

# Texas Marital Property Law 101

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Nearly all Texans know that Texas is a “community property state.” But I’m not sure how many really know what that means—I’ve learned that most people think it means that each spouse “gets half” of everything. But if it were that simple, estate planning and divorce lawyers would be jobless. So I’ve devised this crash course in Texas marital property law to give you a basic working knowledge of Texas’ community property system.

First, some history. In the U.S., there are two types of marital property regimes: “common law ” and “community property.” Most states have a common law, or “separate property,” system, while only nine have a community property system, and how you own property as a married person depends on which type of state you live in when you acquired the property. Let’s compare both of these systems where each came from.

The forty-one separate property states (plus D.C.) inherited this form of ownership from the British colonists who set ashore in New England. As they migrated across America, settling entire Eastern Seaboard, the Midwest, the Central Plains, and the Northern states, they carried this system with them. In a common law state, each spouse separately owns any property that they had before marriage and any property that they acquire during marriage, such as a salary. Neither spouse has any kind of ownership interest in the other spouse’s property.

In contrast to the widespread separate property system, the community property form of ownership exists in only a very small minority of states. If you look at a map, you can trace the path that the community property system took when the French and Spanish settlers brought it with them to the southern United States: start at Louisiana and go west to Texas, New Mexico, and Arizona; turn north to California, Nevada, (skip Oregon), Washington, and Idaho. Now jump all the way over to the Great Lakes, where you’ll find Wisconsin, which adopted a community form of ownership by statute in 1984. These are the nine community property states. In a community property system, both spouses jointly own all property acquired by either spouse during marriage. But the property each spouse owned before marriage remains separate, and anything acquired by gift or inheritance during marriage is also separate property.

Now let’s focus on Texas’ own community property system. Before we can discuss why it even matters, we need to know the rules in Texas that tell us whether something is separate or community property.

The Texas Constitution defines separate property as property that’s “owned or claimed before marriage, and [property] acquired afterward by gift, devise, or descent.”<sup>1</sup> Easy enough: birthday presents, inheritances, and the bean-bag chair you had in your dorm room in college are all your separate property. Well, as you will learn, it’s not always that simple. Gifts, for instance, tend to cause problems now and then. Many times, people want to make gifts to both spouses jointly—which is fine when it’s clear that the person intended to give the gift to both of them. But if your mom gives you \$20, is it all yours, or did she mean for you to share it with your husband? Many a fight has ensued over situations like this (although obviously involving more than \$20).<sup>2</sup>

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Generally, if your mom gave it to you, Texas law presumes that, because you are your mom's "natural object of affection," she meant to give it to you alone,<sup>3</sup> and it is thus your separate property. But how would the cash be characterized if your husband proved that your mother wanted to give it to both of you—would it be community property? No. Because gifts are separate property by definition,<sup>4</sup> it's impossible to make a gift to a couple as community property. Rather, each spouse would own a one-half separate property interest in the gift. For example, if a mother deeds her house to her daughter and son-in-law "as community property," this notation on the title does not make the house community property.<sup>5</sup> It is merely evidence that the mother did not intend to give the house to the daughter alone, but to both spouses. Therefore, the house is one-half the wife's separate property and one-half the husband's separate property. While this may seem like splitting-hairs, these fine distinctions can become very important in the way property is divided upon divorce, as you will see later.

Separate property also includes some categories of personal injury recovery. For instance, recovery for disfigurement or pain and suffering are separate property. The rationale behind this is that each spouse "owned" his or her body before marriage, so any recovery for damage to the body is compensation for damage to separate "property." On the other hand, recovery for medical bills or lost earning capacity is considered to be compensation for damage to community assets; therefore, these types of personal injury recovery belong to the community.<sup>6</sup>

In contrast to the Texas Constitution's definition of separate property, community property is defined negatively as all property that's acquired during marriage "other than separate property."<sup>7</sup> This fuzzy definition may feel a little unsatisfactory at first. But a clear definition of community property is unnecessary in Texas, because of the "community presumption."<sup>8</sup> The community presumption classifies *all* property owned by a married couple as community assets. A spouse claiming otherwise must prove it by "clear and convincing evidence"—the most difficult burden to meet in court. (So even if you *know* you owned that lava-lamp before you got married, it will be community property unless you prove it isn't.) Likewise, anything bought on credit during marriage is presumed to be a community obligation, unless the creditor explicitly agrees to look only to that spouse's separate property to fulfill the debt, which is a rare arrangement.<sup>9</sup> Furthermore, the income from separate property is community property.<sup>10</sup> The word "income" for this purpose is different from what you report on your income tax return. In the marital property context, Texas case law defines certain things as income, such as interest,<sup>11</sup> and certain things as not income, such as the proceeds from the sale of an appreciated asset.<sup>12</sup> For example, if a wife opens a bank account with \$100 of her separate funds, and that account earns \$20 in interest, the original \$100 will be her separate property, while the \$20 of interest income is community by definition. Likewise, if the wife bought Dell stock as separate property before the tech boom, and then sold it before the tech crash, the increase in the stock's value from the time she bought it and the time she sold it will be separate property by definition—but any cash dividends declared while she owned the stock would be community property.<sup>13</sup> But remember, because of the community presumption, the wife would be wise to keep perfect bank records.

It's also possible to have "mixed character" property—part separate and part community. For instance, if a married couple bought a TV with \$300 from the husband's salary and with \$100 that the wife received as a birthday gift from her mom, the TV would be three-fourths community and one-fourth separate property.

So what are some ways to determine whether an asset is separate, community, or mixed? One concept that is uniquely Texan is the “inception of title rule,” which determines property’s character at the moment in time that it’s acquired.<sup>14</sup> You can envision the inception of title rule as a snapshot of when a person has a “right of claim” to the property; it ignores events that happen after this right of claim arises. For instance, if a man signs an earnest-money contract on a house the day before he gets married, the house is his separate property . . . even if the couple doesn’t close on the house until after they’re married, and even if all mortgage payments are made with community funds. This is because the right of claim to the property arose on the day the earnest money contract was signed. And because the inception of title rule looks to the *time* that property is acquired, it doesn’t even matter if the deed names both spouses as grantees. The rule is the same for installment contracts—while the bank doesn’t hand over the title to your car until you pay off the note, the title “relates back” to the day the installment contract was signed.<sup>15</sup> Don’t worry, though, the person who expended separate funds on a community asset, or vice-versa, is entitled to reimbursement in some situations.<sup>16</sup>

The character of an asset can also be determined by the source of the funds used to buy it—this is called “tracing.” To trace an asset sufficiently to overcome the community presumption, a spouse should keep very organized and complete records. With pristine record-keeping, a spouse can trade cash for a car, a car for a horse, a horse for a house, and on and on without losing the separate character of her property.<sup>17</sup> Tracing isn’t as critical to characterizing community property, of course—all you have to do is sit back and let the community presumption do the work for you.

So what happens if a husband and wife mix their property together without keeping clear enough records to trace the source of the assets? This would be “commingling.” If separate and community assets are so commingled that their different characters cannot be ascertained, the community presumption will work to characterize all of the assets as community property.<sup>18</sup> For example, assume that a wife wins a personal injury lawsuit compensating her for disfigurement (separate property) and lost wages (community property). If the wife does not request that the jury make separate findings as to the amount of the award that’s allocated to each type of recovery, the entire award will be deemed community property.

Now assume that the wife in the personal injury lawsuit above *did* obtain separate findings from the jury. They found that \$100,000 was for disfigurement, and that \$100,000 was for lost wages. But then she deposits the entire \$200,000 in one bank account. Is this commingling? Yes, but in situations like this—where funds with clear separate and community characters are deposited into one bank account—Texas law applies another presumption: the “community out first rule.” This rule presumes that, when funds are withdrawn, community funds come out first. To explain, imagine that the wife withdraws \$100,000. The remaining balance would be entirely separate property. But if she were to withdraw \$50,000 more, and then later deposit \$150,000 back into the account making it equal to \$200,000 once more, only \$50,000 would be separate property—unless she can trace the withdrawn funds sufficiently to overcome the community presumption. You can see why the “community out first” rule is also known as the “lowest intermediate balance” rule—it looks to the lowest balance that the bank account ever reached, and determines that portion to be separate property. The lesson the wife learned here is that she should have opened two bank accounts: one

for the separate property portion and one for the community property portion of her personal injury award.

Married couples in Texas aren't stuck with all of these characterization rules. They can agree in writing before or during marriage to designate certain property, and income from that property, to be the separate property of either spouse.<sup>19</sup> Texas law also allows married couples to agree in writing to convert separate property to community property.<sup>20</sup> Note that only couples who are already married can convert separate property to community property. This is because there is no "community estate" until they are actually married.

All of these marital property rules are nice, you may be thinking, but why is it so important? Well, one of the main reasons a married couple would want to clearly define whether an asset is community or separate property is to protect it from the claims of possible creditors. To understand creditors' rights against marital property in Texas, it is helpful to discuss it in the context of a hypothetical couple, whom we'll call Joe and Sally.

Joe and Sally have lived in Texas for their entire marriage, and they are both employed. Joe has a 401(k) from his job, and Sally has a regular IRA. Their primary residence is in Austin, and Sally has a house in Houston that she inherited from her grandmother. Joe has a vintage Corvette that his father gave him for his 40<sup>th</sup> birthday, and Sally owns valuable antiques that she collected before their marriage. Joe and Sally also own life insurance policies on each other's lives, which have sizeable cash surrender values. They have one joint checking account, and they also each have separate checking accounts into which they deposit some of their respective paychecks for their own spending money. Joe was recently in a car accident and is being sued by the driver of the other car. The couple wants to know which of their assets are vulnerable if the other driver wins the lawsuit.

The first asset they're concerned about is their home in Austin. Because this is their primary residence, they filed a form with Travis County designating it as their "homestead." Subject to some restrictions on acreage, Joe and Sally's homestead is fully exempt from creditor's claims, regardless of value.<sup>21</sup> This is true whether Joe or Sally is the debtor, and whether the homestead is separate or community property. So classifying a homestead as separate or community property is not as critical when dealing with creditors' claims (but it is important in other situations).

Joe and Sally are also worried about their retirement savings and their life insurance policies because these are their main savings vehicles. Fortunately for them, Texas law fully exempts retirement plans<sup>22</sup> and the cash surrender value and proceeds of life insurance policies.<sup>23</sup> So Joe's 401(k), Sally's IRA, and their life insurance policies are all exempt from the creditors of either spouse regardless of their community or separate property characterization.

Now that Joe and Sally know that their homestead, retirement savings, and life insurance policies are safe from the other driver's lawsuit, they want to know whether Joe's Corvette, Sally's antiques, and Sally's Houston house are vulnerable. As you know from the characterization rules you just learned, these items are separate property. Because Joe is the debtor here, his Corvette is definitely available to the other driver to fulfill a potential judgment. But the separate property of the non-debtor spouse (Sally) is rarely available to the debtor spouse's creditors.<sup>24</sup> The only time that a creditor of one spouse can reach the separate property of the other spouse is to fulfill a contract for "necessaries."<sup>25</sup> This rule comes from a Texas statute, which imposes a

duty on each spouse to support the other spouse.<sup>26</sup> In Joe and Sally's case, Sally's separate property is safe from the lawsuit, because it is a "tort" action, not an action to fulfill a contract for necessities. But if Joe were being sued by a creditor who provided Joe with clothing or medical services, Sally's separate property would be available to satisfy the debt. Despite the word's connotations, "necessaries" aren't limited to food, shelter, clothing, and medical care. Texas courts will typically look at the financial situation of a couple to determine what a necessary is.<sup>27</sup> In Texas, necessities are those things that are suitable to the spouse's "station in life." So if Joe and Sally were multi-millionaires, a court would certainly allow a creditor to reach Joe's separate property to pay for the Chanel sunglasses and the diamond-studded bikini Sally bought for her trip to Acapulco.

The final items Joe and Sally are worried are their checking accounts. Because the checking accounts are funded with their salaries, this money is community property. Whether a creditor can reach a community asset depends upon its status as "sole-management" or "joint-management" community property, and whether the debt accrued before or after the couple got married.

Under Texas law, Joe and Sally have the "sole management, control, and disposition of the community property that [Joe or Sally] would have owned if single."<sup>28</sup> This means that the income they receive from their jobs—which they would own separately if they were single—is considered sole-management community property. A spouse's sole-management community property is never available to the other spouse's creditors for torts or contracts that arose before marriage, nor is it available for the other spouse's contracts during marriage (except for "necessaries").<sup>29</sup> Sole-management community property is, however, available for the other spouse's torts.<sup>30</sup> Because the lawsuit against Joe is for a tort, Sally's separate "spending-money" checking account will be available to pay off any judgment against Joe. But if the car accident had occurred before they got married, Sally's checking account would be safe. And because Joe is the debtor, his separate checking account will always be available to all of his creditors, whether the liability arose before or during marriage.<sup>31</sup>

What about the joint checking account? Unlike sole-management community property, "joint-management" community property is subject to all tort or contract liabilities of either spouse, whether the liability arose before or during marriage—making it the most vulnerable type of marital property.<sup>32</sup> Because Joe and Sally have mixed their sole-management community property in the joint checking account, it has become joint-management community property.<sup>33</sup> So the other driver can reach this checking account if he were to win in the lawsuit against Joe, and this result would not change if the accident had occurred before they got married.

Another reason a couple might want to characterize marital property is to determine how it will be divided upon divorce or death.

In a divorce, the court will order a "just and right" division of the couple's community property.<sup>34</sup> (Notice that this does not mean the couple is automatically entitled to an even split of the community property.) And a court is never allowed to award one spouse's separate property to the other spouse.<sup>35</sup> This rule has caused many problems for couples who lived in a common law state for their entire marriage and then moved to Texas. In situations where one spouse works and the other stays at home, the divorce court's inability to award separate property to the other spouse would result in the non-working spouse's walking away from the marriage with nothing. So Texas has developed a concept of "quasi-community property."<sup>36</sup> This concept causes

property that “would have been community property” had the spouses lived in Texas at the time the property was acquired to be subject to just and right division upon divorce. The result is that anything bought with one spouse’s salary, although technically separate property, is subject to just and right division upon divorce.

Unlike divorce, community property is divided equally upon one spouse’s death. The surviving spouse automatically succeeds to his or her half, and the deceased spouse may dispose of his or her half by will (along with his or her separate property). If the spouse died without a will, or “intestate,” the Texas statutes will determine the distribution of that spouse’s one-half interest in community property<sup>37</sup> and his or her separate property.<sup>38</sup> A further difference between the division of property upon divorce and the division at death is that Texas courts will *not* recognize a quasi-community property interest in the surviving spouse when the working spouse dies.<sup>39</sup> So if a couple were to move to Texas after spending their entire marriage in Oklahoma, the non-working spouse would not receive the same protection at the other spouse’s death as he or she would have received had they divorced.

One similarity between the divorce and death contexts is that the other spouse is entitled to be reimbursed for any community funds expended to improve the other spouse’s separate property, and vice-versa. For example, recall the situation where a husband makes a down-payment on a house before marriage (thus making the house his separate property), but after marriage, all of the mortgage payments are made out of the husband’s or wife’s salary (which is community property). You may think that it just wouldn’t be fair for the husband (or the husband’s heirs) to take the entire house after all of the money the wife plumped down on the mortgage over the years. And you’d be right. So Texas law entitles the community to a claim, according to a statutory formula,<sup>40</sup> for the economic contribution it made to reduce the debt on separate property. The dollar amount that results from this formula (not the property itself) is then either subject to just and right division upon divorce, or a 50/50 split upon one spouse’s death.

As you can see, contrary to what most people think, “community property” involves much more than “getting half.” The nuances of, and exceptions to, Texas’ community property rules fills volumes. I hope this peek into our community property system has been as enjoyable for you to read as it has been for me to share with you. As a graduate of Texas Marital Property Law 101, you should be confident in your new basic working knowledge of marital property characterization, creditor’s rights against marital property, and how that property will be divided upon divorce or death.

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- <sup>1</sup> Texas Const. Art. XVI, §15.
- <sup>2</sup> See, for example, *Rusk v. Rusk*, 5 S.W.3d 299 (Tex. App.—Houston [14<sup>th</sup> Dist.], 1999); see also *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App.—Beaumont, 1992).
- <sup>3</sup> *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App.—Beaumont, 1992); *Woodworth v. Cortez*, 660 S.W.2d 561 (Tex. App.—San Antonio, 1983).
- <sup>4</sup> Texas Const. Art. XVI, §15; Texas Family Code §3.001(2).
- <sup>5</sup> *Roosth v. Roosth*, 889 S.W.2d 445, 457 (Tex. App.—Houston [14<sup>th</sup> Dist.], 1994); *Marshall v. Marshall*, 735 S.W.2d 587, 597 (Tex. Civ. App.—Dallas, 1987); *McLemore v. McLemore*, 641 S.W.2d 395, 397 (Tex.App.—Tyler, 1982).
- <sup>6</sup> Texas Family Code §3.001(3); *Slaton v. Slaton*, 987 S.W.2d 180 (Tex.App.—Houston [14 Dist.], 1999); *Osborn v. Osborn*, 961 S.W.2d 408 (Tex. App.—Houston [1<sup>st</sup> Dist.], 1997).
- <sup>7</sup> Texas Family Code §3.002.
- <sup>8</sup> Texas Family Code §3.003.
- <sup>9</sup> *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex., 1975); *Anderson v. Royce*, 624 S.W.2d 621, 623 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.], 1981).
- <sup>10</sup> *Arnold v. Leonard*, 273 S.W. 799, 803 (Tex., 1925); *Mortenson v. Trammell*, 604 S.W.2d 269, 275 (Tex. Civ. App.—Corpus Christi, 1980).
- <sup>11</sup> *Mortenson v. Trammell*, 604 S.W.2d 269 (Tex. Civ. App.—Corpus Christi, 1980).
- <sup>12</sup> *Bakken v. Bakken*, 503 S.W.2d 315 (Tex. Civ. App.—Dallas, 1973); *Dillingham v. Dillingham*, 434 S.W.2d 459 (Tex. Civ. App.—Fort Worth, 1968).
- <sup>13</sup> *Amarillo Nat'l. Bank v. Liston*, 464 S.W.2d 395 (Tex. Civ. App.—Amarillo, 1970).
- <sup>14</sup> *Welder v. Lambert*, 22 S.W. 281, 284-86 (1898); *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 430 (Tex., 1970); *Strong v. Garrett*, 224 S.W.2d 471 (1949).
- <sup>15</sup> See *Riley v. Brown*, 452 S.W.2d 548 (Tex. Civ. App.—Tyler, 1970).
- <sup>16</sup> Texas Family Code §3.401 et seq.
- <sup>17</sup> *Gleich v. Bongio*, 99 S.W.2d. 881 (Tex., 1937); *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex., 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex., 1965); *Celso v. Celso*, 864 S.W.2d 652, 654 (Tex. App.—Tyler, 1993).
- <sup>18</sup> *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Jackson v. Jackson*, 524 S.W.2d 308, 311 (Tex. Civ. App.—Austin, 1975).
- <sup>19</sup> Texas Const. Art. XVI, §15; Texas Family Code §§4.001—4.106.
- <sup>20</sup> Texas Const. Art. XVI, §15; Texas Family Code §§4.206—4.206.
- <sup>21</sup> Texas Property Code §41.002.
- <sup>22</sup> Texas Property Code §42.0021.
- <sup>23</sup> Texas Insurance Code Article 21.22 (to be renumbered as Sections 1108.051, 1108.052, and 1108.053, effective June 1, 2003).
- <sup>24</sup> Texas Family Code §3.202(a).
- <sup>25</sup> *Daggett v. Neiman Marcus Co.*, 348 S.W.2d 796 (Tx. Civ. App.—Houston [1<sup>st</sup> Dist.], 1961).
- <sup>26</sup> Texas Family Code §2.501.
- <sup>27</sup> *Crooks v. Aero Mayflower Transit Co.*, 363 S.W.2d 191 (Tx. Civ. App.—San Antonio, 1963).
- <sup>28</sup> Texas Family Code §3.102.
- <sup>29</sup> Texas Family Code §3.202(b).
- <sup>30</sup> Texas Family Code §3.202(d).
- <sup>31</sup> Texas Family Code §3.202(c).
- <sup>32</sup> Texas Family Code §3.202(c).
- <sup>33</sup> Texas Family Code §3.102.
- <sup>34</sup> Texas Family Code §7.001.
- <sup>35</sup> *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977); *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982).
- <sup>36</sup> Texas Family Code §7.002; *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982).
- <sup>37</sup> Texas Probate Code §45.
- <sup>38</sup> Texas Probate Code §38.
- <sup>39</sup> *Estate of Hanau*, 730 S.W.2d 663 (Tex. 1987).
- <sup>40</sup> Texas Family Code §§3.401—3.403.