A Lender's Guide to the Wisconsin Marital Property Act

Introduction

Wisconsin is a marital property state, which is a form of community property, meaning spouses generally share equally in the assets and liabilities of one another. In this regard, the law often treats spouses as a single economic unit, rather than separate. While there have been no new legal developments regarding marital property, WBA frequently receives marital property questions and has developed this guide to assist lenders.

The Wisconsin Marital Property Act (MPA) can be found in Chapter 766 of the Wisconsin Statutes and became effective in 1986. The MPA applies to married Wisconsin residents. The MPA creates an assumption under law that each spouse has an undivided one-half interest in each item of marital property. All property of spouses is presumed to be marital property except that which is classified as individual property. Because of this unique treatment, it's important to understand how it affects lending in Wisconsin.

The following nine questions address the most frequent topics WBA receives from Wisconsin lenders regarding the MPA. The questions are focused on lending-related topics and do not address all aspects of the MPA. The answers condense the law in a way that is designed to be easy to understand, but readers should review the statutory citations after each question for a full understanding of the law. Additionally, the answers below are general in nature. Marital property considerations can be complex and fact-specific and vary from couple to couple. As such, each loan must be considered on a case-by-case basis to determine how the facts and circumstances of each transaction and each borrower's marital status could affect the loan relationship.

WBA Legal's Nine Most Frequent Marital Property Act Lending Related Questions

Question 1: What transactions does the MPA cover?

Answer 1: Generally speaking, the MPA applies to loans "in the interest of the marriage and family." While the law does not provide a definition of what is in the "interest of the marriage or family," it does provide that an obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or the family. Most, if not all, actions of either spouse could, generally speaking, be presumed to be in the interest of the marriage or family. However, each situation must be reviewed independently to make this determination. For example, unique facts, such as the existence of a marital property agreement, could significantly alter this presumption.

In this regard, it becomes important for a lender to determine what property is marital property versus individual property and, whether a loan is "in the interest of the marriage or family." Such a loan could be described as a "family purpose" obligation. Or, to put it another way, the MPA applies to "family purpose" obligations. While "family purpose" is not a term defined by

Wisconsin law, as a concept, it can be helpful for understanding the nature of the MPA and will be used to describe loans "in the interest of the marriage or family" throughout this article. While Wisconsin law does not provide a more precise definition, it does provide that a marital purpose statement can be used to determine whether a loan is "family purpose," as discussed in Question 2.

For reference see: Wis. Stat. section 766.55 and 766.55(2)(b).

Question 2: What is the purpose for a "Marital Purpose Statement" form?

Answer 2: Many loan software platforms will provide a "Marital Purpose Statement" or other form, which includes a statement that a loan application is in the interest of the marriage or family.

Generally speaking, a marital purpose statement is designed to provide conclusive evidence that a transaction is covered by the MPA. As discussed in Question 1, an obligation incurred by a spouse during marriage is presumed to be incurred in the interest of the marriage or the family. Wisconsin law provides that such a separately signed statement signed by the obligated spouse at or before incurring the obligation is conclusive evidence that the obligation is in the interest of the marriage or family. In short, a bank can obtain a marital purpose statement to conclusively determine that a loan is a family purpose obligation.

For example, if a borrower applies for a loan, many software platforms will have a checkbox or other method to determine whether the borrower is a married Wisconsin resident. Upon gathering this information, the system may provide a marital purpose statement. This will likely be a separate document, but it could be incorporated into other forms as well. Such a form may, for example, simply state "I am married, am a Wisconsin resident and the obligation described is being incurred in the interest of my marriage or family."

Because the separately signed marital purpose statement provides conclusive evidence of this fact, WBA generally recommends that when bank is extending credit to a married WI resident, whether solely or joint credit, that bank should obtain this statement. The form is not required by law. However, without having such separately signed statement, if the loan were to default and bank sought to collect against marital assets, it must first prove that the debt was a family purpose obligation, incurred in the interest of the marriage or family. By having a separately signed marital purpose statement, bank has conclusive evidence to prove this fact.

For reference see: Wis. Stat. section 766.55.

Question 3: Is a bank permitted to pull a credit report on a non-signing spouse?

Answer 3: Yes. When dealing with married Wisconsin residents, a bank is permitted to a pull credit report on a non-signing spouse and may even be required to do so.

Wisconsin law requires creditors to consider all marital property available to satisfy the debt when evaluating a married Wisconsin resident's application for family purpose credit. As discussed in Question 1, when there is an obligation in the interest of the marriage or family, it becomes a "family purpose" obligation. Thus, the creditor must consider all marital property available to satisfy a family purpose obligation in the same manner that it would consider the availability of property for an unmarried applicant. For this purpose, it helps to remember that the legal treatment of married Wisconsin residents is that of a single economic unit. In some respects, this means that when a married Wisconsin resident applies for a family purpose loan, they are not applying alone, but applying as a married unit. In this way bank must evaluate the creditworthiness of the unit, not just the individual.

For example, if a married individual applies for a family purpose loan individually, bank must ensure that it is considering all "marital property" in evaluating the applicant. It is not enough just to consider the married applicant individually, even if they would qualify alone. Thus, bank must evaluate all marital property available to satisfy the obligation. Marital property is a broad term, as again the general rule is for a presumption that all property of both spouses is marital property (barring any facts indicating otherwise, such as a marital property agreement). Meaning, marital property can include the debts, assets, and liabilities of the non-applicant spouse. It can also include income.

The law allows lenders to request information about the applicant's spouse if the applicant resides in a community property state or is relying on property located in such a state as a basis for repayment of the credit requested. Because Wisconsin is a community property state, banks are permitted to request this information of the non-signing spouse, including pulling a credit report on a non-signing spouse. Because the MPA requires creditors to consider all marital property available to satisfy the debt, a bank may be required to do so.

For reference see: Wis. Stat. section 766.56(1) and Regulation B section 1002.5(c)(2).

Question 4: Who must sign the mortgage in Wisconsin?

Answer 4: Wisconsin provides homestead rights to married Wisconsin residents. Meaning, under certain circumstances, a non-obligated spouse may be required to sign the mortgage.

The law requires that each spouse with homestead rights must sign the mortgage for it to be valid, unless an exception applies. In this context, homestead means the dwelling, and so much of the land surrounding it as is reasonably necessary for use of the dwelling as a home, but not less than one-fourth acre, if available, and not exceeding 40 acres. It is WBA's understanding that title companies are typically able to identify whether the property would

be considered a homestead under this definition.

Once a bank has determined the pledged property is a homestead, it must determine whether homestead rights apply. If the mortgage alienates any interest of a married person in a homestead, then each married individual must sign the mortgage in order for it to be valid. Meaning, if a borrower pledges homestead property as security, thus alienating the interest of their spouse in the property, then both spouses must sign the mortgage. The only exceptions to this rule are for conveyances between spouses and for purchase money mortgages. It is important to emphasize that this requirement applies regardless of whether the spouse is a borrower or not. If the non-borrowing spouse has homestead rights, they must sign the mortgage or bank's mortgage is invalid.

For reference see: Wis. Stat. section 706.02(1)(f).

Question 5: What is the Wisconsin "Tattletale Notice?"

Answer 5: The MPA requires lenders to provide notification to a borrower's non-signing spouse for certain transactions. This notice is often referred to as a "tattletale notice" and applies to family purpose loans governed by the Wisconsin Consumer Act (WCA). A loan that is governed by the WCA is one that is: (1) consumer, family or household purpose, (2) $25,000 or less, and (3) not secured by first lien or equivalent security interest in the borrower's principal residence.

For family purpose loans governed by the WCA, the lender must provide a "tattletale notice." The notification requirements can be met by providing the non-signing spouse with a copy of the instrument, document, agreement or contract evidencing the obligation, or by providing a separate writing briefly describing the nature of the credit extended. Thus, lenders have some flexibility in providing notice. A lender could, for example, either provide the non-signing spouse with the loan agreement itself (such as the note), or a separate writing. WBA's longstanding recommendation has been to provide a copy of the agreement.

For reference see: Wis. Stat. section 766.56(3)(b).

Question 6: What is the purpose for a "Spousal Consent to Guaranty" form?

Answer 6: Some loan software providers may make available a spousal consent to guaranty form. For example, WBA and FIPCO have made available a form designed to protect a creditor's ability to collect on the guaranty from all marital property belonging to the couple. This form is based upon the fact that the MPA generally limits gifts of marital property to third parties by one spouse acting alone to $1,000 per calendar year unless the spouses act together in making the gift.

While WBA does not necessarily view payments on guaranties or the obligations of and interests in property created by an executed guaranty as gifts to a third party, in the event a court could be persuade to characterize the payment, obligation, or interest as a gift, then by obtaining the non-guarantor spouse's consent to the guaranty, the creditor would then not be limited to the $1,000 per calendar year amount. As a result, a spousal consent to guaranty is not required by law, but without it, bank may need to otherwise prove that the guaranty should not be considered a gift.

Additionally, while spouses may act together to make a gift, WBA strongly cautions against requiring the signature of a guarantor's spouse on the loan. Regulation B prohibits a creditor from requiring the signature of a guarantor's spouse just as it prohibits requiring the signature of an applicant's spouse. Thus, a creditor cannot require the guarantor's spouse to sign the guaranty to protect its interest. Instead, the creditor should obtain the non-guarantor spouse's consent to the guaranty by execution of a form such as the one described above.

For reference see: Wis. Stat. section 766.53.

Question 7: What is the purpose for a "Spousal Consent to UCC Filing" form?

Answer 7: The Uniform Commercial Code (UCC) provides rules for perfecting of creditors' security interests . One method of perfecting a security interest is through the filing of a financing statement. However, as a general UCC matter, a creditor can only file a financing statement if authorized by the debtor. In the event that a creditor, such as a bank, does not have such authorization, the filing is not valid, and bank could be penalized. Under the UCC, "debtor" means a person having an interest in collateral. Oftentimes, this is the borrower, but it could also be a non-borrowing third-party pledgor. It could also include a non-signing spouse,.

Under the UCC, authorization is automatically given when signing the security agreement. Thus, a debtor does not need to give separate authorization because they will have provided it when signing the security agreement. However, if there is a debtor who does not sign the security agreement, separate authorization will be required. For example, if a non-signing spouse is a "debtor" (who has not signed the security agreement), then separate authorization is required. In this situation, many loan software platforms will provide a means to accomplish this through a form such as a "spousal consent to UCC filing/financing statement." This way, bank can obtain authorization to file the security agreement from the non-signing spouse, as required by the UCC.

Consider the following examples: an unmarried borrower pledges their truck as security for a loan and executes a security agreement. By executing the security agreement, the bank has received authorization from the debtor to file a financing statement. In this same scenario, if the borrower is married, and the truck is marital property, then the borrower's spouse is also be a debtor. This is true regardless of whether the spouse is a borrower. In this case, bank must

obtain authorization from both the borrower and the spouse. This could be accomplished by having both spouses sign the security agreement, or, by obtaining the spouse's consent to UCC filing through a separate means, such as a spousal consent to UCC filing form.

If bank does not properly file its UCC financing statement as authorized by all debtors, bank will not only have an unperfected security interest, but it could also be subject to monetary penalties.

For reference see: Wis. Stat. section 409.509.

Question 8: Can a non-borrower request information regarding a loan made to their spouse?

Answer 8: No, unless the transaction is one subject to the WCA.

While it may seem counter-intuitive to the concepts of the MPA discussed above, especially given all of the requirements and rights that a non-signing spouse has (ex: tattletale notice, spousal consent, etc.), a non-borrowing married individual does not automatically receive authority to request information regarding a loan to their spouse. Consider that a loan to an individual is a contract with that borrower. The borrower is obligated to that loan, and all of the terms and conditions within. While that borrower's spouse may have certain MPA rights, they are not a borrower and thus, they are not obligated to that agreement, its terms and conditions, nor do they receive any rights with respect to the loan. Thus, the non-obligated spouse has no right to inquire upon the loan or transact upon the loan.

However, the obligated spouse could provide authority for the non-obligated spouse to request information. If the spouse's desire such an arrangement, it should be documented in writing.

If the loan is subject to the WCA, the non-borrowing spouse may request information regarding the WCA loan made to their spouse. The spouse of a person who incurs an obligation that is in the interest of the marriage or family and is governed by the WCA may exercise all rights and remedies available to the incurring spouse under the WCA. Thus, as the borrowing spouse may ask for records and information regarding the WCA loan, so too can the non-borrowing spouse.

In such a case, before releasing the loan-related information to the non-signing spouse, WBA recommends the bank contact the borrower to let the borrower know the law requires the bank to release the information so that the borrower is not surprised to learn the bank released information about the WCA loan to the non-signing spouse. Getting all spouses' agreement, of course, would be the best scenario. But even if the spouses do not agree, bank need provide the requested WCA-loan information. Before releasing the information, bank should get a signed representation from the non-borrowing spouse that they are in fact the spouse and

have the non-borrowing spouse include in the writing the information requested about the WCA loan.

For reference see: Wis. Stat. section 766.565, 422.306.

Question 9: Does the MPA distinguish between business- and consumer-purpose transactions?

Answer 9: No. The MPA applies to "family purpose" obligations as discussed above. Such obligations are those in the "interest of the marriage or family," which could include both business- and consumer-purpose transactions. For example, a married individual could apply for a loan to purchase a new family van. Such a loan could be categorized as a consumer-purpose loan and certainly be in the interest of the marriage or family. A married individual could also apply for a loan to purchase a truck for the purpose of becoming an owner operator of the vehicle. Such a loan could be categorized as business-purpose, and certainly be family purpose as the truck is obtained for work performed in the interest of the marriage or family.

As discussed at the outset of this article, every loan must be considered on a case-by-case basis. The circumstances of each borrower must be considered to determine what marital property rights and considerations may apply.