

THE ULTIMATE GUIDE TO MARTIAL PROPERTY DIVISION

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Introduction

We created this guide to provide an overview of how property may be divided by a court in a divorce.

Along the way, we'll answer the following:

- What is community property? How is it divided in a divorce?
- What is separate property? Can separate property also be divided during a divorce?
- What is commingling?
- Who will get the family pets in a divorce?
- How does one prove separate property?
- How does one prove community property?
- What is a reimbursement claim?
- How will a business owned by the parties be affected by a divorce?



What is Community Property?

Community property is defined through exclusion as “the property, other than separate property, acquired by either spouse during a marriage.” Texas courts presume that all property acquired during a marriage belongs jointly to both spouses. This “community estate” is subject to a “just and right” division by the court, which typically means as close to 50/50 as possible.



What is Separate Property?

Separate property refers to assets that courts are required to award exclusively to one spouse during a divorce. While community property is subject to a “just and right division” at a court’s discretion, separate assets are awarded in entirety to their respective owners. In Texas, all assets are presumed to be community property.

To claim separate property, a party must demonstrate one of the following through “clear and convincing evidence”:

- The asset was acquired before the marriage;
- The asset was a gift;
- The asset is an inheritance; or
- The asset is a recovery from a personal injury.



Here are four scenarios exploring each basis for separate property claims:

1. Acquired Before Marriage

Assets (including real property, vehicles, personal possessions, or securities) and accounts owned prior to marriage are considered separate property. A court is required to award these exclusively to their respective owners.

2. Gifts

Under Texas law, a gift is an item given voluntarily and without consideration (an expectation of a return or exchange). For example, engagement rings are frequently deemed to be gifts to spouses, and subsequently articles of separate property.



3. Acquired Through Devise or Descent (Inheritances)

Devise refers to acquisitions by way of last wills. Descent refers to acquisitions through bloodline inheritance. If an individual inherited \$500,000 from an aunt and later spent \$150,000 of those funds towards a community asset (like improvements on the marital home), courts would be required to characterize the remaining \$350,000 as separate property.

4. Recovery for Personal Injuries

Texas law considers most compensation for personal injuries to be separate property. For example, courts will likely be unable to divide a judgment for medical expenses won by either spouse. However, compensation for lost earning capacity is an exception to this rule. Because wages are community property, restitution for lost wages also falls into this category.

What is Commingling?

Commingling refers to situations in which spouses combine separate and community assets. For example, consider a situation in which a husband contributes \$45,000 of his income to an account containing \$45,000 of savings his wife amassed before marriage. During this period, the account also accumulates \$10,000 worth of interest. In this instance, 45% of this \$100,000 account would likely be considered the wife's separate property, while the remaining 55% would be a community asset.

Property Has Been Commingled. Now What?

When faced with commingled accounts, spouses who wish to retain separate assets must "trace" or prove the origin of these assets. Tracing is generally conducted by a forensic CPA. However, their testimony alone may not be sufficient to win a claim. Tracing is a complex process that

often requires substantial time and resources. It is vital to hire a reputable forensic CPA who is both familiar with your attorney and skilled at presenting testimony during litigation. Experienced family lawyers will have strong relationships with qualified experts in your area.

Personal Property in Divorce

When considering the division of household goods and personal property, courts seek to divide the assets reasonably rather than evenly; this rarely results in a 50/50 split. It is impossible to evenly split personal property because each individual places a different value, both numerical and sentimental, on items.





How to Agree to Split Personal Property with Your Spouse?

Most couples are able to review the contents of the marital residence and informally agree on an item-by-item division.

To begin this process:

1. Start by making a four-column table.
2. List assets in the first column, monetary value in the second, perceived sentimental value in the third, and a proposed owner for each item in the last column.
3. If unable to agree upon the value of an item, couples may hire an appraiser.

[Download Your Asset and Property Division Spreadsheet](#)

With an attorneys assistance, spouses often find it manageable to negotiate a division using these spreadsheets. When faced with disagreements, courts may use items' appraised values as guides to award ownership.

What Happens to Pets in a Texas Divorce

The State of Texas treats pets similarly to property. Generally, spouses will decide among themselves where family pets will live following separation. In some cases, courts may formalize an agreed pet “possession” schedule through inclusion in a final divorce decree. When faced with disagreement, courts will treat pets



identically to any other property. If a pet was acquired before marriage, it may be deemed separate property. Otherwise, a judge will award pets based on monetary and sentimental value.

How to Prove Separate Property in Texas?



All parties claiming separate property must demonstrate at least one of four criteria: acquisition before marriage, as a gift, through an inheritance, or as compensation for a personal injury.

Examples of evidence used to prove these criteria may include a title to a house showing acquisition before marriage, testimony that certain funds were presented as a gift, or a last will elaborating upon an inheritance.

In general, testimony alone is insufficient to prove separate property and will need to be supported by some form of documentation. Often, when separate and community property become mixed, a forensic CPA is needed to conduct thorough “tracing” of relevant assets and accounts.



How to Prove Community Property in Texas?

In the State of Texas, all property jointly owned by spouses is presumed to be community property. Parties claiming separate property carry the burden of demonstrating otherwise. However, even with this presumption, reinforcing the character of community assets can be essential.



Examples of documentation used to reinforce the nature of community property include:

- Bank statements proving deposits during marriage;
- Titles to a boat, motor vehicle, etc. showing acquisition during marriage;
- Receipts or invoices showing loans or other debts acquired during marriage.

What is a Reimbursement Claim?

A “reimbursement claim” is an attempt by one estate (typically the separate estate of one spouse) to recover money spent on another estate. When this type of cross-estate spending occurs, separate and community assets may become “commingled,”

opening the possibility of reimbursement claims.

Let's apply this concept to a real-life situation; let's say a wife purchases a single-family home before marriage. Then, throughout the marriage, both spouses contribute to improvements and renovations of the residence. In this case, the couple's community estate may have a reimbursement claim against the wife's separate property for the increase in value of the property caused by the improvements and renovations made during their marriage.

How to Present a Reimbursement Claim

Although property division and reimbursements within a divorce are most frequently settled in mediation, about 5% of cases will go before a judge or a jury instead. Despite these odds, you should prepare yourself to present a reimbursement claim at trial.

Is your Business Community Property or Separate Property?

Understanding what is likely to happen to a business is one of the most critical and complex issues facing business owners during divorce. A key first question is whether a business will be considered community or separate property.

The Court's Decision

Few courts advise awarding joint ownership to parties in a divorce—running a company is challenging enough without the added complication of working with a former spouse. To mitigate the damage divorce may have on a business, one spouse will usually buy out the other's interest in their company.

To ensure fair compensation, parties must conduct a business valuation. Unless a company is traded on the stock market, precise values can be challenging to determine and assessments may require a great deal of time and effort. During the valuation process, each side may hire an expert whom they believe will arrive at a conclusion favorable to their position. Courts faced with competing valuations may arrive at a figure somewhere between those proposed by each party or the Court may select the value proposed by one party. In some instances, courts may order parties to sell the business in its entirety, particularly when the composition or size of the community estate does not allow for one spouse to buy the other spouse out of the property.





Conclusion

No matter what, marital property will be divided during a divorce. To maximize the potential of a favorable settlement, parties should hire an attorney experienced in complex asset division. Experienced attorneys will be able to help to provide you with the guidance, expert referrals, and litigation strategy necessary to protect your interests. To learn more about property and asset division, check out the [Walters Gilbreath Blog](#).



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