legislation that paralleled the Uniform Partnership Act, it would only permit couples to opt into it. And, the decision was made by the group that was there, and I should footnote that the group there consisted of legislators, some faculty members, some law students, some practitioners, as well as members of community groups like the League of Women Voters. So, from the very beginning there was an interesting coalition of academics, legislators, and community based groups, as well as practitioners. And, we thought that combination was essential from the very beginning to meet the different questions that would come up from time to time.

The general consensus of that group was that while there were very many valuable ideas in the Uniform Partnership Act, and we should not disregard that as a model, a model which you could only opt into would leave without remedy many people in Wisconsin who we believed, and who believed themselves, deserved a more equitable and comprehensive remedy. So, we put aside for the time being the Uniform Partnership Act, and started looking elsewhere. That is when we started looking very seriously at the eight community property states.

When I want to law school, and I think it is probably pretty true in most law schools in the common law states, when you take a variety of courses like property law, or trusts and estates, you hear mentioned for about two minutes that this is another system of property called community property, but we don't have it, so we don't have to worry about it very much. In most of the case books of trusts and estates, for example, community property takes less than one page. And, we started looking at the community property states in great detail, because none of us, whether we were practitioners or academics or legislators knew very much about it, except some of us may have had relatives who moved in or out of a community property state, or we had clients who may have heard a little bit about it.

Well, the first thing we learned is there is no such thing as an American Community Property System. There is California community property. There

is Washington community property. There is Arizona community property. Each of the community property states, while sharing certain general principles, really had their own distinct system, so there was no one universal answer to any of the questions that came up in our discussions, such as how can you make gifts of community property in a community property state. There were answers all over the map, depending on which jurisdiction.

Well, we, by now, no longer had one student at our high water mark; we had ten students in one sememster working on the various research topics, trying to inform themselves and produce memorandums so that this large group of legislators, pratitioners, academics, and community representatives could find out more about this very different system. And, we liked what we saw. We relized we had to inform ourselves even more, so the research continued for well over a year on what does community property mean in California, in Washington, in each one of the states?

Along with that research we happened to come upon some comparitive law, and we found very interesting that in England, and particularly in Canada, in the late '60's and early 1970's, there was some real interest, some rather widespread interest, in reforming their laws as they related to the on-going rights of the spouses to property during the marriage. And, we started looking at some of the Candaian proposals. At that point we found that in British Columbia, in the early 1970's they had a special group - a commission, I believe - looking into this, and they produced what seemed to us at the time, a very comprehensive, well-thought-out proposal that would change British Columbia from a common law property province, to a community property province, and they had to look at all the problems that came up when you changed from one property system to another, not just at divorce but during the on-going marriage and when the marriage is dissolved at death.

So, we found out there are a number of different models. We also found something I didn't know, which is that in the late 1930's and early 1940's at least six states, including Michigan and Hawaii, that were common law states actually changed to community property. They changed to community property because of the tax advantages at the federal level that couples in a community property state had that common law state couples did not have. And, when the federal tax laws were changed in '48 these states eliminated their community property legislation, leaving some interesting legal problems in their wake about what happens during this period when there was community property in Michigan or Hawaii, etc. But, we found out a lot more as to these various ways of legislative reform. And, we found, incidentially, that Wisconsin had a bill pending before the Wisconsin Legislature about the time the Federal Tax Reform Act of 1948 was passed, and so did New York. So, this was a pretty widespread movement, but for a limited purpose of tax reform, or tax advantage, at a federal level.

Well, having done a lot of the basic research, the shape of a proposed bill for Wisconsin started to take form, and in about 1978, the academic years '78 to '79, a lot of detail work was done as to what should be in Wisconsin Comprehensive Marital Property Reform Bill. At that point, and until very, very recently, we were not calling the system that we were proposing community property for several reasons. We were calling it marital partnership property. First of all, we thought marital partnership property more clearly identified

the concept we had in mind, and therefore we like the name marital partnership property. We also knew that there was a lot of bad aroma to community property in common law states because many people, particularly lawyers, didn't know anything about it. They thought it was a strange exotic system and so we thought we would use marital partnership property to get over that reaction to the use of the label community property.

In the most recent version of the bill, the one that will be introduced into the Wisconsin Legislature, we have found as a practical matter, repeating marital partnership property many times is very cumbersome and so we have changed it to marital property as the concept, but it is a community property proposal, and I think there is no question - in the legislation we say this at the beginning, and clearly present it as a legislative idea - that up front we are basing our system on community property principles.

We also believe that using the phrase marital property makes sense in view of the proposed uniform act that parallels in many ways our proposal. I will get to that a little later, but at the beginning of this year, January, 1981, the Uniform Commissioners who propose reform legislation, or uniform legislation, throughout the country, have produced for public discussion a comprehensive draft of the bill, a uniform marital property act, and they use the phrase marital property for what they are proposing. And, since we are basically proposing the same thing, not only are we making it easier to say, but we are combining into, or hooking up into, a nationally accepted concept.

And, I guess the last reason we are using marital property - and it also gives you some sense of the growth of the idea - is that in many state divorce laws, New York most recently, Illinois before, they use the phrase marital property to distinguish what is the pool of assets that will be subject to division. We don't use it in Wisconsin, but it is now an acceptable term if you read the advance sheets. The headings of many of the cases reported seem to come from community property states, but they are not; they are from states where the marital property concept, at divorce, is already in place, and cases are arising as to interpreting what constitutes marital property and what constitutes separate property. So, we are talking now about a concept which originally was called marital partnership property - which is now called marital property - but which is a community property type system.

By the summer of 1979 we had a bill in draft form, in actual legislative form, indicating what sections were going to be repealed, what sections were going to be modified, what new sections were going to be created. And, at that point we tried to get, prior to introduction, broad input by a variety of groups that would be affected, for example, the State Bar of Wisconsin. We have a mandatory Bar. You must belong to the State Bar in order to practice law in Wisconsin. The State Bar was contacted, specifically a number of the sections of the State Bar that have a substantive interest in this bill. That includes the family law section, the taxation section, the real property probate section, individual rights and responsibilities section, and I believe there were several others which also had a substantive interest. And, the State Bar formed a special sub-committee of the real property and probate section to analyze the legislation in a very detailed way. They hired as a consultant

Professor Effland, from the University of Arizona Law School. Professor Effland had taught at Wisconsin, was known to the State Bar in Wisconsin, was known to be very knowledgeable about Wisconsin law, and now with his special knowledge of Arizona law, having relocated there, he seemed to be an excellent resource person to answer questions as to how things are really done in community property states, and to react, at the committee's request, to various questions.

So, you have the State Bar Special Committee on Marital Property Reform going. I was asked to contact and met several times with special groups, such as the Wisconsin Bankers Association, whose practices would be directly affected; I met with the Wisconsin Merchants Association on a number of occasions. The Wisconsin League of Women Voters, which is a very widespread popular group in Wisconsin, made marital property reform their project and if any of you know the League's policies, they study it one year and take action the second. That was a couple of years ago, and they had some excellent study units that were prepared and distributed widely. And, they have been involved, not only from the very beginning in the popover room papers, but also in a more widespread support study by their membership.

Eventually, something called the Wisconsin Womens' Network was formed to coordinate the groups of supporters, which includes not just League of Women Voters, but the American Association of University Women, several groups of farmers and farmers wives -- a broad spectrum of political support. In a state like Wisconsin, I should say that farmer support, particularly farm wife support, is a very important factor, and farm wives, both at the federal level in getting federal tax relief, and on the state level to get comprehensive relief, have been a very dynamic group, willing to speak out as to why they think the present system is bad and why change is needed. And, they are a very appealing group, as I mentioned earlier.

I probably left out some of the bases that we touched, but all of this was done prior to introduction, and continues to this day. The process of broad input from various groups is not over by any means.

Based on what the initial policy choices were as a result of the research, and based on the input from this broad variety of groups, a bill was introduced in December of 1979. It is Assembly Bill 1090, and that is our initial legislation. Five thousand copies of the bill were made and there are none available now. There was broad distribution.

MS. SARAVIA: Everyone here has one.

PROFESSOR WIESBERGER: Well, AB1090. As you will notice from the impresive array of legislators who sponsored it, those who were interested in Wisconsin marital property reform believed from the very beginning that it should be a bipartisan effort and that the legislators should have the opportunity to be co-sponsors. So, it was introduced, particularly in the Assembly, with over half the Assembly sponsoring it. The legislative process in Wisconsin sends a bill, such as this, off to a committee, and the committee that it was assigned to was the Assembly Judiciary Committee. It was also introduced in the Senate, but the Assembly action went forward at a more rapid rate.

There was a public hearing held on the bill by the Assembly Judiciary Committee in January of 1980, and it was an all-day, well-attended public hearing, with lots of people saying they supported it, and lots of people

saying,"I have these problems with the bill as introduced." It was a very lively public hearing. As a result of the public hearing and as a result of the continuing input by many, many groups, a substitute amendment - Substitute Amendment 4 - was drafted. And, that Amendment was passed by the Assembly Judiciary Committee - Substitute Amendment 4 - on an eleven to two favorable vote. Again, it had bipartisan support, including the minority leader of the Assembly, Assemblyperson Tommy Thompson, who was one of the eleven votes. I think that is important to idicate this is not a partisan issue in Wisconsin, and it has not been from the very beginning.

All right. The Process -- and I will go into some of the changes that were made in the bill as introduced to the Substitute Amendment a little later. But, substantial changes were made, which the sponsors believed did not interfere with the basic principle of accommodating problems that had been raised at the public hearing. And, I think perhaps the biggest one, the only one I will mention now, had to do with coverage. The bill, as originally introduced, had several components. It was perspective, so it would affect not only everyone who was to be married in Wisconsin, or moved into Wisconsin after the effective date, it affected all the property of people already married in Wisconsin as of the effective date, property that they would acquire thereafter. As to previously acquired Wisconsin property by those same already married couples, we had a provision that said that also would be covered by the statute, unless one of the spouses opted out, and we had a notice provision and an opt-out procedure.

That retroactivity provision, as it applied to already acquired Wisconsin property of already married people,produced the greatest controversy, because many estate planners, particularly tax experts,believed it had an adverse tax consequence. If you left all your already acquired property that would be marital under the act to come in under the new provisions, they belived you were making a gift of one-half of that amount, which would be subject to federal taxes, and because of the adverse tax implications that were suggested, plus other reasons, the sponsors, by the time Substitute Amendment 4 was drafted, dropped that aspect of retroactivity. That is how we now handle previously acquired property that Wisconsin couples have as of the effective date.

All right. The bill then went from the Judiciary Committee to Joint Finance, and that is where it was at the end of the 1980 session. The reason it was before Joint Finance is that there were several adverse tax implications of the bill. The bill, from its very beginning, attempted to affect not just property law, but state tax law, and one area of grave concern - almost universal concern, I would say - is that in Wisconsin, as of today, we impose gift and inheritance taxes if property goes from one spouse to another, and there is broad support - I would say unanimous support - for eliminating those inter-spousal transfer taxes, during the marriage or at death.

But, it had another affect, and that was-- The known effect was clearly the cost for the reduction or the elimination of the interspousal transfer taxes. But, when you go from one system, as Wisconsin presently has, of each spouse paying and having income tax liability on their income to a community property, marital partnership concept, you have adverse income tax consequences. In Wisconsin a married couple can file, of course, a federal

joint return, and you have income splitting by the nature of a federal joint income tax return. But, when you come to do your Wisconsin taxes, after you do your federal 1040 form, you have a column that says husband's income and a column called wife's income, and you have to allocate as to who earned it. Well, in a community property system, or a marital property system, the basic concept says that as to earnings, they are owned equally by each spouse, and so if you follow through the tax implications of that, you would permit income splitting and our revenue department estimated there will be an income tax loss of one hundred ten million a year, and that, of course, in these times is completely unacceptable. And, we knew that the rates would have to be adjusted, but as of March of 1980, we had not yet worked out the new rates. Because, of course, once you start talking about changes in income tax rates, there are all sorts of complex considerations that have to be taken into account. In our state that involves special treatment on a federal level. On the state level, capital gains and all sorts of issues unrelated to marital property reform became part of the controversy involving income tax reform.

So, the session ended with the bill before the Joint Finance Committee, knowing that the provision of the bill that directed the Secretary of our State Revenue Department to come forth with new rates would have to be implemented between the time the session ended and the new bill was introduced in this new session.

All right. We have now circulated during this interim period a new draft, and at the present time the bill is in final form ready for introduction, with the legislative sponsors going around with a new draft getting legislative support, we hope along the same lines, at least, as the original support indicated by the number of co-sponsors of Assembly Bill 1090. We have solved the income tax problems by a change in our brackets and rates, that make the entire bill a no-revenue-loss bill. And, we believe that we have made a sufficient adjustment without having too many losers so that the new rates will be acceptable, plus the bottom line is there is no revenue loss. The informal word that Joint Finance has started passing around is that no bill is going to come out of our Joint Finance Committee if it has a cost attached to it. So, the hard times every other state is in we are clearly in ourself.

So, that's where we are now. We are about to have a bill introduced that is a revision of AB1090, and Substitute Amendment 4. The bill will be introduced some time this month, and we will plan to have a public hearing some time in May. The legislative sponsors' timetable has passage in the Assembly sometime in the fall, with Senate passage sometime early next year. I can't evaluate how realistic that is because I have to depend on their judgment. I don't have an independent judgment. The effective date is worked out, so that there is at least a full year prior to the implementation of the act. So, for example, if it is passed by both Houses and signed by the Governor in 1982, the effective date will be January 1, 1984. We believe you need at least a full year for the educational effort that is needed to have those who are going to be directly affected - lawyers, life insurance agents, the whole variety of professionals, as well as people whose rights will be affected under the bill - know about it, know the alternatives, and the consequences of the act.

In this chronology I just want to add two things, because at least I brought you up to date as to where the bill is now. As soon as it is available, I will be glad to supply you all with copies, so that you can see for yourself what the most recent version is like.

I have already mentioned one development, but I think it is awfully important because before the Uniform Marital Property Act was circulated, many people in Wisconsin believed they were part of a national movement, but there were very few visible and tangible signs that we were part of a national movement. I think with the proposed uniform act, you have now a nationally acknowledged group of academics and professionals - practitioners - bringing forth the idea that is basically contained in the Wisconsin legislation. Indeed, they openly acknowledge that many of the provisions come from Wisconsin because we had that much more chance than they have, since they were formed about a year ago, to look into these matters. So, I think to see the importance of the proposed uniform act is a new element that is certainly adding to the political credibility of the proposed Wisconsin legislation.

The other development I want to pick up on concerns our State Bar, because there have been some additional events from the formation of the Marital Property Reform Subcommittee of the State Bar that I think will interest you. The State Bar Committee was primarily composed of people from the Real Property and Probate Section, plus representatives of some of these other sections with substantive interest. They performed, primarily, the function of a line-by-line review, which I openly acknowledge, anytime I have to opportunity to do, has been very, very helpful because they were a very knowledgeable group of practitioners with all sorts of practices, from small rural communities to pretty high-powered practices. So, the benefits of their input, I think, were valuable on that line-by-line scrutiny. Some of the members on that committee believed that while some reform of marital property rights in Wisconsin was necessary, it was too big a leap to take to go into a community property system. They argument was along the line, "surely, we can devise changes in a common law setting that will meet some of the problems you have." They had a little subcommittee going that drafted what they call their alternative bill. Their alternative bill has not yet been introduced, and it is uncertain at this time whether it will be introduced. But, it has support among some members of the Bar.

I would like to describe, after we have talked about some of the other substitutes, what is in the alternative bill. But, I do want to note at this time that our State Bar sections are divided on this. The Family Law section has rejected the alternatives and they support comprehensive reform. Two other sections, the Taxation Section and Individual Rights and Responsibilities believe that the State Bar's support of the alternatives is premature, and probably, they go on to say, an integrated Bar should not take a substantive position on a matter of general public policy, such as this. The only section at this point that is supporting the alternative approach is the Real Property and Probate Section. So, that is where the politics of the State Bar is, but there is an alternative bill, and they think that should be scrutinized by anyone interested in looking at marital property reform because they believe it reflects, although in my judgment inadequate, response to some stated problems. They agree with the sponsors of marital property reform, it should exist in

common law states, like Wisconsin.

This really gets me to the second part, what are these problems? I have told you the process, but very little about the problems. I should begin by saying that In Wisconsin we are not concerned about divorce reform anymore. There are certain minor adjustments that the bill will make to our divorce law, but it is not going to change it. Let me just tell you what our divorce law, since 1978, says, or what is says since the most recent amendments to the Divorce Reform Act of 1980. We separate out gifts and inhereted property, and that is only considered for property division at divorce if there is a hardship, but everything else is put into the pool and there is a statutory presumption of fifty-fifty, except there are certain stated factors that are to be considered, such as length of the marriage, the contribution of a spouse to the education and training of the other spouse -- a whole variety of things, including whether there is a marital agreement that the parties have entered into concerning their property rights. But, basically, Wisconsin has perhaps one of the strongest, broadest -- whichever way you want to describe it -- laws, which says we are broadly going to define the pool of property that is subject to property division at divorce; therefore, the marital property reform bill does not tinker with that very much because as a result of our research we found out that the community property state of Washington has a very similar divorce law. So, we believe our existing law, for which there is widespread support, is compatible with the community property system.

Now, I understand that is not your situation, and I would be glad to talk about what I know about Wisconsin divorce law in practice. But, basically, there is no movement at this point to change Wisconsin divorce law, after that big 1977 reform, as modified by the 1980 trailer bill.

What we are looking at primarily are problems at two critical points. One is at death, when the marriage is dissolved not by divorce but by death; and, perhaps the most important, what happens to property and management and control rights during the on-going marriage?

Now that we have this equal-sharing principle at divorce, there is a very strong argument to say why should a spouse be better off in Wisconsin at divorce than during the on-going marriage or at death? And, that has been a very potent -- the most potent argument we have for marital property reform. It is the argument that the Milwaukee papers picked up as their primary reason for supporting marital property reform. If we believe this is correct public policy at divorce, how can we say to spouses who are adversely affected by the common law system that you are better off divorced than you are during an on-going marriage. Surely, that is not a logical or consistent public policy. Many of the arguments concerning marital property reform start with that very basic proposition: given our existing divorce law reform, shouldn't the entire property and tax system be consistent what that?

All right. At death, in Wisconsin there are several areas of inequity where we believe reform is needed. One has to do with our laws of intestacy, where many people believe, apart from marital property reform concepts, that with marital property reform equal sharing principles, the surviving spouse does not get a sufficient share. But, perhaps the greatest area of dissatisfaction in Wisconsin now at death has to do with the order of death and the various rights that flow or don't flow, depending on which spouse dies first. In

Wisconsin, like all the other common law states, if a spouse dies without any property, the laws of intestacy or the right to will, have no effect. And if you have a traditonal family with one wage earner and one homemaker, if the homemaker dies first, he or she - the homemaking spouse - has nothing to will. The laws of intestacy are academic. That comes as a shock to many people who come in for estate planning as a couple and find out what happens if they die first because they don't have any property rights. Their reaction is rather dramatic. So, one area to look at for remedy is what happens when what we would call the traditional non-property, non-asset-owning, income-producing spouse dies first? Common law states give that person no relief, and under the State Bar alternatives there is still no relief.

If the propertied spouse dies first in a common law state, most states, like Wisconsin, have some sort of modern equivalent of the dower right. In Wisconsin the right to elect, which is what the surviving spouse would choose to do if he or she is not sufficiently provided for under the will when the propertied spouse dies first, equals one-third of probate property only. As those of you who are lawyers or who are involved in this know, it is very easy for some planning to go on that gets most of the property out of the probate estate. So, the right to elect can very well be a meaningless right. And, even where it exists, it is one-third. It is an absolute figure. It doesn't adjust to the length of the marriage. Sometimes one-third may be too much for a very short term marriage with a wealthy surviving spouse. Sometimes it is way inadequate. So, even if the propertied spouse dies first, and there are some rights, the present law in Wisconsin inadequately provides for many surviving spouses -- another problem area.

The biggest problem area, though, is during the on-going marriage, because Wisconsin, like all the other common law property states, basically says if you earn it, you own it and you can decide. If the person who earns and owns the money chooses to make a gift and share, that is their choice; but it is not the right of the other spouse who is contributing in many valuable ways, to receive that property right. And, although joint tenancy property is quite common in Wisconsin, as I assume it is here, again, even joint tenancy does not recognize the rights of the parties. It is still the choice of the person who owns the property to make something joint tenancy or not make it joint tenancy, and very few people have all their property in joint tenancy. Lawyers pull their hair about it. They think it is a terrible estate planning device. But, even for those who want to share and share alike, you have to affirmatively choose on an item by item basis to make these things joint, plus, you have to take out, in many jurisdictions, adverse state gift tax consequence, as well as any federal gift tax consequence. So, a separate property system inherently does not recognize equal ownership rights of either spouses in a traditional marriage with one wage earner, or in the marriage that is now a more common marriage, with two wage earners. Rarely are the two wage earners, for the entire period of the marriage, equal wage earners, so I suggest that marital property reform is not just for homemakers, although it clearly helps homemarkers substantially. But, it is for any marriage, or any portion of a marriage when you have a higher wage earning spouse and a lower wage earning spouse. Because it is our belief, and here you get into principle and philosophy rather than fact, that couples go into marriage

thinking it is a partnership, with a small 'p', not a legal partnership, and it is going to be share and share alike -- that we are going to start acquiring things as 'ours' in a vague sense rather than 'mine' and 'yours', and the law in a separate property state like Wisconsin doesn't recognize that sharing reliance and belief that most couples continue to have when they get married, and during their marriage.

So, the problems we identified during the on-going marriage, first of all, relate to ownership and along with ownership some rights of management and control for both spouses as to property they acquired during the marriage.

The next problem area we identified had to do with individual agreements, because at a very early point we realized that no matter how equitable a property system might be, whether it is a separate property system for equal wage earners, or a community property system for others, couples should have a right to enter into legally-enforceable, individual agreements to vary the terms.

Now, the law in Wisconsin - I don't know New Jersey law on this - has recognized, for the purposes of giving up rights at death, individual agreements if they are signed by the spouses, if there is consideration, and if there has been fair and full disclosure. And, we have also had a limited recognition of agreements between spouses as to how to divide their property at divorce.

But, suppose a couple wants to have a share-and-share-alike agreement during the on-going marriage, and then there comes a point in which one spouse says, "Well, share and share alike was okay up until today, but from now on I don't want to do it." We have no case law that says that is going to be an enforceable agreement. We are at the stage of evolving laws on these individual agreements, and I suggest there are very few jurisdictions which enforce a broad range of agreements. So, we thought any comprehensive bill, indeed the State Bar's alternatives includes a section on individual agreements, should include a broad range of agreements that are legally enforceable. So, that was always a part of marital property reform, not just recognizing partnership concept at death or during the marriage, but also the right of the parties to adjust and tailor, by agreement, the property rights that the state imposes on them to their own needs.

And, the last thing is something that I have already mentioned. From the very beginning, we believed the elimination of state taxes on inter-spousal transfers -- either gift taxes during the life of the spouses or at death -- shoud be eliminated. Incidentally, we are also working for federal reform along these lines, and since 1969 the Treasury Department has been promoting tax-free interspousal transfers at the federal level. From time to time, bills have been introduced into Congress to eliminate that, and we believe that that is what the federal tax should also reflect. Of course, by state legislation we can't directly affect it; we can just work at it as one jurisdiction that believes this is good public policy.

So, I think the identification of the problems is pretty clear cut. Let me talk a little bit about the State Bar alternatives, and then I think I will stop and see if there are any questions or comments at this point before I get into the details of the comprehensive bill.

Two aspects of the State Bar alternative proposal coincides with

the comprehensive bill that I have been involved with. The first has to do with the tax free interspousal transfer. That is very popular in Wisconsin. The Governor's State of the State address put him on line, and he is a Republican Governor with a Democratic Legislature, that this is going to happen -- the tax free interspousal transfers. The State Bar alternative also has a section on individual agreements, the point I just mentioned.

The more controversial aspects have to do with what is going to happen at death, and particularly what is going to happen during the marriage. Under the State Bar alternative proposal, the laws of intestacy have been changed to increase the intestate share of the surviving spouse, and I won't go through the details but there are greater protections at the point of intestacy.

They did recommend, as part of their proposal, a change in the right to elect, but I suggest it is something of a cosmetic change. The right to elect continues under the State Bar alternative bill, but it has been changed from one-third to one-half. Okay? But it does nothing about the pool of assets to which whatever fraction will be applied to. So, you still can transfer out by setting up a revocable trust, and by doing all sorts of things in Wisconsin to get property out from the probate estate. By setting up a joint account with a third party -- there are all sorts of easy devices that anybody can utilize to get property out from a probate estate, plus the fact that the one-half now is on whatever is in the probate estate. Again, this may be too large or too small a figure, depending on the needs of the surviving spouse, and what the assets of the probate estate might be.

But, I think the most controversial part of the State Bar alternative bill has to do with the on-going marriage. They took, very seriously, the problems of homemakers not being able to get credit, and they took very seriously the fact that there are some people who are not the beneficiaries of a generous earning spouse, and therefore have some property of their own. They have two main remedies during the on-going marriage that basically take a separate property system and try and compose certain additional rights. The first has to do with this problem of a spouse in a separate system who may not have any property unless he or she goes out and earns money, or has gifts made to them. The proposal says that during the on-going marriage -- this is the State Bar alternative to keep the separate property system but adjust it -- a spouse has an absolute right to secure a property division along the lines of our divorce law, property division standards. That is pretty heavy stuff. You can imagine the non-propertied spouse, the homemaker, going into court today, assuming it is effective, using divorce law standards, getting a property division. Let me question how many marriages are going to remain intact with that happening? But, let's assume it is still intact; it then means next year, if you want to not share, in a property sense, in the property that is accummulated between the time you have your property division and a year that has gone by, you can go into court again. So, premumably, it is an endless right to go into court on an annual basis, on a monthly basis, on some sort of basis, but the basic right is to have a property division during the on-going marriage, using our divorce law standards. And, remember, our divorce law standards put an awful lot of property into the pool that is divided.

And, a second thing has to do with credit. No matter what the federal and state laws on equal credit say, if you don't have assets you aren't credit

worthy, of if you don't have an income stream - more importantly - you are not credit worthy. You may have credit history, based on these equal credit reporting laws, but you are not credit worthy because you do not have, within your own ownership and control, the means to repay a loan. So, Wisconsin homemakers are not credit worthy, no matter what the federal or state law says about other considerations. And, again, the State Bar subcommittee took that very seriously as a real inequity. What they originally proposed was in the area of credit, to give a once in a lifetime $5,000 total credit if the other spouse is normally credit worthy for that amount. And, the $5,000 limit per marriage, they decided to modify for several reasons. First of all, for a long-term marriage, if you divide $5,000 by maybe 35 years of marriage, it doesn't look very good to say, "this is the value you have contributed for credit granting purposes." More than that, if you are going to have a lifetime, or a life marriage total, you have to have an elaborate filing system to keep track of when you start using it up.

Well, they dropped that and the current proposal is - although I have not seen it in final draft form - based on the credit worthiness of the normally credit worthy spouse, the income producer, the other spouse has an unlimited right to get credit, up to $2,000 per creditor - unlimited number of creditors. So, if some of the drafters who were senior partners in prestigious Milwaukee firms have spouses who are otherwise not credit worthy, they presumably can go to a very large number of creditors and get this $2,000 minor credit. It is not tied into the necessaries. It could be for any purpose that you can get credit from the particular credit granter.

I suspect the reason it is not tied into necessaries is that everytime a person makes a purchase at Sears or whatever the department store is, you don't want the sales clerk to have to decide whether this is necessary or not. So, the $2,000 is for anything. It is not limited by any "necessaries" doctrine at all.

A lot of people are somewhat taken back by the credit provision, because it now exposes the spouse who is not involved in that transaction to having all of their assets, not just marital assets, but everything, including the inheritance from the parents or whatever, to collection by creditors if there is a default.

I have to say that I believe these are sincere attempts by competent attorneys in Wisconsin - and I don't think our level of competency is too much different from the rest of the universe - to try and, within a separate system, meet the problems of credit during the on-going marriage, property rights during the on-going marriage, and some sort of equity at death that presently does not exist.

I think that both the credit provision - which I think is the most troublesome - and also the right to property division presents a lot of problems, and this is, so far, the only proposal that I have seen that attempts to say, within a separate property system, "what can we do to remedy acknowledged problems?"

Incidentially, their proposal says if you are a creditor and you don't give credit to the otherwise non-credit-worthy spouse, based on the spoues's credit worthiness, it is violation of our consumer credit law, which has criminal penalties. We have a very strong consumer credit law. So, they

are saying we are sincere; we really mean this. But, we haven't yet heard from the creditor community. I don't know how they are going to take it. The bill has not been introduced. It is still in the talking stage.

I am going to stop here because I have thrown a lot of information at you and you surely have some questions about material I have covered or material I haven't covered, that I am open to comments on or reactions to of any sort.

MS. ALLEN: I think you have done an excellent job of putting this in the proper prospective, based on your experience.

SENATOR LIPMAN: Theo, you were going to say someting?

MS. TAMBORLANE: I was going to say it is obviously a long, hard struggle. I think that is one thing that came across very clear. I wasn't aware of just how long you had been working on this out there.

PROFESSOR WIESBERGER: My reaction to that is that now, as to the drafting part, any new jurisdiction will not have to do the basic research, but as to developing grass roots support for it, I think that has to happen in every state where there is any chance. The reason all those names were attached to the bill in December of 1979 was that there was already grass roots support and many members of the Wisconsin Legislature had already heard from their own constituents that this is what they wanted. Now, they may not have known all the details of the bill, but they wanted comprehensive reform. So, it seems to me as though some of the time will be shortened. You don't have to start out looking at community property systems.

MS. SARAVIA: All the five years that Wisconsin has spent, other states would not have to duplicate; it would be a matter of months to get a bill drafted if a state decided to go that route because there is such a comprehensive model. Could you talk a little bit about the National Conference of Commissioners on Uniform State Laws -- how they came about looking at what Wisconsin did, and decided that nationally this was a concept that should be considered?

PROFESSOR WIESBERGER: I am not too sure about all of the waives that washed over the Uniform Commissioners; I know part of the movement for a uniform act came from the Marital Property Committee of the American Bar Association's Real Property and Probate. There was some real interest in that, and here I think there were some individuals who for many years have been very interested, including the principal drafter of the Uniform Act,who is the reporter for that particular committee. Bill Cantwell, whose article I think you all have, delivered that as an address before the American College of Probate Counsel. For many years Bill Cantwell, who is a Denver pratitioner, has been interested in some sort of sharing concept. At one point he addressed an annual conference of estate planners in Miami, encouraging something he called joint property agreements, trying to use the closest thing in a common law state to community property and having couples, by agreement, opt into it.

So, I would say he certainly is one of the people who has had a continuing interest, and his law firm apparently has given him leave, because it is not being paid for by either the ABA or the Uniform Commissioners.

The Uniform Act itself is rather comprehensive. I have a marked-up copy of it. It is 71 pages. A lot of it toward the end is boiler plate,

but still it is comprehensive in nature too. I think it comes because there really is a national concern. Divorce reform is one reflection of it. If there is going to be a recognition of the contribution of both spouses, homemaking, wage earning, whatever mix there is, it has to now permeate not just our divorce law but our on-going marriage law. I think it is a natural step after divorce reform.

Now, the Uniform Divorce law was an earlier product, and I think this usually comes as a second wave, saying, "well, if it is good enough for divorce, let's do something during the on-going marriage." And, we have had a wave of probate reform. One of the members of the Uniform Commissioners Committee is Professor Wellman of Georgia, who was a principle drafter of the Uniform Probate Code. Originally he said, "Gee, the Uniform Probate Code is pretty good, why do we need anything beyond it"? But, he has persuaded now that even at death we aren't having equal sharing, let alone during the on-going marriage. I think it is an idea whose time has come, and the Uniform Act is just one more reflection of it. Certainly, the inquiries I am getting, and the legislative sponsors are getting, indicate, particularly in states like Illinois or New York where divorce reform has just come about, this is the next area they are going to be working on.

ASSEMBLYMAN SMITH: Professor, it is interesting. A newsletter crossed my desk in the last week and one-half, and there is a move in the federal government to do something about inheritance tax thresholds, particularly in agriculture, because a "small family farm corporation" is near wiped out when this comes about. Of course, this all plays a part in that particular area.

PROFESSOR WIESBERGER: Yes, I think that is clearly true. I was also part of a conference that was held in Madison on social security reform. There were lots of parts of the discussion on social security -- after all, marriage is a partnership and why don't the social security laws reflect it? -- and the bottom line of that conference was a variety of proposed changes in our social security law that would recognize that, including one very simple one: At the present time, as I understand social security practice, if you have a wage earner and a homemaker, the check is sent in both of their names. However, if one of them request it, they will send two separate checks, but they don't divide it fifty-fifty; they divide it two-thirds/one-third, to reflect the 100% for the wage earner and the 50% portion for the non-wage-earner. And, the simple suggestion was made - because this is a no-cost item - if the request is made that is presently being honored for two checks, why not at least divide it fifty-fifty, so you give seventy-five/seventy-five, rather than one hundred/fifty. That was just the easiest kind of reform because it is a no-cost item, all the way up to giving credit for homemakers -- or apportioning the social security credits that are being earned by a wage earner between husband and wife, and a lot of other reforms. So, I think we are going to see a lot of this at the national level too.

ASSEMBLYMAN SMITH: It certainly has to go along both ways, I think.

MS. ALLEN: Did I get the impression that you feel very certain?

PROFESSOR WIESBERGER: Well, I am not in the political mainstream and I am an optimist by nature. I hear what the legislative sponsors are saying, and they are basically optimistic. There is always a possibility

that there will be some unexpected twist or turn in the scenario. But, for us the real hurdle was adjusting those income tax rates so that they are politically acceptable and don't result in a revenue loss.

From all of the analysis that I have seen-- I am not a tax expert but those who are belive that they have hit the right equity between single taxpayers, married taxpayers where there is only one wage earner, and married taxpayers where there are two wage earners of unequal wages, versus equal -- there are all sorts of problems in adjusting that. If we solve that, my own guess is that that's going to be the critical question between getting it passed sooner rather than later.

MS. SEHAM: The length of time that it took you, in a way it may take us at least as long, because you had all kinds of people participating in early research and early decision-making who were part of the whole thing; it is not being presented to them whole, as an unfamiliar thing and a change in the way we have always done things. So, you say your big problem was the tax reform. I think, in another state where we havn't done the research from the beginning, there will be other problems in making people understand that this is a needed reform. I think we are going to have to get together and get busy on the grass roots part.

ASSEMBLYMAN SMITH: Isn't there also, as you mentioned earlier, almost a tailor made one for each individual state or community, or whatever? I noticed, in reading this treatise that we have here, that this goes way back . To me, it goes back almost before the beginning of time, and it is very interesting. I found it very intersting and very enlightening, particularly the southwest and the Spanish influence and all. But, you take Wisconsin, with more of an agrarian society than we have here in New Jersey -- I mean, New Jersey still has farms and farm families and so forth, but I think they are getting pinched and squeezed harder because of development than the western states -- and I think you are really going to have to tailor make them for each individual state.

PROFESSOR WIESBERGER: Yes.

ASSEMBLYMAN SMITH: And, I think that is going to be the problem that you alluded to.

PROFESSOR WIESBERGER: I think you are absolutely right. There are several levels. One is, most people don't know until they are adversely affected whether the property system is fair or unfair, or whether the tax system is fair, and we developed, as part of getting grass roots support in education, some horror stories in case law, where you had these outrageous results. Some of them are mentioned in the Cantwell article. That was very important. But, also for sophisticated estate planners, which is almost the other end of the spectrum, we are getting some real interest in this reform because there are some tax advantages to community property that estate planners like.

I will just give you one. In community property states, under federal law, only half of the community is taxed -- is in the taxable estate of the decedent. But, the entire community property gets a date of death value, which is very important if you are going to sell it later. You have reduced, significantly, capital gains. That sort of advantage comes out like a big electric light bulb going on and off to estate planners.

Community property also does something that many estate planners attempt to do, which is to equalize the estate of the couple so that you don't worry about the order of death. Well, community property does that automatically by this sharing, so it has that advantage. You don't have to make many of the transfers and do a complicated planning of the same kind that you do in common law states. So, it is an amilgamation of people who believe that the property system is unfair, and some people like the tax advantages. The merchants association liked this and I will tell you why. It is something I didn't know about. A typical family occurrence -- a new couple comes into Wisconsin, and who calls the utility company to start the accounts? Who goes down to the department stores and opens these accounts? We have a very strict consumer protection law. The Consumer Protection law says it is a violtion if you knowingly send a bill to a person that is not legally liable. It is very uncertain as to what the legal status is when the utility company sends the bill to the husband if it is the wife who entered into the agreement, and big companies like Sears, Montgomery Ward and Penny's, are really out on the limb in Wisconsin in their credit granting practices because of this. So, they want the law to reflect this equal partnership concept for their own purposes. So, the Wisconsin Merchants Association, which is really not the group you would think would be right in the forefront of marital property reform, thinks it is terrific. And, like any other movement, you end up by having different groups supporting it for different reasons.

Our meeting with the bankers turned out to be very valuable, because although I don't think they supported it for the same reasons that the Merchants Association did, they worked out some of the changes to a multiple party account statute that they can live with. They may not like it, but they can live with it. Well, that is very important to them, so they are going to be neutralized. They probably won't take any position, one way or the other, saying that is a matter of policy for the Legislature. But, they know if it gets changed, they can live with it.

And, some of those meetings do take a long time, so this goes back to the fact that you can shorten the period but only so much.

SENATOR LIPMAN: I think you said there were three groups in the Bar Association, and the one who accepted it was the Real Property--

PROFESSOR WIESBERGER: Oh, the section that is most strongly in support of marital property reform is the Family Law Section, and the reason they are is, they are trying to live with our present divorce law, which does not say very much about property classification. It just says you have this pool, but you exclude inherited and gifted property. Well, what happens when one of the spouses that that lawyer is representing received, back in 1930, an inheritance of $20,000? What about the fruits of that? What about the increases just due to inflation? What about the increases due because one spouse has worked on the inherited property? Our statute gives them answers because we have tried to spell out property classification in a way that our divorce law doesn't, and they think that is a real "A". We are currently going through a lot of litigation exactly on these questions -- you know, what happens to the interest and divends to what you inherited way back when? The longer back it is, the more likely that something has changed in value as to the excluded property. That is where the fighting is going on now

in our courts. So, they think that anything that will spell it out and give them answers is terrific.

On the other hand, the Real Property and Probate people know the common law. They know how to practice law in Wisconsin as it is. They are just beginning to realize that they may have some reason to know about community property because of migratory clients. But, at the present time, that is just slowly growing.

I gave a continuing legal education program on community property, not marital property; it was community property. The big point was, you better know it now, because you might be making a mistake that exposes you to liability. Several hundred Wisconsin lawyers signed up for it. But, they are slowly learning.

We are saying with a bill like this, "Look, a lot of what you know is going to recede and you are going to have to learn a whole new body of law. Most people, including me -- I don't voluntarily do that unless I have to - suspect the Real Property and Probate people have more of an investment in the present system than the Family Law people, who have already had to go along with changes, and they want the changes to be as predictable as possible rather than unpredictable.

The Taxation section, I would suspect a split on the merits, because some of them like the flexibility that the new property system gives to them and some of them already have this investment in the way things are presently being done. They are going to have to learn how you integrate community property in the marital deducation, for example, and other sophisticated life insurance trusts. There are ways it can be done, but they are going to have to learn the new wrinkle.

My response to those who are opposing the change because it is so new is that you had to learn the Tax Reform Act of 1976, and I am confident that you are bright enough to learn this as well. And, in many ways, it is a conservative proposal in that at the present time sixty million people are living in the community property states. They are buying insurance. They are dying. They are doing all the things -- we have answers. We know we can find out how IRS is going to handle some complicated tax question because we can just call up someone in Los Angeles or Seattle, or whever it is, and say, "What do you do"? We can base what our judgment is of the new system based on what is happening here and now in the community property states, which I find reassuring. We don't have to answer everything in the legislation. We are trying to answer as much as we can, but as to practices, we can find out, and most agents of insurance companies, and most lawyers, estate planners -- they belong to national associations and they have counterparts in the community property states that can tell them. To that extent I think it is comforting, even though it requires a lot of absorption of new material.

ASSEMBLYMAN SMITH: Do you feel that a two year time limit is sufficient for what you have outlined in Wisconsin? There wouldn't be any other factors that come into it that would have to extend that period? The learning process is one concern.

PROFESSOR WIESBERGER: I think there is no simple answer, and my own suspicion is that if the bill somehow gets passed toward the end of a year, there may be an extension so it will be two years, plus. A lot will

depend on when it is finally passed.

The second thing, however, goes in the other direction; which is, there are many people who feel they are presently adversely affected by the system and to delay relief to some future time presents some additional problems. Some of the most vocal supporters are people who want relief now. So, I think there are balancing considerations. The year plus was an attempt to accommodate both problems. I would suspect if it got past late in the session, it might very well go longer than that, but there is a lot of pressure not to have it go very long.

MS. ALLEN: My question is not predicated on the fact that we would be going either way because I think we have a lot of questions yet today, but I always like to point to, "if you had you life to live over, what would you do?" I am just wondering, if you had your experience to live over in this whole past series of years, what would you tell us to avoid?

PROFESSOR WIESBERGER: I don't know that I am going to answer that directly, but I think the most important thing we attempted to do, and sometimes did not do it as well as we would have liked, was to have all the various efforts coordinated and go on at the same time. You have the drafting technical part. You have your contact with the professionals who are going to be implementing it. You have the need for grass level support, and try to keep all those bases touched and coordinated. I think that was the most difficult. I don't know that I would do it differently. I think, as misunderstandings occur, the need for touching bases and doing it on a very systematic basis is something that has been underscored for me. You can't go too far ahead in any one area without everything else being in synchronization or else you are in trouble.

There is an interplay. Many people, for example the Wisconsin Life Underwriters, did not take the bill seriously until it was already subject to a public hearing. So, you are in a bind. You want input in advance, but you are not going to get it until people think it is really going to come about, so they had better do a line-by-line scrutiny, and that takes a lot of time. People are not being paid for it in many instances, so they put it off. Emphasizing that it is really here and now and the reason they should believe you is because here is this grass roots support, interplays with the kind of good feedback you are going to get from these groups who should have given input to it. That is a delicate creative activity. I don't know what the best scenario is, but all I can say is, I think it is terribly important. I thought it was important before, but I know it is important now.

ASSEMBLYMAN SMITH: Those of us in the Legislature realize that about all pieces of legislation of any consequence or that are substantial and will bring about reform. The Senator has been here longer than I have and she will tell you that we have all experienced that in one form or another.

SENATOR LIPMAN: I think that we have been talking about the federal tax advantage with the marital problem. If both spouses are making the same amount of money, then that federal tax increases four times, I think.

PROFESSOR WIESBERGER: You mean the marriage penalty?

SENATOR LIPMAN: Yes, the marriage penalty.

PROFESSOR WIESBERGER: Well, we think we have avoided--
We think we have avoided making it worse by whatever rate changes we made.

That is a whole separate issue apart. I don't know if you have joint returns in this state or not.

SENATOR LIPMAN: We do.

PROFESSOR WIESBERGER: So, it sounds like you won't have the kind of problem we had, which was since we didn't have joint returns it was an enormous tax loss. When we first talked about it we thought that maybe some tax loss would be politically acceptable, and now we are at the point where everything has to be self-funded by changing rates or else it is not going to come about.

MS. KIERNAN: We have the joint return, but we also have a gross tax, so it is a lot different in our system.

PROFESSOR WIESBERGER: Oh.

MS. SARAVIA: Would it be helpful to have Professor Wiesberger talk about some of the specific sections of her legislation? I had prepared an outline for the Commission, based on the Assembly Substitute No. 4, breaking down the different sections, but maybe you could go through and talk about classification of property and all of those nitty gritty things.

PROFESSOR WIESBERGER: Okay. The particular format of our bill, and I don't know how common it is in other states, is that the drafters have to start with the first section that is going to be changed, and then numerically they have to follow through. So, if you start looking at our statute, there are some odds and ends at the beginning, including all the tax material, which is at the beginning. The new bill will be even more extensive because we will have rates and brackets and additional pages. But, you have to pass all of that to get to get to the heart of the marital property reform bill.

I am interested to see that your outline starts with the legislative intent because I think that is terribly important. I don't think it is just boiler plate. I think what we clearly expect is going to be a constitutional attack. That is just the nature of things, and the legislative intent is going to be awfully important there. It also sets a tone and a philosophy, but from a legal point of view I think it is critical for the constitutional analysis that is going to follow.

At the very beginning, following the legislative intent, certain basic things are set forth that I just want to reiterate now, and that is for property that is classified as marital - it used to be marital partnership - there is an equal, vested, present, undivided ownership. I am not talking about some inchoate right that may come about at some future time. It is a present right. It is an equal right. And, it is an undivided right.

There is also another key section that may not come out and hit you over the head, but it is very critical. As to management and control of marital property, or property that is classified as marital, there is this good faith duty to the other spouse to manage and control on behalf of the marital partnership and not to the damage of the managing spouse. And, as part of that good faith duty of management control, there is a disclosure requirement. We think that is critical. Full information has to go back and forth between the spouses.

I would say the next key section is going to be on classification of property, because various consequences flow based on the classification of property. Why don't I start with the list you have on your outline,

and mention which areas have been non-controversial. All the community property states, incidentally, have separate property and they have community property, although there is a system that has been a community property system and what is called the universal community. When you get married, everything -- what you bring to the marriage, what you have acquired during the marriage, what you get during the marriage -- is community. But, we rejected that because we think the idea is so strongly held by people in our state, and obviously in the community property states, that there is going to be some property which properly should be segregated from this sharing concept, that we started out by defining separate property: property acquired before marriage; after separation or divorce; acquired during the marriage by gift, either an intervivos gift or from inheritance under the laws of intestacy or under a will.

E was an interesting one. E represents a drafting solution to a problem that had been a real problem in Texas, which has not been resolved by court decision. But, when we first started drafting, it was a problem. In Texas, fruits, which is the interest, dividend, and rental of separate property during marriage, is community. And, the lower tax court basically said that in Texas if one spouse makes a gift of separate property to the other spouse, they always retain an interest in the fruits because of this constitutional classification of fruits. So, we wanted to clarify that if one spouse wanted to make a gift of separate property to the other, they really could do it and they no longer had any interest. Retaining an interest had some severe, dramatic, adverse federal tax consequences which we wanted to clarify would not apply.

Proceeds from a trust -- we wanted to clarify that if you were a trust beneficiary you didn't have to trace back whether it was principal or income from the trust assets that were involved. Proceeds from a trust-- Distributions from a trust are marital.

G reflects this broad right to contract. Couples may classify property by contract. For example, you may have a couple that says they want part of their marital property to be separate. So, they can change the normal classification rules by agreement. It goes both ways. You can change marital to separate and separate to marital. You can do it for a broad range of property, or you can do it for an asset alone.

H has been the most controversial so far in this list. The fruits of separate property are treated differently, depending on which community property state you are in. In a majority of community property states, fruits of separate property are separate. However, in several community property states, including Texas, fruits of separate property are community. When the bill was first introduced, that was the rule we had. Fruits of separate property are marital property. This was one area where at the public hearing and during the debate within the Assembly Judiciary Committee, there was lots of feeling, one way or the other. A lot of it depended on how the individual handled their own fruits. One of the legislative sponsors had some stock that her family gave to her and she just, when those dividends come, puts in in the joint account and that's it. So, she thought, of course, that fruits of separate property should be narrow. Another of the legislative sponsors had some property from a prior marriage which she kept separate, and she had a segregated account, so she thought fruits of separate property should be

separate. It looked as thought there was going to be some change in the rule that we started out with: fruits of separate property being marital. H reflects what is in the bill and what was in Substitute Amendment 4. It is what is called the Louisiana Fruits Rule. Everybody says we should get a better name than fruits, but it is an accepted term in community property and it is hard to think of a good substitute.

In Louisiana and in what we have adopted, the general rule is if you do nothing, fruits of separate property during the marriage in Louisiana are community, but either spouse retains the right to unilaterally withdraw his or her fruits and make it separate property. To be more accurate, it is so provided by unilateral, written statement because you don't need to consent to it, but you have to follow certain procedures, including giving notice to the other spouse because the other spouse, if they know you are keeping your fruits, may want to keep his or her fruits also. But, that is a controversial area and the community property states don't have a uniform pattern. We adopted what I think is a compromise: If you do nothing it is marital, but you still have the right to make it separate.

"I" is always puzzling to common law property state lawyers. We have, in common law states - in separate property states - joint tenancy and tenancy in common, both of which are forms of concurrent property ownership. And, interestingly enough, each of the community property states retains joint tenancy and tenancy in common. And, indeed, some assets - I understand in California as to the home, for example - are often held in joint tenancy with the right of survivorship. We thought since these are common law concepts, but they are so much a part of community property law, that we would obviously want to continue that as an option. So, we have defined, as the community property states have defined, a spouse's interest in joint tenancy or tenancy in common property as separate property, not solely owned property but separate property.

J is a pretty obvious thing. If you take what was separate property and you exchange it for something else, you still have separate property.

K was controversial. The newest bill, the one that will be introduced, talks in terms of passive increases, or changes in value. What are we talking about in K? And, this reflects a change from Assembly Bill 1090. If I had some unimproved real estate that I bought or was given prior to marriage, and I do nothing about it but during marriage it increases in value because real estate is increasing in value, we label that kind of change a passive change. Originally, we called passive changes in value of separate property marital. None of the community property states followed that route, and at the public hearing there was a great deal of concern about, "Why should you, if you do nothing, have these increases labeled marital"? It is a windfall rather than a natural result, and Substitute Amendment 4 in the present bill says: "Passive increases of separate property during the marriage are separate." That is a change. We originally labeled it marital because it is a simpler system. But, the simplicity of our original solution was not appreciated, so we have now accepted the universal solution in the community property states as to these passive increases or decreases.

L is pretty commonly stated in the community property states. For most people, however, apart from gifts and inheritances, what they are going

to have during their marriage will be marital because wages, salaries, income, and all the economic fringe benefits associated with employment are marital.

Under the most recent version, we say that if an increase in separate property is due to the active efforts of a spouse, if either I or my spouse on weekends go to that unimproved property and start improving it so that it no longer is some land in northern Wisconsin but it now our summer cabin and it has greatly increased in value due to our personal efforts, that active increase of separate property is going to be marital. This, as you can see in many situations, is going to require an apportionment between the component that is due to the active efforts versus those passive, "just because land values are going up" increases.

MS. SARAVIA: I have another question. Are active increases considered as a result of the labor of both or either spouse? I would consider it separate if the owning spouse takes separate property to increase the value.

PROFESSOR WIESBERGER: We are talking about the labor.

MS. SARAVIA: Okay. Just labor.

PROFESSOR WIESBERGER: There is no such thing as separate labor, really. If you do something during marriage that produces something, either an income or an increase in value, we are saying it should be treated the same way. It should make no difference whether I work for the University of Wisconsin and get a salary, whether I work in my own previously established business and increase its value, or whether I use my spare time to improve my real estate that I bought prior to marriage and it is now, because of my efforts during the marriage, more valuable; that is all marital. The only way you could have separate labor would be by agreement between the spouses. We have a broad right to agree. But, there is a general, universal rule that it shouldn't matter whether you are working for a salary, whether you are working for yourself, or whether you are in effect improving what you already own prior to marriage.

MS. SARAVIA: However, if the owning spouse uses not labor but the proceeds from separately owned property, that would be considered separate although it is not passive?

PROFESSOR WIESBERGER: Well, passive increases really go to this increase in value. What you are really doing is tracing: I am using separate property during the marriage -- the separate proceeds -- to buy additional land so I now no longer have two acres; I have four acres.

MS. SARAVIA: Or to build.

PROFESSOR WIESBERGER: Yes, separate property. And, of course spouses, by agreement, can say-- In fact, we expect a number of people in Wisconsin to say when the Act becomes effective that they are going to take their previously acquired property, and we expect many couples about to marry to say, "we, by agreement, will take what we bring to the marriage, and convert it by agreement, under 2E, to marital. We see that happening rather frequently.

Okay, quasi-marital property -- let me just back up and give you a little background as to where that came from, because we took an existing community property concept and broadened it. California is the place where you have the most significant development of what is called quasi community property.

In California they developed a quasi concept to cover this situation. I am married in Wisconsin and I acquire lots of property during marriage -- home, bank account, all sorts of things, and I go to California. Both spouses

move to California. Okay. What happens to that previously acquired property? If you retire in California and you don't generate what will be community property there, you are going to have lots of problems. California, in order to take care of the migratory client that is bringing into California property that would be community property under California's law, developed this quasi-community-property concept. So, assuming we have a Wisconsin or New Jersey couple moving to California, on divorce they treat that quasi property as community, and if the owning spouse dies first, they treat it as community. I go into California with a bank account in my own name, but it comes from my wages during marriage in Wisconsin -- quasi. If you get divorced, it is handled like community property. If I die first, it is handled like community property.

We took that and, as you can see under 3B, that is the California quasi-community-property concept. We expanded it under C to say, for previously acquired Wisconsin property that would be marital under the Act, we are going to handle it in the same way that California handles this in-coming couple's previously acquired property.

As to A, I have to give you a little background because A is our unique feature. First of all, let me say that in Wisconsin it is clearly established by case law that retirement rights, vested or unvested, is property subject to property division. We have no problem with that. You may have lots of problems about how you value it, but you have no problem with division. It is a property right, whether it is unvested or it is vested, and people argue about the value of it and how you are going to enforce the rights in it, but they don't argue otherwise because we know in our state that is subject to property division.

The problem that was brought out at the public hearing last year was, what about the employee spouse who works hard and has certain rights, vested or unvested, and then the non-employee spouse dies first? Under a traditional community property analysis, that spouse has a right in whatever that present value of the pension is at that point, and has a right to will it, or the laws of intestacy will apply. They were saying that really adversely affects the surviving spouse who has been depending on this particular retirement income stream to survive, and can't we do something to protect at that point the rights of the employee spouse who is now the surviving spouse? This is a result of the State Bar committee's recommendation that was incorporated by the legislative sponsors. They came up with the idea that we are going to treat the unmatured right in a pension plan, if the non-employee spouse dies first, as quasi, so they don't have anything to will and we are, in effect, protecting the surviving employee spouse by this concept.

There was a quid pro quo for this special treatment, however. Many of the lawyers on the Bar's special committee were concerned that employee spouses had unwisely chosen options, without considering the effect on the non-employee spouse, and they gave all sorts of horror examples of clients of theirs who really blew it as far as the selection of options was concerned. So, we have, in our Management and Control section, a special requirement that in the selection of options and withdrawal rights, both spouses must consent, which goes beyond anything that presently exists. I think that was an interesting tradeoff. It was an attempt to say to the non-employee spouse

"your property interest, if you die first, is going to be subordinate to the employee spouse who is the surviving spouse. But, we recognize that during the term of that marriage that you had some real influential input into the selection of options that are available to the employee spouse, so we have a consent requirement." That is unique. I think it is interesting.

Okay, in the property classification, there is a statutory presumption which is true in all of the community property states, although it is worded slightly differently. If you don't know what anything is and you can't prove it, it is marital. There is a statutory presumption that property owned by a spouse or both spouses is marital, except as a separate property owner proves that it is separate property. The original bill says that you have to have clear and convincing evidence, and we are now back to a preponderance of evidence to establish that. But, that statutory presumption is terribly important. It gies you an answer if you don't know. And, it gives you an answer if there is evidence fifty percent one way and fifty percent the other way.

We have retained joint tenancy and tenancy in common and there are lots of twists and turns about that that I won't go into. But, spouses can continue to not only retain their tenancy in common, and joint tenancy pre-act, but if they do it the right way post-act, they can continue to do it.

MS. SEHAM: I have a question. In New Jersey we have tenancy by the entirety for real property. Under the Marital Partnership Property Act would a state like New Jersey be able to retain that?

PROFESSOR WIESBERGER: In our provisions, we don't have tenancy by the entirety, but we have a presumption that when title is taken by husband and wife with nothing more, we have a presumption that it is joint tenancy with the right of survivorship, which I assume is substantially similar to tenancy by the entireties. So, there you may have to adapt the right sections. But, the concept would be basically the same because our version of tenancy by the entirety is the presumption that if it is husband and wife it is joint tenancy.

Okay. We have some other property classification rules, but I think those basically are the main points. We have changed the fruits rule and we have changed the rule relating to passive increases. And, we have changed the special treatment of unmatured retirement benefits when the non-employee spouse dies first.

Management control, I would say, is the second most important section. Community property was always an attractive model when you looked at the ownership rights because even back with the Visigoths it was equal ownership. But, management and control of community property until very recently was sole husband management and control, and starting with Texas, in 1967, and ending with Louisiana in 1980, they have all gone to some form of equal management and control, which makes much more attractive the concept of community property, if you try and recognize peoples' legitimate partnership expectations.

The general rule in all of the community property states is that property disposition of community property requires joinder. We have continued that joinder requirement for real property.

As to acquisition of real property, several states - I believe it is Arizona and Washington; I know it is Washington for sure - also require joinder for the acquisition of community, and we have adapted that as a requirement.

So, we require all real property transactions involving marital property to have both husband and wife's signature. The acquisition requirement has been somewhat controversial and there was an actual vote on this at the Assembly Judiciary Committee and it was retained. It was retained because those who wanted it deleted said all sorts of problems might arise, and we were able to contact people in Washington, including title company lawyers, and they said, "no problem," so we figured if they had no problem there must be ways of working it out. So, if it real property and it is marital, joinder was required. Oh, and we broadly defined what is real property, and it includes leases in excess of one year, and we defined trailers as real property, and a whole range of things. We are used to a joinder requirement when a homestead is disposed of, and lawyers are all keyed into that. This is basically an expansion of that homestead joinder requirement to an additional category of cases.

Another area under management and control which was controversial had to do with gifts, gifts of marital property. In the community property states there are several solutions, and we originally took the solution of California and Washington, which required consent for all gifts of community property. So, our original bill said if there is a gift of marital property, both spouses have to consent. They may manifest the consent in various ways, but they have to consent. That was changed in Substitute Amendment 4, and I think the evolution is a rather interesting example of how legislative changes can come about. Several people had voiced concern prior to that Assembly Judiciary Committee debate that husband and wife often don't agree about political contributions, and if you have consent for all gifts you are really going to have some serious problems on political contributions. So, we wrote an exception for political contributions up to $50. Well, the debate started out by saying was $50 too low, but then it raised other questions: "Well, if you have debates over political contributions, you have debates over charitable contributions. What one person thinks is a worthy charity and the right amount, somebody else won't." Then we got into problems of: "Do you mean I can't make a gift to my own mother without my spouse's consent"? One of the legislative members of that committee felt very strongly that consent for all gifts was unrealistic, that spouses should have some ability to make unilateral gifts, and Substitute Amendment 4 reflects that change. We basically went away from consent for all gifts, which is the California-Washington model, to the Spanish rule, which says that a spouse can make a gift of community property as long as it is reasonable and moderate. Now -- lots of problems with deciding what is reasonable and moderate, and you look at the case law and it says you look at the size of the gift and who the donee is and who the donor is, and all sorts of other circumstances, and we knew that when Substitute Amendment 4 was drafted, rather hastily, that we would try and pin that up a little better than we did in Sub 4. The way it now stands in the bill that is to be introduced is to say that all gifts, if they are $3,000 or more, require written consent, and written consent may be satisfied by the filing of the Federal Gift Tax Form, because there is requirement under existing law for filing those forms, even though many people don't do it.

As to gifts below-- Gifts of $3,000 per donee, per year attracts

the Federal Filing Requirement. As to gifts that are less than that, the spouse can unilaterally make gifts as long as they are complying with their good faith duty to manage and control. And, we have not yet been able, except in some specific situations, to pin that down. I think there is a great deal of ambivalence as to where we are. It may be unrealistic to require consent for all gifts, I acknowledge that. But, that is a simpler rule to administer than either the Spanish rule, in which you can take a reasonable and moderate gift unilaterally, or our present rule which at least sets a cap of $3,000. But as to gifts below that, you need consent if it is not within the good faith duty to manage and control. That is where we are now. I think that continues to be an area where we may refine our draft to give greater notice as to when consent is required and when it is not.

Let's see, what else? Under management and control, at least one aspect has been controversial in the next area. To recap, joinders required for real property transactions that involve marital property, and certain types of consent are required for making gifts. As to all other transactions, however -- buying and selling of personal property -- the normal rule in all the community property states is each spouse has equal management and control not of fifty percent but of one hundred percent. That means in the community property states, in contrast to Wisconsin and New Jersey, the homemaking spouse who has equal property rights and equal management and control has the right, under Regulation B as interpreted by the Federal Trade Commission, to receive credit on the exact same terms as the wage earning spouse. There is a big difference between community property states and common law property states as to credit. And, the general rule that each spouse, apart from where joinder or consent is required, can manage and control marital property, subject to good faith duty without the other spouses' joinder or consent, prevails.

In the most recent version, and I will just mention it now and I will pick it up later, there was a particular concern about securing unsecured credit. In recognition of the concerns expressed by some, both lawyers and non-lawyers, that with this equal management and control of 100% of the marital property you could have some imprudent spouses going out and doing all sorts of things that might harm the other spouse that either may not be a breach of the good faith duty or where there is no effective remedy for breaching the good faith duty, we have limited, in the area of getting unsecured credit, the management and control rights to one-half the marital property. And, we are unique in that. It is an attempt to make the argument of, "hey, in the area of unsecured credit there may be some particular problems with some imprudent spouses and so we are going to have some equal management and control," i.e. up to 50% but not for 100%. That is not reflected in Substitute Amendment 4. That is, in addition to the tax change, the major change in the bill that is going to be introduced.

Okay, I think that the--

MS. ALLEN: Could I just interrupt for a minute for the game play of the day. I think you have been talking very long.

SENATOR LIPMAN: Yes, we are wearing you out.

MS. SARAVIA: The earliest I could get a luncheon reservation for across the street was one o'clock. So, we have about twenty minutes before we would want to break and walk over there. It is about 12:25 on my watch.

PROFESSOR WIESBERGER: Okay. Why don't I get to the individual marriage agreements and then perhaps we can leave some of the rest of the subjects until later.

Special problems of management and control as they relate to business property, particularly sole proprietorships and partnerships -- we have special provisions as they relate to a sole proprietorship where there is just one spouse who is involved, because from a commercial point of view we are very concerned about the other spouse interfering with the normal business relationships. So, for that situation, where there is only one spouse involved in a sole proprietorship, except for the disposition of all or substantially all of the business, one spouse has exclusive management and control, subjet to the good faith duty. And, we believe that is just a sensible accommodation to the realities of the sole proprietorship where there is only one spouse involved.

However, sometimes you have both spouses involved. You know, one spouse handles the business end and the other spouse -- let's say it is a craft store that produces a craft - or both are involved, then you have equal management and control.

We also have some special rules for partnerships where our law, for example, for a professional partnership prohibits the non-professional spouse, or a non-professional, from having any partnership interest. We have said as to management and control of a partnership interest, that management and control is exclusively within the partners' rights, subject to the good faith duty.

So, we have attempted to blend the reality of the business world, particularly as it relates to partnerships and sole proprietorhsips, with equal management and control, so that the non-involved spouse is protected from a property point of view and is protected by the good faith duty, but we are still giving to the active spouse additional management and control rights.

I guess the last thing I would say under management and control is that there is a section which basically says that for third parties dealing with a titled owner -- title ownership does not have the same meaning in a community property system as it has in common law; it doesn't say anyting about who really owns the property in a community property system -- who has a bank account in his or her own name, we have an exception to the normal management and control rule which says that that person is protected, the third party is protected in dealing only with the titled owner.

Let me give you a very easy example. One of the big employers in Madison is Oscar Meyer. Let's say the bill is in effect. The Oscar Meyer employee takes his or her paycheck and opens an account in the First Wisconsin Bank in his or her own name. Now the very nature of the classficiation system says this is marital property, it is wages during marriage. Okay. And, that still is true, even though the funds are now in a bank account with one spouse's name on it. Are we to say to the First Wisconsin that they can deal only with the titled spouse and not have to inquire as to whether you are married and who your spouse is, and all the rest? In our remedy section, we have a remedy for the non-employee spouse and among other things that non-employee spouse could have his or her name added to the bank account. But, until that is done, First Wisconsin is protected in saying, "Hey, I am not

going to have to inquire when this non-titled spouse comes and says, 'I want to make a withdrawal,' into making a full investigation into whether he or she has the rights to that." Again, I think that is an accommodation that is required in the normal practicalities of this world, and we are depending on the remedies available to the spouse who doesn't have access.

SENATOR LIPMAN: The titled spouse doesn't mention that he is married? He doesn't have to?

PROFESSOR WIESBERGER: He doesn't have to.

SENATOR LIPMAN: How do they find out?

PROFESSOR WIESBERGER: The only way the bank is going to find out is when they are served with a court order that says: "You, First Wisconsin, change the title on that bank account to Mary and Joe Jones." Then Mary, or whoever the non-employee spouse is - or the non-titled spouse - is now a titled spouse and the bank is required to deal with them on the same basis. Again, I think that third parties should not be required in these normal transactions to make an investigation. Suppose someone comes and says, "Hey, I am the spouse of so-and-so, I know that there is an account here under my spouse's name," as far as the bank is concerned, they are dealing with a stranger and it is awfully hard to establish. Maybe you were a spouse at one time, maybe you really are, but it is up to you to get your name added on to the bank account, and we have a summary proceeding for doing that. But, that is again a special management and control rule that protects third parties, like First Wisconsin, who will say we will only deal with the titled spouse. Title does not have the same magical effects, but in this one instance it is recognized as a management and control rule.

SENATOR LIPMAN: Suppose it is an unfriendly gesture from the non-titled spouse?

PROFESSOR WIESBERGER: To get their name added? He or she has a right to do it. Of course, a lot of legal and non-legal moves are considered unfriendly. If the marriage is deteriorating, this just might be one more symptom of the deteriorating quality, where spouses are using threats in the enforcement of their legal rights as a way of getting back at the spouse. At least we have provided a legal remedy to reflect the underlying ownership, which I think is awfully important.

Just as a final philosophical comment, because we have been talking about a lot of nitty gritty, many people say: "What difference is this really going to make?", particularly in the beginning when you are talking about marriage partners who have lived a long time under the old system and who have not voluntarily been partners, marital partners, and they haven't shared and shared alike. My only response, which is not based on any psychology or social science or research I know, but which I think is based on the way people really are, is that in the short run it probably will not make a difference for many people, but it will in the middle and long run make a difference. If you know, in the give and take of family decision-making that you have certain rights, whether you go to court and get your name added on to that bank account or not, I think your bargaining posture will be different and more reflective of your equal ownership and equal management control rights, whether you legally assert it or not, and there will be, where there presently is an inbalance, greater balance. There is no guarantee that it ever will

be equal, but there will be greater balance.

PROFESSOR HECKEL: What effect will this have on the popularity of marriage in Wisconsin? It makes it awfully unattractive. I am an old bachelor speaking -- my God.

PROFESSOR WIESBERGER: Okay. That very question has been asked: "Will we ever have any marriages in Wisconsin?"

PROFESSOR HECKEL: They will all be Lee Marvins.

PROFESSOR WIESBERGER: Well, first of all, there may be no escape, depending on how well we do with cohabiting couples. So--

PROFESSOR HECKEL: I take it you are not getting into that?

PROFESSOR WIESBERGER: No, we are not. We made a legal decision that that is another issue which will come at a different point. The question has been seriously raised.

PROFESSOR HECKEL: I am very serious.

PROFESSOR WIESBERGER: I have two responses: for those couples, where one of the about to be married people is concerned and doesn't want the system, it is going to force them to discuss and either work out a pre-marital agreement, or perhaps decide not to get married. But, I think the discussion, pre-marriage, if one spouse does not want to go into a sharing marriage, is benefical before marriage rather than having it disclosed somehow as the marriage takes place.

PROFESSOR HECKEL: It is going to present problems for marriage counselors.

PROFESSOR WIESBERGER: Different problems. The second answer to this is - and I don't want to use California on this because California is atypical as to their marriage and divorce patterns - the marriage rate in the community property states is no different than it is in the common law property states, and people in Wisconsin who get good job opportunity in the community free states are not saying I am not going to take that job because when I get to Texas all my wages are going to be owned by my spouse, fifty-fifty. So, in the actual world there may be some people who feel the way you do, but I don't think - not that you do, but you are speculating that way - it is going to affect the marriage rate, and I think that it will lead to more stable marriages, because one of the gripes that many disadvantaged spouses have has to do with the lack of economic decision-making in the marriage.

PROFESSOR HECKEL: I think it is conceivable that people will get into the marriage relationship without ever having any kind of preparation for it and moving in complete ignorance.

PROFESSOR WIESBERGER: They do now.

PROFESSOR HECKEL: As they do now, but not as much.

PROFESSOR WIESBERGER: No.

PROFESSOR HECKEL: Because this changes the pattern of things. People are familiar with the present pattern.

PROFESSOR WIESBERGER: I am not sure they are.

PROFESSOR HECKEL: Whether it is inequitable or not, they are more familiar with it.

PROFESSOR WIESBERGER: Well, I guess this goes back to, again, non-social science conclusions. But, I think most people who get married think they are going into a partnership. They may not quite know the limits or

the contours of their partnership, but I think most people think they are going to somehow be, loosely speaking, partners; therefore, I am not too sure people know any more now than they might under a different system.

The second thing is we have attempted, in some minor ways, in the marriage license information that is being given, to at least key them into this. But, I suspect that people don't read everything that they get when they apply for a marriage license. One of my friends said, very seriously: "After all, you can't drive a car in Wisconsin without studying the booklet and taking an exam. Maybe we ought to have exams." But, I suspect that is not going to come about in applying for a marriage license the way it comes about in applying for a drivers license. But, there is something to that point.

MS. SEHAM: A vision test. (laughter)

I hope we are going to touch on that when we come to this individual marriage agreement.

MR. LEE: When it comes to the management of assets, the party who feels that the management of the assets has been misused or misapplied, is that party entitled to some form of restitution?

PROFESSOR WIESBERGER: Yes. We have a comprehensive remedy section that follows the individual agreements -- well, it follows debts, I guess -- and we have a broad range of remedies during the on-going marriage as well as a dissolution, if there has been a breach of the good faith duty and damages or if there has been a unilateral gift without complying where joinder or consent is required. We have attempted to beef up existing remedies and have a broad variety available.

One of the interesting things was that the original bill, on the remedies part, was very sensitive to not having a separate action for accounting because the political sponsors thought this might be a sensitive danger point. The State Bar thought that of course there should be this broad accounting right, so it is in there now as a separate remedy, the way we originally had it but had modified because we thought it might be unpopular. So, we will be coming to the remedies this afternoon.

MR. LEE: In a general sense, this appears to be a panacea in terms of women and some of the laws that have existed with respect to marriage. It terms of the actual litigating process currently, what has been some of the problems with respect to that?

SENATOR LIPMAN: They haven't tried it yet.

PROFESSOR WIESBERGER: Well, let's take the Oscar Meyer employee who takes his wages now from Oscar Meyer and puts it into First Wisconsin. There is no remedy for that because our property system says it is his, or it is hers if she is the wage earner. So, we have said under the classification and management control, there are certain new rights. So, we have had to think through how to enforce these new rights if there is somehow non-compliance with the recognition of the new rights. So, we had to really go beyond the existing remedies to make this bill not just paper rights for ownership and management control, but have some legality.

Let me ask you something. If any of you or your friends or relatives got a job offer that was very attractive in a community property state, do you think that people are going to think twice about moving to that state

because of that fact?

PROFESSOR HECKEL: I don't think they have any idea what will happen when they do move. The probable ignorance here is tremendous. The average person going into marriage believes that his or her own salary check is their own property, and the idea that that salary check or-- I have been in a pension system, but the idea that my pension would be something that would be shared would be a startling thing to a lot of unsophisticated people.

PROFESSOR WIESBERGER: But, what about a traditional marriage, where the wife is home full time and the husband is the breadwinner? Do you think at least the homemaker, without being sophisticated legally -- don't you believe that that homemaker believes that he or she has some stake?

PROFESSOR HECKEL: I don't think they believe that. I think they do not believe they have a legal stake in the salary of their husband.

MS. ALLEN: I think they do until they find out they don't.

MS. SEHAM: I think they do and I think that women who become widowed are quite horified to find out that they are inheriting things that they thought were already theirs, which are not considered by the law to be theirs at all -- furniture and all kinds of family property, which was considered to be family property.

MS. KIERNAN: That's assuming there is no will.

MS. SEHAM: No, I am talking about a will. I am talking about an estate. I am saying, you inherit from your husband something that you thought was yours and that you did not have to inherit from him because it was already yours, or half yours. I think the ignorance of the law thing works under both systems. I don't think people think much about it at all, frankly. I think when they move from state to state they don't think about the property laws at all. They probably assume it is going to be the same and don't think about it.

MS. ALLEN: Well, I think in the field of pensions, a lot of women do think they have more coverage than they wind up having, particularly when the spouse dies at an earlier age than eligibility age and having a vested right in that pension.

MS. SEHAM: Maybe the difference here is in management and control. I think the traditional housewife, of whom there are relatively few these days, by the way, may not think she has a right to her husband's salary, to have it in her hands and control it. She may think that he has a right to manage it, but she certainly thinks she has a right to have shelter and food and other things provided that come from that salary.

PROFESSOR WIESBERGER: So, voice in the allocations too-- It seems to me the most appalling or an appalling case of a real horror scenario under the present system is the woman who was widowed with young children, is married again, is a traditional housewife during this second marriage, and helps, through being very frugal at home, in the accummulation of some savings account stocks, whatever, with the second husband. Then that woman dies first, hoping to provide for her kids from the earlier marriage. You hear this. Do you mean to say that she has earned nothing that she can will to her kids from the 30 year second marriage, where clearly it was her frugality in not buying things or making due with whatever? It is situations like that, I think, that will get many people thinking that surely her contribution at home

should be recognized in a legal way.

PROFESSOR HECKEL: I think this kind of a law cries out to be adopted to bring equity, but I think it is complicating life a great deal. The present law is inequitable and sinful, relatively, and this is a lawyers panacea. I think having equitable distribution added to our fivorce law has been great for lawyers. It should have come and it is the right thing but it has made life a great deal more complicated.

PROFESSOR WIESBERGER: Except for those who believe in a partnership concept and think the law should reflect this. They really do want to share; therefore, the presumption suits them fine. The laws of intestacy under the proposed statute will suit them fine, and everything else that will flow from that. But, if you want something different from the general law to apply to you, yes, then I think you clearly should be getting some expert advice, and the more your assets are the more likely it is that you will want it. I have been met by the argument that I find a rather strange one, that the present system is neutral and you are proposing a system that is not neutral.

PROFESSOR HECKEL: Oh, no.

PROFESSOR WIESBERGER: Well, if you are adversely affected by the present system you don't think it is neutral at all.

PROFESSOR HECKEL: It is not and you know it.

MS. SARAVIA: That's right.

MR. LEE: During the drafting of this, was there any discussion as to the freedom of choice and one exercising the right to be a "houseperson" or house--

PROFESSOR WIESBERGER: You can say wife.

MR. LEE: Housewife, okay.

PROFESSOR WIESBERGER: House spouse?

MR. LEE: House spouse. (continuing) --and that this freedom to have the person choose that now places an obligation on the working spouse to become,basically,an employer, since he has acquired an interest in, say, other dividends or benefits that have naturally, or traditionally, have been his?

PROFESSOR WIESBERGER: I am not too sure of the thrust of your question. I think under the present system, and I think under this system, couples will basically, I hope, talk it over as to whether one spouse will remain home, period , whether it is during periods when there are young children in the home, or whether it is to work part time or whatever it is. I don't know how that decision-making process will be changing, except for the spouse who drops out of the labor market or doesn't enter it having equal property rights with the employed spouse.

MR. LEE: The focus of my question is really geared towards any type of hearing you may have had as to whether or not that question came up.

PROFESSOR WIESBERGER: No.

MS. SEHAM: I think you are talking about decision making being a decision by one person, and I think in practice it is usually a family decision, or maybe unarticulated it is an assumption. I don't think one person decides, "I am going to stay home." I think two people decide who is going to stay home. And, if somebody who has been staying home wants to get a job, they

often have a great deal of resistence from the wage earning spouse.

I hear what you are saying, which is that one person voluntarily chooses to stay home and the other person becomes obligated financially, but I don't think it is a single person's decision. I really don't. I think it is a decision of both of them.

MR. LEE: It doesn't seem to have any real equitable basis.

MS. KIERNAN: I think he is absolutely right. If two people make some kind of even not particularly a decision about how their life was going to work and what their lifestyle was going to be, and say it was traditionally the male that would go out into the work force and the female who would stay at home, then he sort of likes to have, when he comes home, his cocktail and hors d'oeuvre and have her fix a nice gourmet meal and perhaps invite people for the weekend. She has her role also laid out by him as to what she is to do. Maybe she is involved in decorating the house -- things that he wants done for him, which she is doing for him too. He is enjoying the same benefits at least in a very traditional role. I think you are right, maybe 12% or 15% of people do it now. It was not a conscious decision by them, it was a general decision by both partners about what their lifestyle would be.

MR. LEE: Well, with that in mind, in terms of some type of profit sharing agreement, wouldn't it have been a lot easier in terms of them agreeing as to what percentage, or what rate, this person is to be compensated for those services?

MS. ALLEN: You say they become a definite employer.

MS. CERPA: Except that I think New Jersey doesn't allow for contracting domestic services.

PROFESSOR WIESBERGER: We clearly said it is not an employer-employee relationship.

MR. LEE: It takes on a flavor of that though. The person gets benefits, perhaps with the exception of unemployment. But, then again, a person has an indirect interest in one's unemployment check.

MS. SEHAM: Everybody gets benefits. It is a family corporation. One person has one function, another person has another function and everybody gets benefits from what the other person does. It is not a matter of one person paying the other.

MR. LEE: It appears as if there is a lack of choice.

PROFESSOR WIESBERGER: Hearing your concerns, are you worring about a free loader?

MS. SARAVIA: I think that is what he is saying.

MS. ALLEN: Are you worring about a free loader?

MR. LEE: Not specifically. I was just throwing the question out.

PROFESSOR WIESBERGER: I would say of the concerns voiced, that was not one of them. They were more concerned about the imprudent spouse who would go off and do something with the partnership money that the other spouse would not have done. People spend money in lots of different ways, and some are more prudent and there are just life style differences. We have had that. You know, there is going to be a race for whoever can get credit first. But, apart from those concerns, it shows a certain incongruence between the partners to the partnership. Your concern has not been voiced.

The concern about people not wanting to get married, some people

won't get married; that I have heard.

MS. ALLEN: I think in relation to his concern though there is some conversation that is taking place about payment for housework and the fact that they should be covered separately under social security; this is what you are really talking about.

PROFESSOR WIESBERGER: We looked at that as an alternative, compensation for homemaking services, and found that it is so impossible to work out a system that at an early point we abandoned it. I didn't even mention it when I said uniform partnership act, because we didn't get very far at all. But, you are right, there are all sorts of studies as to, you know, if you spend a certain amount of time chauffeuring and a certain amount of time gardening, and what the market value of these various services is.

PROFESSOR HECKEL: As one academic to another, may I salute you and say that what you did this morning was spectacular. And, I do not say that lightly. But, the utter clarity was remarkable.

SENATOR LIPMAN: Yes, absolutely.

PROFESSOR WIESBERGER: Thank you.

MS. KIERNAN: I brought something with me that I would like to share with the commission and anyone who is interested. Justice Pollock made a speach a week or so ago - or before that, I guess - at the New York Law Alumni Association and I had read about it in the paper and I thought we might be interested in it, particularly in his reference to a decision that he made, which I am sure Alma is aware of, concerning the Jersey Shore Medical Center versus Blum decision, in which he extended the common law rule by saying that husbands and wives are jointly liable for necessary expenses incurred by either spouse. Now, we haven't discussed that here, but maybe we should some time. I brought the speech along. He only sent me one nice letter and one copy, but I had a few copies made in the office.

PROFESSOR WIESBERGER: Your reference to that case reminds me of something that happened in Wisconsin at Thanksgiving after that case was decided. We have a tradition of being a liberal state, but there is also a big "but." We have had two 1980 Supreme Court decisions on necessaries in Wisconsin which says on a six to one vote that husbands are primarily liable and wives are secondarily liable in Wisconsin. And, in one opinion the concurring justice and the defending justice in the second case said that might have some constitutional problems, given federal and state court equal protection arguments. But, that whole area of necessaries is one that we have tried to look into, and believed that necessaries, as a doctrine and the way it is developed in Wisconsin, is basically a creditor remedy doctrine, rather than a right of a spouse to get necessaries. Therefore--

MS. KIERNAN: I never thought of it that way.

PROFESSOR WIESBERGER: Yes. You know, if a creditor extends me credit, great, but I can't force the creditor, under a necessaries doctrine, to extend credit. Therefore, we went down that road and in effect abandoned it as a meaningful way of getting any kind of relief for adversely affected people now. Would you agree? I think it is astonishing in a state that prides itself as being experimental to have a 1980 decision that says husbands are primarily liable for necessaries and wives are secondarily liable, rejecting the New Jersey approach.

PROFESSOR HECKEL: Alma, I'm hungry.

SENATOR LIPMAN: Let' go.

MS. SARAVIA: Okay.

SENATOR LIPMAN: We will call a recess for lunch and we will come back right after that.

(lunch break)

AFTER LUNCH

SENATOR LIPMAN: We will now proceed, Professor Weisberger.

PROFESSOR WIESBERGER: I would like to get back to the substance of what we were talking about earlier. One concern voiced about comprehensive marital property reform by members of the State Bar Committee was that the spouses' interests will be so different and so much in a potential conflict of interest that they no longer will be able to advise both clients. Well, I think we are going through a period where we are increasingly sensitive to the fact that spouses may need separate representation. Some of the opponents of the State Bar alternatives have pointed out that under their proposal there probably is a potential conflict and do you have an obligation if the State Bar's alternatives are passed, if you are an attorney in private practice, to notify all of your clients that there is this new statute and you may want to come in for a review of your estate planning because a spouse now has a right to this partition during an on-going marriage?

PROFESSOR HECKEL: well, I teach the legal profession course and I really advise them never, never in a matrimonial action represent both parties, no matter how tempting it is and if they say, "well, we have agreed to everything such as custody, and the rest is just routine. Why should we have two lawyers"? But, it is very dangerous, I think, for any lawyer to represent both sides.

PROFESSOR WIESBERGER: And, I would expand what you are saying as to the existing practice in estate planning. While I think it is possible for the same attorney to draft wills and do estate planning for both, I think there is an increasing conflict of interest and I think everyone has to be very careful to know who your client is. You can't just assume that both of them are your clients, and yet really advise estate planning based on one spouse's interest.

PROFESSOR HECKEL: Particularly based on confidences. If they are both your clients, what do you do about confidences that they inadvertently share with you? It is very dangerous.

PROFESSOR WIESBERGER: Yes. The American College of Probate Counsel, in a recent publication, has a whole series of questions. Like many legal issues, there are lots of questions and no good answers to the questions, such as, "What do you do if? -- and a lot of them concerned estate planning as well as the family law area, where the couple may think of the lawyer as the lawyer for both, but then they really want to keep some information back from the other spouse but want the lawyer to know. What happens thereafter?

SENATOR LIPMAN: Excuse me. Could I ask a question. This sounds very interesting. You are saying that under the marital property community property, the spouses have different lawyers. In the case of divorce, which one?

PROFESSOR WIESBERGER: Well, we were saying under existing law, I think that even in friendly divorces, I certainly advise people who ask me to get separate lawyers, because they may think everything is agreed on and very routine, but then it turns out that no one thought about those pension rights or something else that turns out to be an issue in dispute. So, under existing law, I think there are more and more situations where a husband and wife need to go to separate lawyers, or it is more desirable.

PROFESSOR HECKEL: The wife often does not assert the things she is entitled to, and if her husband is your client as well as the wife, can you say to the husband, "Now, look, she is entitled to a lot more." The situation is very sticky.

PROFESSOR WIESBERGER: So, it is a really here and now problem, and some people identify it as a problem of marital property reform. But, it is not a marital property reform problem; it is just a question of becoming increasingly sensitive to the fact that in some issues, particularly economic issues, husbands and wives may not exactly coincide on where their best economic interests are, and lawyers are just beginning to realize that they may have some additional responsibilities that they don't presently recognize. I think that when you are talking about reform it tends to bring some of these questions up that may not have been as consciously talked about before. At least I would suggest, as I describe the situation in Wisconsin, that I think reform is coming. The only question is when and how, rather than whether we are going to have it at all. And, under any form that has been suggested, these problems of potential conflicts between the wife's best interest and the husband's best interest may require, or it may be highly desirable, to have independent counsel.

When we get to the individual agreement section, we considered and rejected having as a requirement independent counsel. We thought it would seem too self-serving. But, if I were asked, I think that for many couples, would be an important thing to do, to have independent counsel, to make sure what you are doing and if you go ahead and do it you are doing it with full knowledge and, therefore, it can't be overturned because later on someone says, "Well, I didn't know what I was doing and there was overreaching," and the court is going to say, "Well, it is unconscionable and for whatever reason it is unenforceable."

I just thought I would give a little emotional play here before we got back to the nitty gritty and tell you about two cases in talking about marital property reform and why it is needed. We thought the most important thing to do was to explain the need before we got into what the proposed solution might be and two of the cases make the point, I think, about the inadequacies of the common law system. One involves a Wisconsin case and the other involves a Nebraska case. They are often included in family law case books, particularly the Nebraska case, involving a farm family. I believe it was a 1951 case, and that usually gets some emotional reaction, when Mrs. McGuire goes into court during an on-going marriage, and she worked hard and did all the right things that a farm wife should do, and she wants indoor plumbing and she wants some clothes and some other things. The court basically says, if you are here in the context of a divorce proceeding you can have relief, but we don't

want to interfere with the on-going marriage and as long as you are in that situation, you accept the level of support as determined by your husband. And, in his case, he was not a poor farmer, but it you looked at his assets--

PROFESSOR HECKEL: He was very frugal.

PROFESSOR WIESBERGER: Well, frugal in many aspects as they involved Mrs. McGuire. The Wisconsin case, I think, hits also at a very emotional level, and it is the Rasmussen case. Mrs. Rasmussen was the one who saved out of her household allowance -- whatever it was, $25 a week or whatever it was. She saved some amount of money because she wanted the kids from that marriage to go to college. There was a disagreement about the value of a college education, apparently. So, she made all the purchases, but there was a little excess which she carefully banked in a joint account with her children for their college education. And, she died first and Mr. Rasmussen said, "That is my money in that account because it was my money when I earned it. I gave it to my wife for household expenses. This is an excess of household expenses," and he was successful.

I guess there is a third Wisconsin case that is perhaps a little less clear, but she agreed to support him through graduate school in return for a promise that he would support her. It took him a while. I think it was 19 years, but he finally got his doctorate and he now teaches at the University of Wisconsin in Madison. I met him in person. I could hardly restrain myself from saying, "Oh, you are the person who broke his promise." But, anyway, she supported him all those years, and then it was her turn, and there was a disagreement as to a lot of things, and in the divorce proceeding the question was, "could she enforce her contractual rights of getting some quid pro quo for the promise," because she was now going to the graduate school, and the court did not find any promise and there were no enforceable rights. Apparently, she never was able to succeed.

PROFESSOR HECKEL: We just had a decision in New Jersey, which was a landmark decision, in which the trial judge awarded the wife and evaluated his medical education, and gave evaluation to it and said she put into that and she is entitled to half of the value of his medical education and the prospects, as I recall, of what he will get as a doctor. And, that is a landmark decision.

PROFESSOR WIESBERGER: Right. We even got word of it out in the mid-West and are very interested in progressive New Jersey courts.

PROFESSOR HECKEL: By the way, I taught him law. Sometimes there is a delay.

PROFESSOR WIESBERGER: Well, in any case, it is cases like this that are real "here and now" cases that have been litigated that underscore for people how basically the law is going to conform to what they think is equitable and reasonable and they find that it isn't because everyone in Wisconsin knew the law and they reacted to it in the abstract that has produced some of this widespread support.

I guess this morning we got as far as the individual agreements, and I think from here on in what I am going to try to do is, rather than go over the broad terms, just identify the areas where there has been some conflict and some policy choices, and at least you will have some sense in a more specific way as to how our legislation was fashioned.

In the individual marriage agreement section, there was an interesting philosophical drafting question. We attempted to spell out a lot of general contract law. We were codifying deliberately in the legislation. The Legislative Reference Bureau, the drafting arm, does not think that is good drafting. If it is in the case law, you don't put it in your statutory law, and there was a good deal of give and take. The legislative sponsors said, "We want it in, even though we know we are not adding anything by spelling it out, because if people read that section, lawyers and non-lawyers alike, we want them to know that undue influence, for example, and fraud and incomplete disclosure, all these normal contract questions and the case law developed, are applicable." So, that was a general decision made. We have places where you are going to see provisions and you kind of wonder why is it in there, isn't this a duplicate of something else? And, the answer is, yes, but it was deliberately done that way for educational purposes, the education both of lawyers as well as non-lawyers. Sometimes rather than referring back to a section, which is better drafting policy, we will repeat something just to underscore for the lawyers, in case they get a little sloppy, that we intend to incorporate certain things.

I would say the individual agreement, the most interesting conference we had, had to do with whether there was going to be a requirement of consideration. In order for the contracts to be valid, we clearly wanted full and fair disclosure, and there was no argument about that. But, there is a question: Should someone who agreed to something be able to get out of it if they could argue there was no consideration, no quid pro quo, nothing they got of sufficient value to have it enforceable? And, within our own group there were differences. Some people thought individual agreements should be very difficult to enter into. But, once you did it, they should be enforceable without very many exceptions. There are some people who argue they should be easy to get into and easy to get out of. And, we had every different position represented in our own group.

The final decision was made that we thought spouses should be free to make gifts a present property. So, if I wanted, when I got married, to take my separate property and say it is marital, I should not be restricted under normal gift laws, from making a gift of something that I already acquired. But, as to future gifts, I agree that anything I receive as separate property -- gifts, inheritances, whatever -- in the future should become marital. As to making gifts of that sort enforceable there ought to be a consideration, and we had a big debate as to whether we should define consideration as full and adequate or fair consideration. There are whole different standards, and you will notice if you go back and look in there, we just talked about consideration and taking a traditional drafting way out and saying, "Well, the case load will develop what kind of consideration we mean." And, maybe that is less irresponsible than you may think because in our present law it says under the probate code, you can waive certain probate protections. The stataute is silent as to consideration, but our case law is quite clear that you need some consideration, and we attempted to tie together that existing case law with the consideration requirement under the individual marriage agreement. But, that was a distinct issue, and I think people in this room probably vary as to how easy or how difficult it should be to enter into

these agreements, and how easy it should be to get out of them, if you want to.

MS. KIERNAN: Would you define consideration in the legal sense for me?

PROFESSOR WIESBERGER: Well, it is easier to define what it is not.

MS. KIERNAN: Like everything else.

PROFESSOR WIESBERGER: Right. You have a couple about to get married, and the proposed agreement is that whatever he earns is going to be his separate property and whatever she earns is going to be her separate property. Well, on its face it looks as though they are each getting something. But, let's also suppose that she, by agreement - it is well understood - is going to stay home, so that he is going to have an income, which under the agreement will be his separate property, and she will have no income and, therefore, no separate property. I would say that agreement clearly is not supported by consideration. Okay. Now, suppose he earns $50,000 and she earns $5,000, or suppose he earns $50,000 and she earns $10,000 -- I mean, you start playing around with the figures -- at some point it is going to be supported by consideration under our standard, but I know not where and I would not even care to speculate there. But, the easy case, where she is not going to have anything, or she is going to have $1,000, which is only a minute fraction of what he is going to have, that would be inadequate.

PROFESSOR HECKEL: I think the diffiuclty is not so much the amount of consideration as much as she has independent advice. I mean, in the average marriage case still today I suspect, the wife does not have as much experience and she will not understand what her rights are and she will bargain them away, like all antenuptual agreements; the problem with antenuptual agreements has to do with whether they are free with full disclosure, and both parties have to know what their rights are. And, I would think that here that is the problem.

PROFESSOR WIESBERGER: You are absolutely right, because you are dealing with a confidential relationship, or one that in most circumstances is a confidential relationship.

PROFESSOR HECKEL: It is not likely to be arm's length.

PROFESSOR WIESBERGER: And you worry about one spouse overreaching the other. So, we have, really, a multiplicity of protection. One is the full and fair disclosure. We stayed short of requiring independent counsel, but I would assume that is going to be an important factor, in fact, as it is under our case law in the Probate Code individual agreements. We have an unconscionability standard. We also have void against public policy. So, we have tried to build in a number of multiple protections.

PROFESSOR HECKEL: I would strongly urge independent counsel. I would say no agreement should be possible or upheld unless there were independent counsel.

PROFESSOR WIESBERGER: Okay. All I might suggest is that from a political point of view, that presents serious problems.

PROFESSOR HECKEL: I don't care. I think it is important that people know their rights.

PROFESSOR WIESBERGER: I would agree with you as to the kind of advice. My guess is that politically such a requirement is going to be considered so unacceptable that it probably will not have a chance in the immediate

future or even the middle future to be included.

One special feature of our individual agreement section has been expanded in the newest bill that is in the process of being introduced. One of the problems that was raised about community property in general is that there is going to be more and more probate required because of the equal ownership, and many people in Wisconsin, as in many other common law states want to avoid probate and the way they do it is by having a lot of jointly held property, which is passed outside the probate system to the surviving joint tenant.

What we did there was to adopt two provisions, and our most recent bill that you will get a copy of reflects that. One is based on what the State of Washington permits by statute. In the State of Washington, couples, by agreement - that is why it is in the individual agreement section - may agree to dispose, by contract, of property at the death of the first to die spouse. They are called Washington Community Property Agreements. In the State of Washington, you go to your friendly drug store and you get a form - and lawyers tear their hair but it is used very commonly in Washington just as joint tenancy is used very commonly in Wisconsin - to avoid probate. And, we have put in an option. If people want to avoid probate, they do it now and feel they should continue to be able to do it under a marital property system. So, we have the Washington Community Property Agreement provisions in our statute.

We have also added something from the Uniform Probate Code, which says that on acid by acid basis you can take a particular piece of property and add a right of suvivorship to that, and under the Uniform Probate Code as we have adopted it, that is non-testamentary in nature. It passes outside the probate system. Again, if people want these options to avoid probate - although in Wisconsin probate is not a horrendous procedure; we have informal probate and all the rest - and they seem to want to avoid it, Mr. Dacy is still selling copies of "How to Avoid Probate", in Wisconsin as well as elsewhere. We have provided these options within a community property, marital property system. And, that is part of our individual agreement section.

Okay, as to debts, we had a lot of policy choices on debts, and I would say that if our draft differs in any significant way from the uniform proposed act it is in the debt section. And, I think the easiest way to summarize our debt section is to say that there are three kinds of debts. The easiest to define are separate debts during the marriage. A separate debt during the marriage is a very, very narrow band of debts. Basically, they are debts that the creditors agree are separate debts during the marriage, and if there is default only the separate property of the contracting spouse can be used to satisfy it.

Then we have separate debts prior to the marriage, and here we originally choose one solution, but we have now adopted the Washington-Arizona scheme. Basically, as to separate debts prior to the marriage - the car you buy while you are single, or whatever, there are a whole variety of things, and it also applies to debts acquired in Wisconsin prior to the effective date - the creditor can follow the debtor into the marriage and get whatever the creditor could without the marriage. So, the income stream of the debtor, which is marital property after marriage, is available 100%, but the income stream of the new spouse is not available. There is no windfall for the creditor because of

the marriage. That seems to be what most people feel comfortable with. We had two groups that really wanted it that way. One was the existing creditors, because they know how to operate under the present system and they were willing to take their risks as they presently do. The other consisted of attorneys who saw themselves representing the non-contracting spouse and didn't want that new spouse's income at all involved in pre-marriage debts of the other spouse. And, once we went to that solution the dust pretty much settled on it.

The third kind of debt you can have is probably the biggest category, which is going to be marital debts, and for marital debts our original rule was, and continues to be in part, that all the marital property stands behind that marital debt, as well as the separate property of the contracting spouse. But, the separate property of the non-contracting spouse is not involved at all. Well, we now have a special section for that unsecured credit. I said earlier on management and control, for a spouse who would normally have management and control rights over all the marital property, all the marital personal property, there is now a limitation for unsecured credit of only being able to encumber one-half of the marital property, and in satisfying a marital property debt, based on unsecured credit, we have a similar limitation - that the creditor can only go to one-half of the marital, plus the separate property of the contracting spouse. Now, we know that some spouses will want unsecured credit, based on 100% of the marital, and we have a limited joinder provision that we have just finished drafting which says the second spouse can join for the purpose of making 100% of the marital available. However, that spouse's separate property will not be implicated just because they are allowing the marital property to be available, unless they expressly join in. And, that is a very sensitive issue. If you are the second spouse you are willing to say, "Okay, maybe all the marital for this debt, but I don't want my inheritance, or whatever to be involved." That separate protection, it seems to me, is awfully important.

In general, the uniform act is much more favorable to creditors. But, we have a history in our state of trying to balance debtor rights against creditor rights, and the Uniform Act favoring creditors is incompatible with our history of creditor-debtor rights in our State. I suspect they are going to be under great pressure to limit the creditor protections.

For example, under the Uniform Act if it is a marital debt, all the property of both spouses is available, even though one spouse signed. I think that goes too far, really. You also, under the Uniform Act, can change a pre-marital debt from a separate debt into a marital debt if it benefits at all the second spouse. For example, I buy that car before marriage and I encumber my income stream, unless my new spouse drives it once or twice. If you read the Uniform Act, it now looks as though having driven it once or twice all that spouse's assets are available for debt satisfaction, which I think it much too generous because it provides a windfall.

PROFESSOR HECKEL: It gives the creditor more than he is entitled to.

PROFESSOR WIESBERGER: Yes. Well, the only thing good to say about it is it is going to have creditors encouraging their debtors to get married.

PROFESSOR HECKEL: That overcomes my worry.

PROFESSOR WIESBERGER: Right. So, if you are worried about the marriage rate, maybe this is one way to counterbalance it.

That probably is the main part of the debt satisfaction. In community property states, under our act, it is absolutely appropriate for a creditor to ask for your marital status, because property rights flow from marital status. If all you want is a separate debt during marriage, you don't have to provide a statement of your separate property, and that is it. But, that comes as a surprise in common law states where we have all worked too hard to eliminate credit inquiries about marital status to see it come in, but it is inherent in the property system; the creditor can't assess your property rights unless they know your marital status.

We also had an interesting question about interrelationship of these individual marriage agreements and creditor-debitor rights, because suppose you want to change the laws that apply to you through individual marriage agreements, how is that going to interface with what creditors are going to be able to get to? We had a long debate and finally decided that we were not going to mandate the filing of these individual agreements because many people consider that an invasion of their privacy. However, we have certain consequences flow as to creditor rights, depending on whether you have filed agreements or unfiled agreements. If they are filed, you have to provide a copy upon request to the creditor and then the creditor is bound by the agreements. If is unfiled, the creditor has some options to choose which way they want to go in recognizing or not recognizing that.

MS. KIERNAN: Could you claify that a little bit? That is quite an interesting point.

PROFESSOR WIESBERGER: Okay. The question really came up whether we were going to require filing and, in effect, make that notice to the whole world.

MS. KIERNAN: That they have an agreement?

PROFESSOR WIESBERGER: That they have an agreement. And, we thought this for two reasons. I mentioned one. We believe that many people will want these individual agreements, but they will not want to file them and make them a matter of public record. I had a Norwegian student, a law student who was a greaduate student at Wisconsin, and I asked her about their property system, and there they have a community property type system with marriage agreements like this. I said, "What about this privacy"? And, she said, "Oh, you can call up and find out about your neighbor by calling this central location in one city, and that is it." Well, that is unacceptable, I think, to many Americans, and politically the legislators felt that we were not going to require filing.

The other part of it is, are you going to require creditors to go through all the filings? You impose an additional burden and therefore a cost in granting credit that were weren't willing to impose. So, there were two reasons, but I would say the privacy reason was probably the primary one. We didn't want to require filing.

Well, okay. How do you interface? If you voluntarily file, a creditor must ask if there are documents that verify the ownership, and if you present them with the information about your filed documents they are bound by them.

If they are unfiled documents, if you and your spouse have an individual agreement that varies the terms, but it is not filed, the creditor may choose to either acknowledge and proceed under your agreement, or it should proceed under the normal statutory rights.

MS. KIERNAN: So, it becomes a creditor's interest to decide at that point, not yours?

PROFESSOR WIESBERGER: Yes. Now, you and your spouse still have a valid agreement and if the creditor proceeds according to the State Property Laws, then you may have remedy.

PROFESSOR HECKEL: Thank you.

PROFESSOR WIESBERGER: You're very welcome.

PROFESSOR HECKEL: I would like to come out to Wisconsin and be your student.

PROFESSOR WIESBERGER: That's a compliment. You still may have remedies because it is a valid agreement between the two of you, but the question is how much are you going to bind third parties if the document is unfiled? And, this is how we have accommodated these competing interests.

MS. KIERNAN: Is there any experience with that?

PROFESSOR WIESBERGER: I don't know any other area with voluntary filings. We have had not only to eliminate any filing requirements which we had considered at the beginning, but there was some strong political sense that we call it a marital registry, which is voluntary. But, even that went too far and so under the statute as it is now drawn all we do is broaden the register of deeds power to accept filings to include these documents. We really played down this aspect because apparently once people hear there are filings, even though they are voluntary, there is a negative reaction which we wanted to avoid.

MS. CERPA: The outline on page 10, on credit transactions with married people, will break down that filing system the way the professor explained.

PROFESSOR WIESBERGER: And, on page 11, this marital property registry has now been eliminated as a separate animal. Everything else flows as it did before, but we do not have a separate thing called a marital property registry. But, the same document that was referred to can now be filed, including one that I haven't mentioned before. Nowadays, I know people who have two separate domiciles in two separate states -- you know, the community marriage -- and for whatever reason they each choose to have a domicile in distinct jurisdiction. Well, we thought it was unfair to have the Wisconsin spouse sharing under the Wisconsin property law, and the Illinois spouse - just to use an example - under separate property. There is not a mutuality. So, for those two spouses where their domiciles are in different jurisdictions, they may choose to file a choice of law statement, in which they, by agreement, say they will be covered by Wisconsin or they will be covered by another jurisdication. I think that is just another interesting twist, based on modern mores that we have had to accommodate. You really could have a great deal of disparity and inequity if the Wisconsin spouse is covered but Wisconsin has no jurisdiction over the other spouse.

MS. KIERNAN: But, that's public information when they fill that?

PROFESSOR WIESBERGER: No. Okay, the enforcement proceedings -- I think I am going to skip over them, except to make a general comment that

we have had a broad range from access, to damages, to partition, to termination of equal management and control rights, to sole manager situations, and special remedies for unconsented gifts and for having your name added to title. And, the only place where I usually mention that there is an overlapping between my labor law interest and marital property reform is the agreement to arbitrate disputes; under the statutes or under agreements that is expressly provided for.

MS. CERPA: Professor, is it in this section that Wisconsin now has included accounting?

PROFESSOR WIESBERGER: Yes. Previously, under Sub 4, accounting was an auxillary part of the relief you could get in getting another kind of an action. If you were bringing damage action you could get an accounting, but now it is an independent action.

Let me just mention, because it is very different from a separate property system, the treatment of insurance and death benefits in community property states under our statute. This is well accepted community property law and I talked to some practitioners and they say, "Of course, doesn't everyone do it this way"? But, it is very different from New Jersey or Wisconsin. In New Jersey or Wisconsin, if you want to take out an insurance policy on your life, you are the insured and you - it is your property - designate the beneficiary. You may choose for estate planning reason to give away your ownership or make a gift of it to the beneficiary or someone else, but again that is your choice. You own it initially and you are the insured and you designate, as part of your ownership rights, the beneficiary.

Well, community property states are different, very different. If you use your community property to pay for the premium, either directly - to make a payment from your wages - or maybe as part of your fringe benefits you get insurance coverage from your employer, that is part of the community property there. In community property states if the premiums are paid for by community property proceeds or labor, it is a community property policy. Some policies, of course, are going to be part separate because you started them when you were single and then you got married. But, they are going to be community property components of life insurance policies, for example. In the community property states you cannot designate the beneficiary for over 50% of the proceeds attributable to the community property premiums except with the consent of your spouse, because your spouse owns the policy as you own it as community property, and we have a special recovery way so that if there is not consent upon the death of the insured, and the insured has designated some third party - the third party might be anywhere from kids from a former marriage to a friend, non-relative, or even a relative - the surviving spouse may recover the community property portion that that spouse owns upon death. We spell this out because it is so different. It is consistent with community property concepts but it is very different from what we are used to. We are used to if it is an insurance policy, we can designate the beneficiary, and that it very different from the community property state.

Those who live in a community property state tell me that it is done very easily because consent forms are part of the standard forms that you are given when you take out a policy. But, I wanted to mention that because

it is on the outline specifically, and it quite different from what we are used to.

Okay, let me skip to the at-death provision in the statute, because again the difference between the separate property state and the community property state is very different, and we have several policy choices that our most recent bill reflects that are not reflected in Substitute Amendment 4.

First of all, we have increased the intestacy share of the surviving spouse, and we have done it in a somewhat unusual way. The surviving spouse in a community property system - marital property system in Wisconsin, as proposed - owns at death half of the marital property, outright. You don't receive it at death; it has always been yours during the marriage and now the at death point recognizes that equal ownership of marital property. All the community property states are similar in that way.

But, there often are additional protections that are needed. In most of the community property states under laws of intestacy, as to the portion a decedent could will if he or she had a valid will, it consists of one-half of the community and the decedent's separate property. The community property states generally give to the surviging spouse in intestacy all of the community property, and then they vary as to how they handle separate property. Based on Professor Effland's advice, and remember he is the one who experienced it both in Wisconsin and in Arizona, he recommended highly Arizona's intestacy scheme because in Arizona they have eliminated arguments on property classification because of the way they have structured their intestacy laws. In Arizona, if there are only children of the surviving spouse and the decedent, the surviving spouse gets everything -- all the separate property and the decedent's share of community. However, if there is at least one child or issue of the decedent who is not also a child or issue of the surviving spouse, you have a very different law applying in intestacy, where there is no will. In that situation, the surviving spouse only gets one half of the separate property. So, by the nature of that scheme, there are no arguments particularly over whether something is community or whether it is separate because the surviving spouse gets half of it, regardless of the classification.

Well, we have taken the Arizona scheme, which is not reflected here, but is reflected in the new bill, and modified it to say that if you only have kids of the decedent and the surviving spouse, the surviving spouse gets everything. We are similar in that way. But, if there is at least one kid or issue of the decedent who is not also a kid or issue of the surviving spouse, the surviving spouse gets the greater of $100,000, or one-half the separate property. We put a floor of $100,000 as additional surviving spousal protection. That, of course, does not take into account the fact that the surviving spouse, of course, owns outright one-half of the marital property. So, we have adopted the Arizona scheme, which is a little different than most of the other community property states, without modification, and we think it is a sensible choice. We have gotten very little feedback on that because of the simplicity argument. You have less arguments over classification.

MS. KIERNAN: That's $100,000 or--

PROFESSOR WIESBERGER: The greater of $100,000 or one-half of the separate property.

MS. KIERNAN: Whichever the larger figure is?

PROFESSOR WIESBERGER: Right.

MS. CERPA: That is if there are children?

PROFESSOR WIESBERGER: That's if there are children. If they are just kids of that marriage, then the surviving spouse gets everything. But, if there is at least one kid from a prior marriage -- you know, the easiest example is a second marriage with at least one kid -- then the surviving spouse of course has that surviving spouse's share in the community or marital and then $100,000, or one-half of the separate, whichever is greater.

We have done something else that is somewhat unique and it is to solve a problem that remains unresolved in the community property states. In the community property states they have no right to elect. That is a common law property concept. It is our basic protection in Wisconsin for the surviving spouse. However, in the community property states they have admittedly a number of situations where they have what is called the community without community property, or separate property marriage, where the marriage has generated very little, if any, community property. Maybe it is a second marriage and a retirement situation, and the basic property system thereby provides no particular protection and the spouse, by will, has disposed of half of the community and all of the separate property. So, they have surviving spouses who may live very well on the income from five million dollars of separate property, but have nothing at death. We have continued, in a very limited form, a right to elect. We basically have retained a Wisconsin right to elect of one-third, but it's now the separate property probate estate.

Our third protection, besides the basic property law, besides the limited right to elect, involves a unique existing Wisconsin feature. In our present probate code, we give to the probate judge discretion in testacy and intestacy, to make a special allowance not just during probate administration, but period. We give a special allowance for the support and education of minor children. No matter what has been provided, if it is insufficient - and we have certain standards in that discretionary section for minor children, and we have now added the surviving spouse as a protected class - and assuming there is not enough community or marital property and assuming the right to elect doesn't provide enough for the support and maintenance of the surviving spouse, the judge has discretion in our probate code under the proposal to make an allowance, and I am not talking about just during the probate period; I am talking about a permanent allowance -- figuring out what that spouse needs and setting it aside for that spouse.

These are, I would say, in the nature of surviving spousal protection more than, perhaps, marital property reform provisions, but we see that as one bundle.

The only other thing I would like to mention because I think it has been troublesome to draft and we are still in the process of revising and reworking it, has to do with the material-- Well, if you read our legislation, toward the very end we have something called agreements preserved. It is how you go from one system with lots of existing contractual rights, arrangements that you don't want to disturb and maybe you can't constitutionally disturb, and go to a new system. We have said that this is prospective only, except with this quasi-marital property concept. So, we have a very important section that is called the grandfather section as to existing range of agreements,

including buy-sell agreements, guarantees, existing joint tenancies and tenancies in common, existing marital agreements which may not meet the new standards, and for those listed transactions as well as a more general catch-all clause. We have said if they were valid at the time they were entered into, they continue to be valid post-act; however, if there is -- and then we use a tax law concept -- a material change post-act, then they are brought in under the requirements of the new act. This has been very difficult to draft because we were very clear about some of the transactions we wanted to preserve, but we didn't want to omit any. So, we tried to draft it both by giving specific instances as well as a general catchall. I suspect that even what is introduced in late March of this year is going to be redrafted before final passage to reflect even greater refinement. This is basically a transitional problem.

MS. KIERNAN: Could you give us an example of how this works?

PROFESSOR WIESBERGER: Okay. You and your spouse have entered into a pre-marital agreement now which does not comply with the formalities under the new act, but at the time you entered into it it was absolutely valid. We don't want to interfere with that, although according to some of my constitutional law colleagues we may or may not have a constitutional right to require you to reexecute it if you want it to be valid under the new standard. We want to grandfather that and say that is what you entered into, that's what you wanted pre-act, you can continue to have it even though now some of the property is going to be affected; it is going to be property that you acqure post-act.

MS. KIERNAN: That property will still be covered by your pre-act agreement?

PROFESSOR WIESBERGER: By your pre-act agreement, but if you amend it, and the amendment is found to be a material change--

MS. KIERNAN: After the act takes place?

PROFESSOR WIESBERGER: After the act takes place, then it is going to be governed by--

MS. KIERNAN: Does the entire agreement change?

PROFESSOR WIESBERGER: Yes, the entire agreement.

ASSEMBLYMAN SMITH: In other words, you are going to have to revise the whole agreement.

PROFESSOR WIESBERGER: Once you have made a material change. Now, you clearly-- I know it is like moderate and reasonable; these are troublesome words, I know it. But, this has been used as far as federal tax law is concerned to grandfather certain charitable remainders back in 1969, and it was the best tool we could come up with to say: well, we are going to grandfather it but if you try and play the system too much by doing post act events to this pre-act document--

ASSEMBLYMAN SMITH: We are going to slap your hand.

PROFESSOR WIESBERGER: Yes.

MS. KIERNAN: I can see a big problem with that.

ASSEMBLYMAN SMITH: Well, your spouse might have been part of that or may not have been part of that.

PROFESSOR WIESBERGER: Probably was not part of it.

ASSEMBLYMAN SMITH: Well, more than likely not.

PROFESSOR WIESBERGER: Yes, and if all you do is continue along

under that, fine. But, suppose you and your partner decide to amend it and let's say you really change the basis on which you are going to value the interest, not just be tinkering with some minor feature. There I don't think it is unfair to say this is basically like entering into a new post-act and you are going to be covered by the new requirements.

I would reiterate that this particular provision which seems somewhat innocuous, the drafting of it is a big challenge because there are somethings that you can't constitutionally affect, although no one can tell me what, even if they have been teaching constitutional law for zillions of years. Also, there is something that you may not want to, as a matter of policy, affect because people are relying on it even if they don't have a constitutional argument for reliance. You don't want to disturb too many things unless you have to.

MS. KIERNAN: The fairness doctrine.

PROFESSOR WIESBERGER: Yes.

ASSEMBLYMAN SMITH: How would wills fall under this?

PROFESSOR WIESBERGER: We are not changing any of the formalities of the will, but the property which your will is going to be affecting is clearly going to change after the act. I mean, basically you are just going to have, as to what is property classified as marital property, a situation where you can just will half of it. Now, your will is going to be exactly as your old will is, excuted according to all the old standards. But, that has always been true. The will affects a changing body pool of assets. I mean when you executed you may have 'x' and 'y' and by the time you die you may just have 'x' or you may have struck it rich and had a lot added to your probate estate.

MS. KIERNAN: His question was what if the agreement is being handled in one way but the will is not? That was my understanding of it.

PROFESSOR WIESBERGER: Well, wills are unilateral documents and you can have a post-act will that is going to be subject to the same probate code formalities with all the same requirements of witnesses having to sign in the presence of the testator and all that. We are not changing those formalities. We are changing the formalities though. We are making them more formal. In fact, the original draft used will formalities and I said: "We have all these crazy problems in Wisconsin when it says 'in the presence of.' Does that mean you have to see the person sign or can it be in the figurative presence of"? And, I said: "We don't want any of that terrible formility litigation to come up." So, we have witnessing requirements without some of the will's formality requirements.

MR. LEE: Are you aware of any public opinion polls that were taken before you acted on this?

PROFESSOR WIESBERGER: Did we do any social science research? No. We thought about doing it and we had a problem with coming up with some dollars to do it, and all we can say is based on an unscientific social science survey -- when we talked to groups, and the feedback that the commission got way back before this was even proposed. The only thing I am aware of is that there are some studies in Iowa and believe another midwestern state about how common joint tenancy property is, and the theory that many people consider joint tenancy the closest thing to a sharing system that you can have in common law states. There are some English social science surveys asking couples

what they think they own, like the house. The house is one thing that people tend to disregard title to. Most couples think the house is owned by both of them whether it literally is or not. They asked about a whole series of assets. But, do we have Wisconsin research? I think we need to have it and if anyone would like to suggest a good funding source--

MR. LEE: Having this in mind, that this is a radical change from our current law in New Jersey, how was it generally perceived by the general populace out in Wisconsin?

PROFESSOR WIESBERGER: Again, you are asking for my subjective reaction. As people know about some of the problems under the existing system, I think they tend to have this attitude of "surely the law should reflect what we think rather than the way it is." And, I have always said this legislation is basically supported by three groups: one is the house spouse. The second is the lower wage earner, who often is a woman and who often is coming home and doing the housework after working and therefore there are some special equities for the lower wage earner. The third group includes a large number of male supporters and they believe in a partnership marriage and think the law should make it easier for them rather than putting obstacles in their way. Clearly, under the present law if you truly want to have a partnership marriage with an economic sharing of the assets - fifty-fifty - it is hard to do. You have to take certain affirmative legal steps. Maybe there is no way for some personal property that has no evidence of title to ever have that as tenancy in common or joint tenancy, for instance the furniture. Anyway, even if you could, every time you acquire something you have to do it right. It seems to me as though the system should provide a vehicle so that those who want a sharing marriage have a system that will cover them rather than have them go through hoops.

As to percentages, you can guess as well as I can.

MS. KIERNAN: June, could you give us a quick rundown on what the timetable looks like. We know how it works in our state pretty well, but what is your legislature doing? Are they in session this year?

PROFESSOR WIESBERGER: They are in session this year and they are probably going to talk about budget matters until June. This is a big budget year normally, and it is bigger because of the crisis. There are committee hearings, however, going on, so the bill will be introduced. The legislative debate has nothing to do with introduction and committee hearings. But, probably there will be no floor debate until the fall, and it will probably go before the Assembly first, simply because of the dynamics of the two houses.

MS. KIERNAN: Is there a timetable on how bills are handled in your state? I mean, are there a certain number of days after introduction and that kind of thing? You know, some states do that and that is why I am asking.

PROFESSOR WIESBERGER: No, it is highly discretionary. The last talk I heard was, rather than having a hearing by the Assembly Judiciary Committee, they may have some sort of joint Assembly-Senate hearing. But, that is probably going to be before the summer.

SENATOR LIPMAN: But, they have been through it once.

PROFESSOR WIESBERGER: They have been through it once.

SENATOR LIPMAN: So they can do that.

PROFESSOR WIESBERGER: They have been though it once; however, there are significant changes and the bill will not be ready for circulation until about the time it is introduced. So, we are going with a time schedule that is much tighter, and some of us were concerned that if we didn't allow a good period of time, i.e. six or eight weeks, between introduction and hearing, there is going to be a lot of legitimate complaint saying, "You introduced a bill with 90 pages and new tax rates, and we are going to have a hearing tomorrow? That is unreasonable." So, that has some real booby traps, and the hearing will not be, probably, until May.

MR. LEE: I think you mentioned earlier about the various organizations. Could you reiterate one thing? Were any church orgnaizations involved in that?

PROFESSOR WIESBERGER: I don't think I mentioned it before, but the the United Church in Wisconsin is a large group and I believe as a result of a recent presentation by the Wisconsin Council of Churches that there will be endorsement. I think generally the churches, with a few exceptions, that are interested in family stability see this as something that they strongly favor because it gives both parties an economic stake and it eliminates that irony that I started out with, that you are better off divorced in Wisconsin than you are in an on-going marriage if you are the spouse with less money. The family stability argument, which is part of our legislative finding, is a very appealing church issue. I think there may be a few fundamentalist groups that do not believe in a partnership -- in a marriage being a partnership.

We have not heard negatively from church groups. I would suspect that-- I doubt that they are going to come out to the public hearing. They did not the first time. We had some ultra conservative groups come out because they were concerned about our abolishing certain parts of the common law, but outside of that--

SENATOR LIPMAN: Such as, for example?

PROFESSOR WIESBERGER: The right of a husband to want sexual services. I mean, I was asked that question: Do you really propose to do this?

MS. KIERNAN: We have laws about that in New Jersey.

PROFESSOR WIESBERGER: Well, we don't because when we went through rape reform they still have the exception that you cannot have sexual assault charges against a spouse, so this is still an outstanding legal issue in Wisconsin.

I might mention that technically what we are doing in the bill is we are repealing the old Married Womens' Property Act and substituting this as a new chapter. I read the Married Womens' Property Act recently, and was appalled to find that in Wisconsin in 1981 a wife - a married woman - has the ownership of her wages, except when she works for her husband in his business. And, there it is. And, the one that is even more appalling, and certainly not complied with is, in Wisconsin under the Married Womens' Property Act, a married woman cannot have a business of her own unless her husband has failed to or neglected to support her and her children, or for other good cause. So, I would say that anybody in Wisconsin would be shocked to find that these are laws on our books.

The other oddity we have is that we have an equal rights statute -- one section where men and women have equal rights. It was originally to

give equal rights to women and then it was made sex neutral, so it is rights of married men and women. There was one minor bit of discrimination that was still left in that, which was that in Wisconsin - and this is the existing law that still is on the books - you can only choose your domicile for voting purposes, but presumably the common law applies for other purposes, and under the common law if the husband chooses the domicile and the wife does not concur and fails to follow, there are all sorts of legal consequences that follow. But, anyway, that is a minor part. But, I think not being entitled to wages if they are earned in your husband's business section is a rather odd discrepancy, but not being able to have your own business unless you have not been supported by your husband or for other good causes is really a shocker.

MS. KIERNAN: Should we make that one sex neutral?

SENATOR LIPMAN: I can see the advantage of this for a low wage earning woman. However, if there is no property other than wages, is it a good family stabilizer after all?

PROFESSOR WIESBERGER: I don't know, when you are living on the margin with actually no discretionary choices, whether it is going to make any difference, except perhaps in the psychological sense that the person who doesn't have control of this minimum wage level may feel as though they had more of a say as to some of the choices even within that very limited economic circumstance. I think that is a point that I have to acknowledge, that basically you are talking about some discretionary choices as to how to live and where to live and all the rest, but I don't think it just applies to middle class and upper class people. I think there are a lot of working class people for whom this will have an effect. But, if you are talking about people who are really on the margin there are problems -- continuing problems, I should say.

SENATOR LIPMAN: It still gives a woman the advantage of not being exactly abandoned.

PROFESSOR WIESBERGER: In our original bill we had made some attempt to eliminate some of the disparities in aid for dependent children based on whether it was the father or mother who had custody and how that calculated, but we decided in that area we were taking on more than we could handle already and that welfare reform should come, but this would not be able to be a welfare reform bill. We also considered whether cohabiting couples could opt in and we decided that was another problem too.

There are other areas of probate reform also. Summary proceedings have very low dollar limits and many people think they should be raised, and we said, "You are probably right, but we can't do it in this bill." I think increasingly there is pressure in any reform like this to add on other areas which are related, and I think that is a policy choice that has to be made. I guess we feel we have taken on enough in what we have tried to do, and we have just had to say, "These may be very good areas for the next wave of reform and we will work on that next if you still need help, but not now for this bill."

MR. LEE: If I understand what you are saying correctly, Wisconsin presently does not have common law marriage.

PROFESSOR WIESBERGER: No, we don't. Interestingly enough, in the community property states, I believe only two of them do.

MS. CERPA: I have a question. I don't know whether this really relates or not, but would this act have an effect on property taxes? Would the non-earner be liable for his or her share of property taxes?

PROFESSOR WIESBERGER: Assuming that the property involved is marital property - typically it is going to be the home - the debt satisfaction comes from marital property -- both spouses.

MS. CERPA: It would be a marital debt.

PROFESSOR WIESBERGER: Yes. Now, every now and then you may very well have a house that was owned before marriage by one spouse. If they keep it separate, in that case it will be a separate debt and the other new spouse won't be implicated. But, for most couples who acquire a house during marriage - just to use that as one example - it will be a marital debt and both spouses' incomes will be available for it, and if both signed then their separate property will also be available.

MS. KIERNAN: Isn't that the same as we have now? Most houses are owned by both. They are both on the deed. I never thought of it, but if the taxes on my house were in arrears I would be liable for one-half of the taxes if the house was in two people's names.

MS. CERPA: You would probably be liable for all of it.

MS. KIERNAN: All of it? Okay. What would happen if you were liable for half and nobody paid the other half? You would be liable for all of it, wouldn't you?

PROFESSOR WIESBERGER: Yes, you may have an action against your joint tenant or your tenant in common for contribution but you will--

MS. KIERNAN: Once your name is on there you are liable.

PROFESSOR WIESBERGER: Of course, a lot of people don't realize this and they often sign - particularly women may be asked to sign - for some sort of credit and then later on things go sour and the spouse who really incurred the debt has gone out of state and who is left in town? -- the one who signed,and if you signed you are liable.

MR. LEE: What is the extent of tort liability?

PROFESSOR WIESBERGER: We tried to classify as best we could torts that would result in marital debt and torts that would result in separate debts. Again, we generally followed the State of Washington where if you are in a car and it is for a marital purpose, broadly defined, including recreation - practically everything - it is going to be a marital debt and a marital property because there what you are basically doing is balancing the equities between this innocent victim versus the couple, and the definition in Washington has been quite broadly interpreted. But, you are right, that is something we had to deal with.

People have different drafting styles and we have a marvelous colleague who teaches tort, so I said, "I have to see what he says about torts because I haven't taken torts in a long time." So, I told him what the problem was and asked how he would classify it. Then you have to classify various recoveries -- are they marital properties? He just laughed and said, "I think you ought to have nothing on it and let the courts work out everything." And, I said, "Thank you very much" and then we to someone else who was willing to at least take the inquiry seriously. We tried to spell some of it out, but what is a marital purpose we didn't try to spell out.

SENATOR LIPMAN: Well, this has been a most inspiring day.

MS. KIERNAN: We all want to come to Wisconsin and enroll in your class. Thank you so much for coming.

SENATOR LIPMAN: Yes.

MS. KIERNAN: It has been a great education.

PROFESSOR WIESBERGER: It was great fun. When I started this I thought it was just going to take a few hours a semester supervising students who were going to be doing all this interesting work and it didn't work out that way.

SENATOR LIPMAN: You became an advocate.

PROFESSOR WIESBERGER: Oh, yes. I don't represent myself as a neutral in this area, only in labor law. But, the one thing I thought was that when we were working in Wisconsin in 1976/'77, we would just contact all similarly situated groups throughout the country and we would get all this marvelous information that they had already worked on. We found a few, but not many. That was a big surprise to me. It showed you where I was at. I naively thought other people were already doing what we planned to do.

MS. SARAVIA: Although now I think it is important to note that there is a trend with the National Conference. I went to a conference in Washington on Saturday where people from all over the country came from the Womens' Bar Assocication, and all the topics that they talked about kept pointing to the need for this kind of a concept. One woman spoke on the economics of divorce and she made a lot of similar comments to the ones we heard today.

Another law professor talked about an outline of common law versus community property and wound up talking about a partnership concept, and everyone seemed to feel that even if all the families in the future were two wage earners, given that most people will have children, somebody is going to have to take time off from the labor market and there is going to have to be, in principle, some kind of a sharing philosophy - sharing concept. So, there seems to be some thinking going on, from what I have seen. A lot of different people are now striving to do some research.

PROFESSOR WIESBERGER: Yes. I think the reason we were where we were then was, we had divorce reform just a few years sooner than some of the other jurisdictions. And, now other jurisdictions have "finished" divorce reform and they are now getting into doing the on-going marriage reform.

ASSEMBLYMAN SMITH: Of the eight states that have community property, how long have they had it?

PROFESSOR WIESBERGER: They always have.

ASSEMBLYMAN SMITH: They always have had it?

PROFESSOR WIESBERGER: Yes. So, you have no models for transitional problems.

ASSEMBLYMAN SMITH: That was my question.

PROFESSOR WIESBERGER: Yes. There are no models for transitional problems except, first of all, you had British Columbia - or at least their proposal - consider transitional problems, so that was very helpful in the beginning. But, of course, now we have gotten to sixth generation problems while they were still dealing with pre-drafting problems.

The only other area that we found was, in a State like Michigan, for example, which went to community property perspectivly only and then

abolished it, during the two year period they had community property, and their repeal legislation had to deal with what happened to those vested rights during the two year interim. And, they came up with something I thought was an interesting device which is - it was never tested constitutionally - they said if you want to preserve your rights that you gained during that two year period, you have to register it by a certain date or else they will vanish.

There was one other glimmer of this problem. There is a Law Review article that goes through all the repeal legislation to see what happens to those pre-existing rights. But, otherwise no, we don't have anything, and this last section on preserved agreements is all out of own own cloth, because we couldn't go to the community property states since they were always community.

ASSEMBLYMAN SMITH: What was the compelling reason for their rejection of it after two years?

PROFESSOR WIESBERGER: Oh, that was when the Federal Tax Reform Act was passed.

ASSEMBLYMAN SMITH: Oh, okay.

PROFESSOR WIESBERGER: So, they rejected it in '48/'49.

ASSEMBLYMAN SMITH: Yes. Okay.

MS. KIERNAN: What would happen if one spouse wanted to go the old route and the other spouse didn't? In that case, did Michigan have any problems with the spouses not agreeing on where they wanted to go?

PROFESSOR WIESBERGER: I haven't looked at this material for a while, so I am just guessing. I think what they permitted was, let's assume that during that period the couple accumulated $10,000 worth of community property, I assume what they were permitting a spouse to do was to register their half interest. So, they weren't really recognizing community property; they were recognizing the partitioned interest of the spouse.

MS. KIERNAN: In that two year time any accumulated amounts by them would be allowed to be divided, one-half for either spouse?

PROFESSOR WIESBERGER: Right. And, that is really very similar if you come into Wisconsin. Suppose you say, "By the way, Mr. Attorney or Ms. Attorney, I just sold my California house." Most attorneys should have their electric light bulb going on and off, figuring those properties are probably community property and owned half and half. So, when you now invest in Wisconsin property, each spouse has equally contributed to the down payment, if they are using their community property proceeds. I think it is a similar analysis to what Michigan has gone through.

SENATOR LIPMAN: I was just going to ask -- it is similar to getting a divorce, but not quite, in Michigan to have it partitioned one more time?

PROFESSOR WIESBERGER: Except there it is being partitioned because of the law no longer recognizing it.

SENATOR LIPMAN: Yes, not that you are going to stop living there.

PROFESSOR WIESBERGER: right.

SENATOR LIPMAN: But, the effects of the law, which is being repealed, and the partitioning still gave half and half, didn't it?

PROFESSOR WIESBERGER: In Michigan?

SENATOR LIPMAN: Yes. So they still have community property, don't they?

ASSEMBLYMAN SMITH: If they still chose to.

SENATOR LIPMAN: If they still chose, right. Well, what if they didn't choose?

ASSEMBLYMAN SMITH: It goes back to common law.

SENATOR LIPMAN: It goes back.

PROFESSOR WIESBERGER: If they didn't register it, then presumably whatever the normal rules are would apply.

SENATOR LIPMAN: Well then, do they have both laws operating?

PROFESSOR WIESBERGER: In Michigan I assume that by now it is probably-- Well, I don't know, there may be some 46 registered, or some 48 registered. I suspect it was not used widely because no one has ever mentioned that they know anyone who ever registered property.

ASSEMBLYMAN SMITH: If the tax situation was such that it was repealed because of that problem, more than likely it wasn't carried through. There definitely were probably tax advantages to going the other way.

SENATOR LIPMAN: How drastic is this change in taxes? Is it an improvement?

PROFESSOR WIESBERGER: One way of looking at is, how many winners are there and how many losers are there, and it depends on how you define winners and losers. We have several different tables. One defines it as indifferent if you either get $50, or your liability is $50 more or less, than on another table with $100 more or less -- you know, a one dollar a week or two dollars a week basis. I think using the higher figure, it was something like 75% to 80% indifferent.

ASSEMBLYMAN SMITH: You did a lot of calculations along the way, didn't you?

PROFESSOR WIESBERGER: I know property laws are a sensitve area, but tax law is even more sensitive. And, we were working with several variables and one of them was an earned income credit because the normal losers in the Wisconsin system, going from a combined return to a joint return-- Under the present system if you have a total combined family income of $40,000, but it is composed of two $20,000 a year earners, your tax is substantially less under our present law than if one person was the sole wage earner and it was a $40,000 income. And, that is what we had to bring into balance. One way of doing it was to expand our brackets and change our rates but also add the earned income credit for that second wage earner, or else we would have adversely affected a lot more people, and this is not the year to do it.

MS. KIERNAN: I can see if we want to discuss this at length at one of the many succeeding meetings, one of the things we are going to have to have is a run down on the tax situation in New Jersey and how that affects it, because the way we do taxes here is totally different from the way you are doing it.

PROFESSOR WIESBERGER: Yes. I think we probably had the maximum adverse impact because we didn't have any joint return, so we were going to a system--

MS. KIERNAN: We have a graduated income tax.

PROFESSOR WIESBERGER: (continuing) --of a graduated income tax that levels off around 11%.

MS. KIERNAN: We have 2% on the first 20 and then 2½% after that. It is joint and it is totally different. We have a totally new kind of table, plus the fact that many of the people in this state work out of the state which means they are paying taxes -- I know this is true of myself -- in New York City, New York State, plus New Jersey. And, the people who work in Philadelphia have pretty much the same. So, it is a much more complicated tax situation here. Plus, we have a homestead rebate, which comes back on your property taxes.

PROFESSOR WIESBERGER: We have that too.

MS. KIERNAN: In check form or in a take-off of your taxes?

PROFESSOR WIESBERGER: No.

MS. KIERNAN: We get a check from the government.

PROFESSOR WIESBERGER: No, it is a credit from the government.

MR. LEE: Certain places of employment do take on certain personal property characteristics. How is that dealt with?

PROFESSOR WIESBERGER: We haven't dealt with it specifically at all. Apparently the estate planners, when they went through the probate code, who were members of the State Bar Special Committee, did not feel that any changes were needed on that. Now, that is something that this next period of time, from the time this bill is introduced until the time something comes out of Committee in the fall, we are going to have to look at.

One of the things, as you all know who have been through the legislative process, I would like to mention is, the first couple of times you are looking at the gross problem and then each new bill starts you looking at more and more of the special refinements and sophisticated problems. We have not gotten to that level yet, partly because - and this is just the reality of the way the bill is put together - the probate sections are at the very end and the earlier sections got a lot more scrutiny than the later sections because people ran out of steam when they got to page 73, or whatever it is.

ASSEMBLYMAN SMITH: You have new personalities coming on board.

PROFESSOR WIESBERGER: That's right.

ASSEMBLYMAN SMITH: You have new players.

SENATOR LIPMAN: Right.

PROFESSOR WIESBERGER: I am sure that either I or a lot of other people who were involved - I am just one of them - would be glad to answer phone calls, written inquiries, or what have you, because we found in turn that calling on our contacts in the community property states to find out why and how it was done was terribly helpful. This is an area where if you just read the statute you only get one dimension. You have to know why it is there and how it works in practice.

SENATOR LIPMAN: You have done a marvelous job of trying to do that. Your talk was well-rounded. We appreciate your being here.

PROFESSOR WIESBERGER: Well, I was glad for the chance.

SENATOR LIPMAN: I am sorry that Senator Gagliano couldn't come today.

PROFESSOR WIESBERGER: Yes, that's too bad.

ASSEMBLYMAN SMITH: He had a good representative.

MS. KIERNAN: I'm sorry Senator Berstein couldn't be here either, particularly because of his interest in the probate. I mean, being the father

of the Uniform Probate Code in New Jersey he would have had some questions on that subject too. He had an Education Committee meeting in Trenton.

SENATOR LIPMAN: Yes, I remembered that.

PROFESSOR WIESBERGER: Have you enacted pretty much the Uniform Probate Code ?

MS. KIERNAN: With a few refinements in New Jersey.

PROFESSOR WIESBERGER: You have what we would call informal administration?

MS. KIERNAN: Yes.

PROFESSOR WIESBERGER: We have a probate registrar who handles it rather than the judge, unless there is a specific issue where you want to litigate and you go into court just for that issue, and then you are back into the informal system, which is basically administrative in nature.

MS. KIERNAN: And we have the elective share and all of that in a package of bills; you know, one after the other after the other. And, Assemblyman Burstein, who is a member of this Committee, was the sponsor of that whole package of bills.

MS. SARAVIA: Well, as soon as I have copies from June on the newest version, I will see that everyone on the Commission gets a copy. I also plan to write to William Cantwell and get a copy of the National Commissioners Draft on Marital Property.

PROFESSOR WIESBERGER: I think in regard to one of the bills, going through the next one will be much easier because you are going to start looking at familiar material.

MS. ALLEN: I would also be interested in some of the material that you might have on the Married Womens' Property Act.

MS. KIERNAN: We went through that here a few months ago.

MS. SARAVIA: A year ago. It was January 1980.

MS. KIERNAN: I was horrified myself. I didn't realize a lot of those things until we really studied it.

PROFESSOR WIESBERGER: It is not that long in Wisconsin. It is just to look at it and then you realize that even the things that say something such as a woman can sue in her own name during marriage was considered a big leap forward from the prior law.

SENATOR LIPMAN: Let me just ask you, if we did decide to take such a big undertaking, we should try and get the pulse of the public first do you think, or the pulse of the legislature?

PROFESSOR WIESBERGER: Well, I would assume one would depend on the other. Wouldn't I be right? The pulse of the legislature would depend on the pulse of the public?

ASSEMBLYMAN SMITH: You really have to say it is an education process. We don't have it, so we will have to get to the grass roots.

MS. SARAVIA: Well, we are now going to have a complete record of today's meeting, and that could be sent out with a copy of the legislation to the leaders of the Bar and a variety of organizations with a cover letter asking for comments and maybe a summary of what the idea is.

MS. KIERNAN: I also think on something as controversial as this there is a point at which it should be introduced even if it never goes any further than that, because in the next session it goes out to the public

at that point, and you have done your homework to begin with. You then want some public discussion so you would have some committee meetings. You know, something like Pat Dodd has done with the Water Bill package in New Jersey, or Toxic Waste, or things like that, which are so controversial that it takes a good year to get them moving around the State. But, you have to have a beginning vehicle before you make its amendments, and you can't start out from nothing. So, at some point you have to go with it.

PROFESSOR WIESBERGER: I think that is very good advice because until something is introduced, it is awfully hard to sell a concept and have people take it seriously. And, the other thing is, I think in no way did any of us expect the bill to pass the first year. If you call a bill like this, as some of our sponsors have, "The Bill of the Decade", it is awfully hard to say you have one session to pass it.

MS. KIERNAN: How long did it take us to do the criminal code and the probate code?

ASSEMBLYMAN SMITH: Twelve years.

MS. KIERNAN: It took twelve years for a new criminal code, and the probate code took six, I think from the time it was originally conceived until it was actually passed. And, three of the last four years took concentrated work on it. The other time was just beginning to build your constituency for it. So, it is not something you can do overnight.

SENATOR LIPMAN: When did we get the equitable distribution, about 1970?

MS. SARAVIA: The change in the law was in 1972, and the major court cases were in 1974.

PROFESSOR WIESBERGER: Yes. You see, the view from Wisconsin is the constitutional challenge, which has marvelous language in it. So, without knowing how the equitable distribtuion law is applied, it looks like a very liberal statute with that language of the Supreme Court upholding the constitutionality. I understand that in practice it may not be quite so easy.

MS. SARAVIA: We had two public hearings last year and a number of people came to testify, and they felt that there was a great deal of inequity. I get calls every week, or people send me metters, saying, "This has happened to me; what do I do now? I didn't get anything after 20 years of marriage." Or, "I only got 10%." Of course, people in New Jersey think equitable means fifty-fifty, but it has not worked out that way.

SENATOR LIPMAN: I don't think that New Jersey would be terribly against this if they understood the advantages of it. But, they have to understand the advantages in the first place.

ASSEMBLYMAN SMITH: When you are one of the original 13 you have to go very slowly in New Jersey.

MS. KIERNAN: I think the point you made before about the church groups is a most interesting one and one that I hadn't really thought about earlier today. But, if we proceed in this direction and wanted to do something with it, I think that would be a very valuable group to have with us. I know how much help they were on sex education. We just amended the sex education in the State, and the school boards in New Jersey passed a regulation on that basis, and there is, there was, and there will continue to be objections to it, but the Catholic Conference came out for it and that really made a difference.

They helped work it out. They worked it out with the kinds of things they thought were necessary in it, and they they went out publicly supporting it. They did difuse a lot of the objection to that. It is a group that should be talked to on something that they will feel has something to do with family styles and the way families work together.

PROFESSOR WIESBERGER: I think the argument that is very effective with them, as well as with other groups, is that although this does represent a big change in the way we have done things in common law states, it is basically conservative in the sense that many other states and many other countries have had this system so we are not proposing something that has no precedent where we just have to speculate how it works. We know how it works because we can go to the community property states for an example. I think, to most people, that is a pretty good argument.

SENATOR LIPMAN: We will now adjourn the meeting and we would all like to thank Professor Weisberger for joining us today.

(meeting adjourned)

DATE DUE
