

LOU JONES BREAKFAST CLUB

OUTLINE FOR JULY 9, 2013

MARITAL AND NON-MARITAL PROPERTY & EXEMPTIONS

Wisconsin is what is known as a “marital property state.” We join eight other states that have a system of “community property” (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington).

The provisions for marital property are found in Wis. Stat. §766. The primary feature of the marital law system is that both spouses have an equal interest in certain property and debts acquired during their marriage in the State of Wisconsin. However, it is not merely that simple, especially as it relates to bankruptcy law.

WHAT IS MARITAL PROPERTY?

Marital property is property in which “[e]ach spouse has a present undivided one-half interest in each item of marital property”. Wis Stat 766.31(3). For our purposes, property is “an interest, present or future, legal or equitable, vested or contingent, in real or personal property.” Wis Stat §766.01(15).

Below are listed several especially important statutory sections as relates to bankruptcy law:

- Wis Stat §766.31(1) GENERAL. All property of spouses is marital property except that which is classified otherwise by this chapter and that which is described in sub. (8).

- Wis Stat §766.31(2) PRESUMPTION. All property of spouses is presumed to be marital property.

- Wis Stat §766.31(8) RIGHTS IN PROPERTY ACQUIRED BEFORE DETERMINATION DATE. Except as provided otherwise in this chapter, the enactment of this chapter does not alter the classification and ownership rights of property acquired before the determination date or the classification and ownership rights of property acquired after the determination date in exchange for or with the proceeds of property acquired before the determination date.

- Wis. Stat §766.01(5) "Determination date" means the last to occur of the following:
 - (a) Marriage.
 - (b) 12:01 a.m. on the date that both spouses are domiciled in this state.
 - (c) 12:01 a.m. on January 1, 1986.

What this means is that, absent a marital property agreement, such as a prenuptial agreement, most any property obtained by spouses while they are living in Wisconsin is marital property. The same holds true of debts obtained by either spouse. See Wis. Stat. §766 for exceptions to this.

WHY IS THIS IMPORTANT?

This is important to bankruptcy practitioners because the filing of a bankruptcy case creates an estate. Bankruptcy Code §541(a)(2) defines what property of the estate includes.

11 U.S.C. §541(a)(2) – All interest of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

- (A) under the sole, equal, or joint management and control of the debtor; or
- (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

If both a husband and wife are filing, this is not a problem, as all assets owned by either party, no matter if they are in one name or both, as well as all liabilities, would be included. However, when one spouse is filing for bankruptcy, and the other is not joining, it becomes important to know what property is marital and what is not, for the purpose of filing complete and accurate schedules.

IN RE XIONG, 05-43121-SVK

- Husband filed for bankruptcy, but wife did not join. Debtor chooses to use federal exemptions.
- Trustee files motion to compel turnover of assets (Kansas real estate, Wisconsin real estate, truck, and car).

- Need to determine which assets are marital property and must be included in the bankruptcy estate and which are not, as well as what exemptions may apply to equity in assets of the estate.
- Debtor and non-filing spouse (hereinafter NFS) were married and living in Kansas prior to moving to Wisconsin in June, 2004. Kansas is not a marital or community property state. They purchased the Kansas real estate in 1999, and the deed listed the Debtor and NFS “as joint tenants and not as tenants in common.” The property had equity of approximately \$15,240.00 at the time of filing the bankruptcy case on October 14, 2005.
- The car in questions was purchased and titled solely in the NFS’ name, again, prior to the move to Wisconsin.
- The Debtor and the NFS purchased a house when they moved to Wisconsin, and at the time of filing, there was equity in the amount of \$7,259.00.
- Although the details are not entirely clear, it appears that the truck was either purchased after the move to Wisconsin (and therefore after the “determination date”) or was titled in both the Debtor’s and NFS’ name as tenants in common.
- Determination Date – according to Wis. Stat. §766.01(5), the determination date is the later of the marriage, the date on which both spouses are domiciled in Wisconsin, or January 1, 1986. In this case, the determination date is the date on which the debtors became residents of Wisconsin (June, 2004).
- Kansas Real Estate - As the property was purchased prior to the determination date, we look to Wis. Stat. §766.31(8), which states that the state law does not change the nature of property acquired prior to the determination date. As the Kansas real estate was purchased prior to June, 2004, it is not “marital property,” and only the interest of the Debtor is included in the bankruptcy estate (remember that it was classified as a joint tenancy, the result may have been different if it had initially been tenancy in common). Therefore, one-half of the equity of the house, or \$7,620.00, was part of the estate. The debtor used the “wild-card exemption” to exempt that entire interest, and it was not subject to turnover.
- Car – The car was also purchased prior to the determination date, and as it was titled solely in the NFS name, it did not enter the bankruptcy estate at all. It was not necessary for the Debtor to exempt any portion of the car, and it was not subject to turnover.

- Wisconsin Real Estate – Debtor and NFS purchased the Wisconsin real estate after the determination date. As such, it is considered marital property. Being marital property, the entirety of the equity in the property came into the bankruptcy estate. The trustee argued that the Debtor should only be allowed to exempt one-half of the equity in the real estate, as his interest only extended to one-half of the real estate. However, §522(d)(1) of the Bankruptcy Code “provides that the debtor can claim as exempt ‘the debtor’s aggregate interest...in real property or personal property that the debtor or a dependent of the debtor uses as a residence.’” The Debtor did not have an interest in “one-half of a house; he own[ed] a one-half interest in the entire house.” The Debtor’s interest extended to the entire property, and he was able to exempt all of the equity in the property, up to the limit of his statutory exemption. In this case, the entire equity of the Wisconsin property was able to be exempted. As all equity in the real estate was exempt, the Wisconsin real estate was not subject to turnover to the Trustee.
- Truck – Under the same concept as above, although the Debtor only had a one-half interest in the truck, as long as his exemption covered the entire value of the truck, which it did, he was able to use his exemptions to prevent turnover of the truck.

WHAT’S IMPORTANT FROM IN RE XIONG?

- Importance of marital vs. non-marital property determination.
- Debtor may use entirety of his/her exemption to exempt equity in property that is not “fungible,” or easily divisible, not just one-half of total equity. Contrast In re Page, 171 B.R. 349 (Bankr. W.D. Wis. 1994), where the property was a check which had a certain value that could easily be divided into halves.

EXEMPTIONS & MARITAL PROPERTY CONCEPTS

- DETERMINATION DATE
- CAN EXEMPT EQUITY UP TO STATUTORY LIMIT OF EXEMPTION IN PROPERTY SUCH AS REAL ESTATE, VEHICLES, OTHER PROPERTY THAT IS NOT READILY DIVISIBLE

- MUST INCLUDE ALL MARITAL PROPERTY AS PROPERTY OF THE ESTATE, AS DEBTOR HOLDS AN INTEREST IN ALL MARITAL PROPERTY
- IF COUPLE WAS MARRIED PRIOR TO MOVING TO WISCONSIN, LOOK CLOSELY AT PRIOR STATE'S LAWS AND CONTRACT/TITLE FOR PROPERTY ACQUIRED PRIOR TO MOVE