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CHARACTERIZATION OF PROPERTY

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Fellow - American Academy of Matrimonial Lawyers
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Member - Fee Dispute Committee - Dallas Bar Association (1998 - 2000)
Fellow - Collin County Bench Bar Foundation
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Chairman - Program Committee, Collin County Bench Bar Conference, 2000
Board Member- Advisory Board in CASA of Collin County
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Member - Grievance Committee, District 1A (2002 - 2007); (Chair – 2006-2007)
Certificate - Advanced Mediation - Family Law (1995)
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SPECIAL RECOGNITIONS/HONORS:
Listed in D Magazine – "Best Lawyers in Dallas" Family Law (2001, 2005, 2006, 2007, 2008, 2009, 2010).
Listed in D Magazine – "Best Female Lawyers in Dallas" (2010).
Listed in "The Best Lawyers in America" – Woodward and White Press.
Listed in Texas Monthly – "Top 50 Women Texas Super Lawyers" (2003 - 2010).
Listed in Texas Monthly – "Top 100 Texas Super Lawyers" (2004 - 2009).
Listed in Texas Monthly – "Top 100 Dallas/Fort Worth Super Lawyers" (2003-2006; 2008-2009)
Listed in Texas Monthly – "Texas Super Lawyer" in the area of Family Law (2003 - 2010).
Best Family Law CLE article, State Bar of Texas, 2004.

PUBLICATIONS:

Co-Author, ***West Publishing Company, TEXAS FAMILY LAW PRACTICE GUIDE*** (published March 2000, supplemented each year to the present).

Primary Author, ***PROTECTING YOUR ASSETS FROM A TEXAS DIVORCE*** (2005).

Co-Author, ***Protecting Children From Incompetent Forensic Evaluations and Expert Testimony,*** Journal of the American Academy of Matrimonial Lawyers Journal (2006).

PUBLICATIONS/LECTURES:

CHARACTERIZATION OF PROPERTY, Family Law on the Front Lines, The University of Texas School of Law (June 2011)

COURSE DIRECTOR, Collaborative Law Course, State Bar of Texas (March 2011)

CO-COURSE DIRECTOR, New Frontiers in Marital Property Law, State Bar of Texas (October 2010)

ASSISTANT COURSE DIRECTOR, Collaborative Law Course, State Bar of Texas (2010)

ELECTRONIC EVIDENCE WORKSHOP, Advanced Family Law Course, State Bar of Texas (August 2009)

THE ELECTRONIC EVIDENCE BIBLE, University of Texas School of Law (June 2009)

CHARACTERIZATION**,** Marriage Dissolution Institute, State Bar of Texas (April 2009)

PREMARITAL AGREEMENTS, Collin County Bar Association (February 2009)

ELECTRONIC EVIDENCE – CIVIL AND ETHICAL IMPLICATIONS, University of Texas School of Law, Parent-Child Relationships; Critical Thinking for Critical Issues (January 2009)

PREMARITAL AGREEMENTS, Collin County Bar Association, Estate Planning Section (September 2008)

RELOCATION, Advanced Family Law Course, State Bar of Texas (August 2006)

TEMPORARY SUPPORT, MAINTENANCE AND ALIMONY, Marriage Dissolution Institute, State Bar of Texas (April 2006)

CHILD SUPPORT UPDATE: WITHIN AND OUTSIDE THE GUIDELINES, Marriage Dissolution Institute (April 2006)

RELOCATION, American Bar Association, Section of Family Law, Spring CLE Conference, Washington D.C. (May 2006)

COLLABORATIVE LAW, "A Panel of Texas Authors on Texas Collaborative Law" (April 2006)

MARITAL PROPERTY 101, State Bar College "Spring Training" 2006, State Bar College (March 2006)

HIGH TECH EVIDENCE, Collin County Bar Association, Family Law Section (December 2006)

HIGH TECH EVIDENCE, WEBSITES, HARDDRIVES, E-MAILS, ETC., Advanced Family Law Drafting Course (December 2006)

CHILD SUPPORT, 31st Annual Advanced Family Law Course, State Bar of Texas (August 2005)

PSYCHOLOGICAL TESTING, American Academy of Matrimonial Lawyers (March 2005)

RELOCATION, Dallas Volunteer Attorney Program and Family Law Section, "Nuts and Bolts" Family Law Training (February 2005)

OPENING STATEMENTS AND CLOSING ARGUMENTS, Ultimate Trial Notebook – Family Law, State Bar of Texas (December 2004)

HIGH TECH EVIDENCE, WEBSITES, HARDDRIVES, E-MAILS, ETC., Williamson County (October 2004)

RELOCATION DEBATE, 30th Annual Advanced Family Law Course, State Bar of Texas (August 2004)

COLLABORATIVE LAW PANEL, Collaborative Law Spring Retreat (March 2004)

HIGH TECH EVIDENCE, WEBSITES, HARDDRIVES, E-MAILS, ETC.**,** 29th Annual Advanced Family Law Course, State Bar of Texas (August 2003)

FAMILY LAW EVIDENCE, Collin County Bench Bar Conference (May 2003)

FAMILY LAW EVIDENTIARY ISSUES**,** 16th Annual Advanced Evidence & Discovery Course, State Bar of Texas (March 2003)

PARENTAGE: ESTABLISHING, ATTACKING & UNDOING, Texas Academy of Family Law Specialists (January 2003)

PARENTAGE: CURRENT ISSUES, University of Houston Law Center (October 2002)

OBJECTIONS AT TRIAL, American Bar Association, Section of Family Law, Fall CLE Conference, Orlando, FL (November 2002)

DIVISION OF PROPERTY AND DIVIDING SPECIFIC ASSETS, University of Houston Law Foundation (June 2002)

FAMILY LAW FOR THE NON-SPECIALIST, J. Reuben Clark Law Society (April 2002)

DIVISION OF PROPERTY ON DIVORCE, University of Houston Law Foundation (September 2001 and September 2002)

FAMILY LAW UPDATE, Ten Hot Topics in Family Law, Collin County Bench/Bar Conference (June 2000)

MODERATOR**,** Collin County Bench/Bar Conference (June 2000)

FAMILY LAW UPDATE, J. Reuben Clark Law Society (June 2000)

DIVISION OF PROPERTY ON DIVORCE, University of Houston Law Foundation (April 2000)

FAMILY LAW DISCUSSION, J. Reuben Clark Law Society (October, 1999)

BUSINESS VALUATIONS IN DIVORCE AND CROSS-EXAMINATION OF A VALUATION EXPERT, American Bar Association, Family Law Section, San Diego (October, 1999)

OPENING STATEMENT - JURY OR NONJURY, 25th Annual Advanced Family Law Course, State Bar of Texas (August, 1999)

UPDATE ON FAMILY LAW, Dallas Women's Lawyers Association (December, 1998)

FAMILY LAW FOR THE NON-SPECIALIST, Dallas Bar Association (December, 1998)

OBTAINING RECORDS FROM NON-PARTIES, 24th Annual Advanced Family Law Course, State Bar of Texas (August 1998)

DISCOVERY UPDATE, Dallas Bar Association Friday Clinic (December 1996 and July 1998)

OPENING AND CLOSING THE FILE, Family Law Conference for the General Practitioner and Legal Assistant, South Texas College of Law (February 1998 and February 1999)

DISCOVERY UPDATE, 23rd Annual Advanced Family Law Course, State Bar of Texas (August 1997)

DISCOVERY UPDATE, 22nd Annual Advanced Family Law Course, State Bar of Texas (August 1996)

BUSINESS VALUATION IN DIVORCE, Dallas Chapter Texas Society of Certified Public Accountants Fifth Annual Divorce Conference (September 1996, September 1998)

DISCOVERY, Dallas Bar Association Family Law Training Seminar (October 1996)

ATTORNEY'S FEES, Family Law Practice Institute, University of Houston (September 1996)

I. INTRODUCTION

This article discusses characterization of property on divorce and contains the most recent cases that have addressed the issue of characterization.

Once all of the property in a couple's estate has been identified, the next step is to characterize the property. *Allen v. Allen*, 704 S.W.2d 600 (Tex. App. – Fort Worth 1986, no writ). Property must be characterized as separate or community before the court can divide the estate, as the court can divide only the parties' community property, and not their separate property. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977); *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983). In many cases, the marital property will all be community property, but characterization issues arise when one or both of the spouses entered the marriage with substantial assets or inherited them after the marriage.

II. COMMUNITY PROPERTY SYSTEM

A. Definitions

1. Separate Property

Texas Family Code Section 3.001 defines a spouse's separate property as follows:

"A spouse's separate property consists of:

(1) The property owned or claimed by the spouse before marriage;
(2) The property acquired by the spouse during marriage by gift, devise or descent; and
(3) The recovery for personal injuries sustained by the spouse during marriage, except for any recovery for loss of earning capacity during marriage." *Tex. Fam. Code Ann. § 3.001.*

Separate property is defined in the Texas Constitution, Article XVI, Section 15 as follows:

> "Sec. 15. Separate and community property of husband and wife
>
> All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future

> spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; and spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse."

2. Community Property

Community property is not defined in the Texas Constitution, but is defined in the Family Code as property, other than separate property, acquired by either spouse during their marriage. *Tex. Fam. Code Ann. § 3.002*. Case law has defined community property as any property or rights acquired by one of the spouses after marriage by toil, talent, industry or other productive faculty, and as property acquired during marriage other than by gift, devise or descent that is the product of the unique, joint endeavor undertaken by the spouses. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676 (1953); *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982); *Arnold v. Leonard*, 273 S.W.799 (Tex. 1925)(community property is all property acquired by either spouse during marriage, except for separate property).

All property that either spouse possesses upon dissolution of the marriage is presumed to be community property. *Tex. Fam. Code Ann. § 3.003(a)*; *Tarver v. Tarver*, 394 S.W.2d 780 (Tex.1965); *Matter of Marriage of Morris*, 123 S.W.3d 864 (Tex. App. – Texarkana 2003, no pet.); *Tate v. Tate,* 55 S.W.3d 1 (Tex. App. – 2000, no writ); *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ)(property conveyed to spouse during marriage presumed to be community property, unless conveying instrument specifically states conveyed to spouse as his or her separate property, in which case conveyance is *prima facie* proof that property is separate property of spouse to whom conveyed).

The introduction of contrary evidence ends the presumption of community property. *Dawson v. Dawson*, 767 S.W.2d 949, 950 (Tex. App.–Beaumont 1989, no writ); *Harris v. Harris*, 765 S.W.2d 798, 802 (Tex. App.–Houston [14th Dist.] 1989, writ denied). Once contrary evidence is introduced, the trier of fact should not weigh the presumption of community property nor treat it as evidence. *Roach v. Roach*, 672 S.W.2d 524, 530 (Tex. App.–Amarillo 1984, no writ); *Harrison v. Harrison*, 321 S.W.3d. 899 (Tex. App.–Houston [14th Dist.] 2010, no pet. h.).

3. Quasi-Community Property

"Quasi-community property" is the term commonly used to describe property that is not community property but that is nonetheless divisible on divorce or annulment. Texas courts are permitted to treat property acquired in another state that would have been separate property in such other state as community property if, at the time of acquisition, the property would have been community property in Texas. *Tex. Fam. Code Ann. § 7.002*; *Zorilla v. Wahid*, 83 S.W.3d 247 (Tex. App. – Corpus Christi 2002, no pet.)(children's education account acquired in New York treated as community property). Property that spouses acquire during marriage, except for property acquired by gift, devise or descent, is divided on divorce in Texas in the same manner as community property, regardless of the domicile of the spouses when they acquired the property, the legal system of the previous domicile, or whether the property was acquired before the enactment of the quasi-community property statute. *Ismail v. Ismail*, 702 S.W.2d 216 (Tex. App. – Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982).

B. Theory of Community Property System

Under the community property system, the spouses are equal owners of undivided interests in all of the community property. *General Ins. Co. v. Casper*, 426 S.W.2d 606 (Tex. Civ. App. – Tyler 1968, writ ref'd n.r.e.). The existence of the community estate depends on the marriage of the parties, and when the marriage ends, property acquired by the spouses during the marriage is divided between them in a just and right manner, with due regard for the rights of the parties and of any children of the marriage. *Tex. Fam. Code Ann. § 7.001*; *Lee v. Lee*, 247 S.W. 828 (Tex. 1923); *Peterson v. Peterson*, 595 S.W.2d 889 (Tex. Civ. App. – Austin 1980, writ dism'd w.o.j.).

C. Community Property Presumption

All property that is possessed by either spouse during the marriage or at dissolution is presumed to be community property. *Tex. Fam. Code Ann. § 3.003(a)*; *Matter of Marriage of* Morris, 123 S.W.3d 864 (Tex. App.–Texarkana 2003, no pet.); *Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1965)*; Burgess v. Easley*, 893 S.W.2d 87 (Tex. App. – Dallas 1994, no writ); *Hopf v. Hopf*, 841 S.W.2d 898 (Tex. App. - Houston [14th Dist.] 1992, no writ).

A contrary presumption may displace the community property presumption. For instance, a presumption that property is separate arises where a deed recites that property is conveyed to one spouse as his or her separate property, or that the consideration was paid from one spouse's separate estate, or both. *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ); *Pemelton v. Pemelton*, 809 S.W.2d 642 (Tex. App. - Corpus Christi 1991), *rev'd on other grounds*, 836 S.W.2d 145(Tex. 1992); *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App.–Beaumont 1992, no writ)(property conveyed to spouse during marriage presumed to be community property, unless conveying instrument specifically states conveyed to spouse as his or her separate property, in which case prima facie proof the property is separate property of spouse to whom conveyed).

Parties claiming certain property as their separate property have the burden of rebutting the presumption of community property, and to do so, they must trace and clearly identify the property in question as separate by clear and convincing evidence. *Pearson v. Fillingim*, 332 S.W.3d 361 (Tex. 2011)(per curium)(husband did not provide any evidence that mineral deeds were his separate property). The community property presumption can be rebutted by clear and convincing evidence. *Tex. Fam. Code Ann. § 3.003(b)*. Clear and convincing evidence is defined as that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *Tate v. Tate*, 55 S.W.3d 1, 4 (Tex. App.–El Paso 2000, no pet.); *Stavinoha v. Stavinoha*, 126 S.W.3d 604 (Tex. App.– Houston [14th Dist.] 2004, no pet.); *Boyd v. Boyd*, 131 S.W.2d 605 (Tex. App.–Fort Worth 2004, no pet.)(failed to meet clear and convincing standard); *Irvin v. Parker*, 139 S.W.3d (Tex. App.–Houston [1st Dist.] 2004, no pet.)(failed to meet clear and convincing standard); *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772 (Tex. App.–San Antonio 2004, no pet.)(failed to show husband's separate ownership of patent).

The spouse claiming that disputed property is his or her separate property must trace and identify the property to show that it was originally his or her separate property or that it was acquired with his or her separate property. *McKinley v. McKinley,* 496 S.W.2d 540 (Tex. 1973); *Barnard v. Barnard*, 133 S.W.3d 782 (Tex. App.– Fort Worth 2004, pet. denied); *Zagorski v. Zagorski*, 116 S.W.3d 309 (Tex. App.– Houston [14th Dist.] 2003, pet. denied); *In re Marriage of Moore*, 890 S.W.2d 821 (Tex. App. – Amarillo 1994, no writ); *Hopf v. Hopf*, 841 S.W.2d 898 (Tex. App. – Houston [14th Dist.] 1992, no writ). Tracing involves establishing the origin of the property through evidence showing how the spouse claiming the asset as separate property obtained possession of the property. *Hilliard v. Hilliard*, 725 S.W.2d 722, 723 (Tex. App.–Dallas 1985, no writ).

A spouse has the burden to provide clear and convincing evidence as to the exact nature of the portion of property that is his or her separate property, even though the other spouse concedes that some portion of property is the other spouse's separate property. *Zamarripa v. Zamarripa*, WL 1875580 (Tex. App.–Houston [14th Dist.] 2009, pet. denied)(not reported)(although wife conceded that some portion of a pension was husband's separate property, it remained husband's burden to provide clear and convincing evidence as to the exact nature of that portion and the trial court was not required to speculate about it; husband further was not entitled to rely on the statute characterizing retirement benefits); *see also Graves v. Tomlinson*, 329 S.W.3d 128 (Tex. App.–Houston [14th Dist.] 2010, pet. denied)(clear and convincing evidence standard is not satisfied when spouse's testimony is contradictory by the inventories in evidence or unsupported by documentary evidence).

D. Income From Separate Property

Unless the spouses have agreed otherwise, all income acquired during marriage, whether from separate or community property, is community property. *Yaklin v. Glusing, Sharpe & Krueger*, 875 S.W.2d 380 (Tex. App. – Corpus Christi 1994, no writ). In agreements made after September 1, 2003, the partition or exchange of property includes future earnings of income arising from separate property of the owning spouse, unless the agreement specifies that the future earnings will be community property. *Tex. Fam. Code Ann. §4.102.*

E. Commingled Property

Separate property commingled with community property remains separate property as long as its identity can be traced, but where separate property has become so commingled with community property as to defy segregation and identification, the entire property is presumed to be community property. *Jones v. Jones*, 890 S.W.2d 471 (Tex. App. – Corpus Christi 1994, writ denied); *Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987); *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. App. – San Antonio 1990, no writ)(entire herd of cattle was community property, even though some cattle may initially have been husband's separate property; calves, which were community property, were commingled with original herd, and separate cattle were not traceable). Thus, as long as the separate funds can be traced, they may be deposited in a joint account without losing their character as separate property. *Celso v. Celso*, 864 S.W.2d 652 (Tex. App. – Tyler, 1993, no writ); *Welder v. Welder*, 794 S.W.2d 420 (Tex. App. – Corpus Christi 1990, no writ).

F. Community Debt Presumption

The community property presumption applies not only to assets but to liabilities. *Viera v. Viera*, 331 S.W.3d 195 (Tex. App.– El Paso 2011, no pet. h.). Therefore, a debt which arises before marriage should be treated as the incurring spouse's separate debt and cannot be assigned to the non-incurring spouse. *Id.* The spouse attempting to rebut this "community debt" presumption bears the burden of proof with clear and convincing evidence. *Id.*

Debts undertaken during marriage are presumed to be community debts, but this presumption may be rebutted by proof that the lender agreed to look only to the separate property of the borrowing spouse for repayment. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975); *Jones v. Jones*, 890 S.W.2d 471 (Tex. App. – Corpus Christi 1994, writ denied). The agreement may be implied. *See Dunlap v. Williamson*, 683 S.W.2d 544 (Tex. App. – Austin 1984), *aff'd in part and rev'd in part on other grounds,* 693 S.W.2d 373 (Tex. 1985); *Humphrey v. Taylor*, 673 S.W.2d 954 (Tex. App. – Tyler 1984, no writ).

Property purchased on credit during a marriage is community property, unless there exists an express agreement on the part of the lender to look solely to the separate estate of the purchasing spouse for satisfaction of the indebtedness. *Glover v. Henry*, 749 S.W.2d 502 (Tex. App.– Eastland 1988, no writ). The intention of the lender to look solely to the property of one spouse is a primary evidentiary factor. *Jones v. Jones*, 804 S.W.2d 623 (Tex. App.- Texarkana 1991, no writ). The intention of a spouse to repay the loan out of separate property funds and then hold the property purchased with the proceeds of that loan as separate is not controlling. *Welder v. Welder*, 794 S.W.2d 420 (Tex. App.–Corpus Christi 1990, no writ).

G. Effect of Premarital and Postmarital Agreements

Spouses may enter into agreements, either before or during the marriage, which affect the characterization of property acquired during their marriage. *Tex. Fam. Code Ann. § 4.001 et seq., 4.101 et seq*. The Texas Family Code provides that parties about to marry can agree that property that would ordinarily be community property will be separate property.

"At any time, spouses may partition or exchange between themselves any part of their community property, then existing or to be acquired, as the spouses may desire. Property or property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property." *Tex. Fam. Code Ann. §4.102*.

"At any time, the spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner." *Tex. Fam. Code Ann. §4.103*.

Premarital agreements often provide, for instance, that a spouse's income from employment is to be that spouse's separate property, and can also contract with respect to their rights and obligations in property, the right to manage and control their property, and the disposition of their property on separation, divorce, or death. *Tex. Fam. Code Ann. § 4.003*. Spouses may agree at any time to partition or exchange between themselves any part of their community property then existing or to be acquired. *Tex. Fam. Code Ann. § 4.102.* Spouses may agree that income from separate property, which would normally be community property, is to be the separate property of the spouse who owns the property. *Tex. Fam. Code Ann. § 4.103*. In agreements made after September 1, 2003, the partition or exchange of property includes future earnings or income arising from the property of the owning spouse unless the agreement specified that the future earnings and income will be community property.

H. Agreements to Convert Separate Property to Community Property

Effective January 1, 2000, spouses may agree that all or part of the separate property owned by either or both spouses is converted to community property provided that certain formalities are met. *Tex. Fam. Code Ann. §§ 4.201-4.206.* Prior to this new law, spouses could partition or exchange community property into separate property, but there was no means to convert separate property into community property. Only existing property may be converted; spouses cannot agree that all future gifts and inheritances will be community property when they are received.

III. SEPARATE PROPERTY

A. In General

Texas Family Code Section 3.001 defines a spouse's separate property as follows:

"A spouse's separate property consists of:

(1) The property owned or claimed by the spouse before marriage;

(2) The property acquired by the spouse during marriage by gift, devise or descent; and

(3) The recovery for personal injuries sustained by the spouse during marriage, except for any recovery for loss of earning capacity during marriage." *Tex. Fam. Code Ann. § 3.001.*

A court cannot divest a spouse of his or her separate property in dividing the marital estate upon divorce, even if it requires the other spouse to pay for the separate property out of his or her own separate property. *Schlafly v. Schlafly*, 35 S.W.3d 863 (Tex. App. – Houston [14th Dist.] 2000, pet. denied); *Powell v. Powell*, 822 S.W.2d 181 (Tex. App. – Houston [1st Dist.] 1991, writ denied); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977); *Leighton v. Leighton*, 921 S.W.2d 365 (Tex. App. – Houston [1st Dist.] 1996, no writ); *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App. – Houston [1st Dist.] 1995, no writ).

If the trial court mischaracterizes separate property as community property, the error requires remand, unless the mischaracterization has only *a de minimis* effect on the division. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977); *In re Marriage of Taylor*, 992 S.W.2d 616 (Tex. App. – Texarkana 1999, no writ); *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App. – Houston [1st Dist.] 1995, no writ); *Robles v. Robles*, 965 S.W.2d 605 (Tex. App. – Houston [1st Dist.] 1998, no writ); see also *Matter of Marriage of Morris*, 123 S.W.3d 864 (Tex. App. – Texarkana 2003, no pet.)(court of appeals reversed a property division because the trial court mischaracterized as the husband's separate property two parcels that were part of the community estate); *Vandiver v. Vandiver*, 4 S.W.3d 300 (Tex. App. – Corpus Christi 1999, no pet.)(trial court's mischaracterization of $500,000 in investment accounts as the wife's separate property did not require reversal for a redivision of the community estate because the trial court had found that its property division was just and right regardless of any mischaracterization).

The degree of proof necessary to establish that property is separate property is clear and convincing evidence. *Tex. Fam. Code Ann. § 3.003(b)*; *Harrison v. Harrison*, 321 S.W.3d. 899 (Tex. App.–Houston [14th Dist.] 2010, no pet. h.). Clear and convincing evidence is defined as that measure or degree of proof that will produce in the mind of the trier of fact, a firm belief or conviction as to the truth of the allegations sought to be established. *D.B. v. K.B.*, 176 S.W.3d 343 (Tex. App. – Houston [1st Dist.] 2004, pet. denied)(community property presumption was not rebutted and husband's potential qui tam fee was held to be community property and subject to division by the trial court); *Stavinoha v. Stavinoha*, 126 S.W.3d 604 (Tex. App. – Houston [14th Dist.] 2004, no pet.); *Tate v. Tate*, 55 S.W.3d 1 (Tex. App. – El Paso 2000, no pet.); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App. – Fort Worth 1995, no writ); *Long v. Long*, 234 S.W.3d 34, 40 (Tex. App.–El Paso 2007, no pet.).

A court must award separate property to the party that owns the interest. *Dickinson v. Dickinson*, 324 S.W.3d 653 (Tex. App.–Fort Worth 2010, no pet. h.)(although husband's pleadings did not mention the division of separate property, separate property cannot be divided; it must be awarded to the party who holds the separate property interest); *Sikes v. Sikes*, WL 2112809 (Tex. App.–Eastland

2010, no pet. h.)(not reported)(trial court erred in awarding wife husband's separate property that he inherited prior to the couple's marriage).

B. Property Owned Before Marriage or Acquired After Marriage

Property a spouse owns before marriage is that spouse's separate property. *Tex. Fam. Code Ann. § 3.001(1)*; *Langston v. Langston*, 82 S.W.3d 686 (Tex. App. – Eastland 2002, no pet.); *Parnell v. Parnell*, 811 S.W.2d 267 (Tex. App. – Houston [14th Dist.] 1991, no writ). Similarly, property a spouse acquires after the marriage ends is his or her separate property. *Burgess v. Easley*, 893 S.W.2d 87 (Tex. App. – Dallas 1994, no writ)(where deed to land was executed during marriage but not filed until after divorce, land was former husband's separate property). This is true even if payments on the property were made during the marriage with community funds, although the other spouse may be entitled to reimbursement for part of the payments. *Tex. Fam. Code Ann. § 3.401-3.406*; *Matter of Marriage of Jordan*, 264 S.W.3d 850, 856 (Tex. App. – Waco 2008, no pet.)(home was husband's separate property despite fact it was refinanced during marriage as husband purchased property before marriage but may give rise to claim for reimbursement); *Matter of Marriage of Louis*, 911 S.W.2d 495 (Tex. App. – Texarkana 1995, no writ); *Calder v. Calder*, WL 3370766 (Tex. App.–Austin 2010, no pet.h.)(not reported)(dog purchased prior to marriage was purchased with wife's separate property funds, even though the funds came from the husband's checking account).

Property a spouse acquires while separated from the other spouse is community property unless the manner in which is property is acquired makes it separate property as there is no recognition of legal separation in Texas. *Wilson v. Wilson*, 44 S.W.3d 597 (Tex. App. – Fort Worth 2001, no pet.).

C. Inception of Title Rule

Property is characterized as "separate" or "community" at the time of inception of title to the property. *Camp v. Camp*, 972 S.W.2d 906 (Tex. App. – Corpus Christi 1998, pet. denied); *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 665 (Tex. App.–San Antonio 1990, no writ). Under the inception of title doctrine, the character of property, whether separate or community, is fixed at the time of acquisition. *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 430 (Tex. 1970).

The terms "owned and claimed" as used in the Texas Family Code mean that where the right to the property accrued before the marriage, the property would be separate, even though the legal title or evidence of the title might not be obtained until after marriage. Inception of title occurs when a party first has right of claim to the property by virtue of which title is finally vested. *Welder v. Lambert*, 44 S.W. 281 (Tex. 1898); *Strong v. Garrett*, 224 S.W.2d 471 (Tex. 1949); *Wilkerson v. Wilkerson*, 992 S.W.2d 719 (Tex. App. – Austin 1999, no pet.); *see also Smith v. Smith*, 22 S.W.3d 140 (Tex. App. – Houston [14th Dist.] 2000, no pet.)(lawsuit proceeds were husband's where he was defrauded by a third party prior to marriage and filed suit and recovered a judgment after marriage). Acquiring an ownership interest or claim to property refers to the inception of the right, rather than the completion or ripening thereof. *Creamer v. Brioschi*, 109 S.W. 911 (Tex. 1908). All property held either by a husband or wife before marriage remains the separate property of such spouse and the status of the

property is to be determined by the origin of title to the property, and not by the acquisition of the final title. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984).

The inception of title rule was codified by Texas Family Code Section 3.006, which states: "If the community estate of the spouses and the separate estate of a spouse have an ownership interest in property, the respective ownership interests of the marital estates are determined by the rule of inception of title." The major consideration in determining the characterization of property as community or separate is the intention of spouses shown by the circumstances surrounding the inception of title. *Scott v. Scott*, 973 S.W.2d 694 (Tex. App. – El Paso 1998, no writ); *Winkle v. Winkle*, 951 S.W.2d 80 (Tex. App. – Corpus Christi 1997, writ denied). For instance, if a spouse took possession of property and began making payments on it before marriage, but did not actually acquire title to the property until after the marriage, the property will be that spouse's separate property. *Wilkerson v. Wilkerson*, 992 S.W.2d 719 (Tex. App. – Austin 1999, no pet.); *Scott v. Scott*, 973 S.W.2d 694 (Tex. App.– El Paso 1998, no writ).

When character as separate property attaches, it is immaterial that part of the unpaid purchase price is thereafter paid from community funds, since the status of property as being either separate or community is determined by the very time of its acquisition and such status is fixed by the facts of its acquisition. *Villarreal v. Villarreal*, 618 S.W.2d 99 (Tex. Civ. App.–Corpus Christi 1981, no writ). In *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. Civ. App.–San Antonio 1990, no writ), the court held that a car purchased two years before marriage is separate property under the inception of title rule, even though it may have been paid for with community funds and its final title acquired during marriage.

Further, the separate character of real property is not changed because the property was improved with funds borrowed on community credit, because both parties signed a note secured by a deed of trust on this property, or because both parties' names are on the deed of trust. *Leighton v. Leighton*, 921 S.W.2d 365 (Tex. App.– Houston [1st Dist.] 1996, no writ); see *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.)(deed to property purchased with husband's separate property taken in names of both spouses created a presumption of a gift).

In *Burgess v. Easley*, 893 S.W.2d 87 (Tex. Civ. App.–Dallas 1995, no writ), property was deeded to the husband by his parents during their marriage. Although the deed was dated during the marriage, it was not recorded until after the husband and wife were divorced. The Court found that the property was the husband's separate property since he had no right in the property until the deed was delivered, which was when it was filed after the divorce.

The use of community funds to improve separate property does not change the character of the property or give the community estate an ownership interest in the property. *Carter v. Carter*, 736 S.W.2d 775, 780 (Tex. App.–Houston [14th Dist] 1987, no writ). In *Kite v. Kite*, WL 1053014 (Tex. App.–Houston [1st Dist.] 2010, no pet. h.)(not reported), the trial court erred by divesting husband of separate property proceeds from the sale of a marital residence. The marital residence was built on real property that the husband received as a gift. Because the marital residence was built on the husband's

separate property, it is separate property, even though husband and wife used community funds to improve husband's separate property by building the marital residence.

If the community estate of the spouses and the separate estate of a spouse have an ownership interest in property, the respective ownership interests of the marital estates are determined by the rule of inception of title. *Tex. Fam. Code Ann. § 3.006*; see *Cook v. Cook*, 679 S.W.2d 581 (Tex. App.– San Antonio 1984, no writ); see also *Murray v. Murray*, 15 S.W.3d 202 (Tex. App.–Texarkana 2000, no pet.)(spouses own real property purchased by them before marriage in proportional percentage contributed by each to the total purchase price). If a purchase is made partly with separate property and partly with community credit, the separate and community estates own the property as tenants in common. *Cockerham v. Cook*, 527 S.W.2d 162 (Tex. 1975). Each estate owns an undivided interest in the proportion that it supplies to the consideration. *Gleich v. Bongio*, 99 S.W.2d 881, 883 (Tex. 1937); *Jacobs v. Jacob*, 669 S.W.2d 759, 763 (Tex. App.–Houston [14th Dist.] 1984, aff'd in part, 687 S.W.2d 731 (Tex. 1985); *Scott v. Scott*, 805 S.W.2d 835, 838 (Tex. App.–Waco 1991, writ denied).

D. Gifts

1. Generally

Property acquired during marriage by gift is the separate property of the recipient spouse, whether the gift was from the other spouse or a third party. *Tex. Const. Art XVI § 15; Tex. Fam. Code Ann. § 3.001*; *Powell v. Powell*, 822 S.W.2d 181 (Tex. App. – Houston [1st Dist.] 1991, writ denied); *Beavers v. Beavers*, 675 S.W.2d 296 (Tex. App. – Dallas 1984, no writ). The gift must be absolute and may not be open to future reconsideration. *Soto v. First Gibralter Bank, FSB San Antonio*, 868 S.W.2d 400 (Tex. App. – San Antonio 1993, writ ref'd).

2. Elements of a Gift

A gift is a voluntary transfer of property to another made gratuitously and without consideration. *Hilley v. Hilley*, 342 S.W.2d 565, 568 (Tex. 1961); *Hallum v. Hallum*, WL 4910232 (Tex. App.–Houston [1st Dist.] 2010, no pet. h.)(not reported). To show that a transfer of property was a gift, the spouse claiming the property as separate must establish:

- Donor's intent to make a gift;
- Delivery of the property; and
- Acceptance of the property.

Ellerbracht v. Ellerbracht, 735 S.W.2d 658 (Tex. App.–Austin 1987, no writ); *Dorman v. Arnold*, 932 S.W.2d 225 (Tex. App. – Texarkana 1996, n.w.h.); *Oadra v. Stegall*, 871 S.W.2d 882 (Tex. App. – Houston [14th Dist.] 1994, no writ); *Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726 (Tex. App. – Corpus Christi 1993, writ denied); *Grimsley v. Grimsley*, 632 S.W.2d 174, 177 (Tex. App.–Corpus Christi 1982, no writ). In *Scott v. Scott*, 805 S.W.2d 835, 839-40 (Tex. App.–Waco 1991, writ denied), the jury found that the wife did not make a gift of money to the husband, even

though she put a $100,000 certificate of deposit in his name alone. A gift cannot occur without the intent to make a gift.

The promise to give property in the future is generally not a gift. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.–San Antonio 1983, writ ref'd n.r.e.).

3. Burden of Proof

In the absence of an alternative presumption, the burden of proving a gift is on the party claiming the gift. *Woodworth v. Cortez*, 660 S.W.2d 561 (Tex. App. – San Antonio 1983, writ ref'd n.r.e.); *Haile v. Hottzclaw*, 414 S.W.2d 916 (Tex. 1964)(finding it proper for trial court to find gift made based on circumstances surrounding the gift, despite transferor's testimony of no donative intent).

4. Delivery of Property

A donor delivers property when he or she releases all dominion or control over it. *Soto v. First Gibralter Bank, FSB San Antonio*, 868 S.W.2d 400 (Tex. App. – San Antonio 1993, writ ref'd); *Grimsley v. Grimsley*, 632 S.W.2d 174 (Tex. App. – Corpus Christi 1982, no writ). Title to the property must pass immediately and unconditionally, and the transfer must be so complete that the donee spouse could maintain an action for conversion of the property. *Oadra v. Stegall*, 871 S.W.2d 882 (Tex. App. – Houston [14th Dist.] 1994, no writ). Thus, a valid gift of real estate must include transfer and receipt of the deed, and a gift of stock must include endorsement of the stock certificates. *Grimsley v. Grimsley*, 632 S.W.2d 174 (Tex. App. – Corpus Christi 1982, no writ).

5. No Consideration

A transfer is not a gift if the recipient gave consideration in exchange for the transferred property. *Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726 (Tex. App. – Corpus Christi 1993, writ denied); *Pemelton v. Pemelton*, 809 S.W.2d 642 (Tex. App.- Corpus Christi 1991, writ granted), *rev'd on other grounds,* 836 S.W.2d 145(Tex. 1992); *Ellebracht v. Ellebracht*, 735 S.W.2d 658 (Tex. App.-- Austin 1987, no writ).

The grantor may make a gift of encumbered property to a spouse, and the property will be a gift even if the grantee spouse assumes an obligation to extinguish the encumbrance. *Pemelton v. Pemelton*, 809 S.W.2d 642 (Tex. App.- Corpus Christi 1991), *rev'd on other grounds,* 836 S.W.2d 145(Tex. 1992); *Kiel v. Brinkman*, 668 S.W.2d 926, 929 (Tex. App.–Houston [14th Dist.] 1984, no writ).

If even minimal consideration is given in exchange for the property, the property may become part of the community estate. *Saldana v. Saldana*, 791 S.W.2d 316 (Tex. App. – Corpus Christi 1990, no writ)(lot transferred to husband and wife by husband's mother during marriage was community property, where wife paid mother $10 at time she executed deed, and husband offered no evidence to rebut presumption that $10 came from community estate).

However, there are cases that support the position that recitals in a deed are not conclusive as to consideration. *Hallum v. Hallum*, (Tex. App.–Houston [1st Dist.] 2010, no pet. h.)(not reported), is a case where a stepfather executed three deeds conveying fractional interests in real property to the husband, and the deeds stated that the conveyance to the husband was in consideration for ten dollars and other good and valuable consideration. The deeds did not expressly state that the conveyance was a gift or that the stated consideration was to be paid out of husband's separate property. The stepfather's wife testified that the stepfather loved the husband very much and introduced him as his son. The stepfather delivered the three deeds to the husband when he was in the hospital dying. The stepfather's wife testified that she was present when the stepfather instructed his lawyer to prepare the deeds and that the stepfather said to his lawyer that he wanted his "son" to have the lots as his separate property. The Court of Appeals affirmed the trial court's ruling holding that the real property was the husband's separate property. The Court stated that standing alone, the fact that the deeds recited the receipt of ten dollars and other valuable consideration and lack a recital that the consideration was paid out of separate property tend to show that the conveyance was a sale, not a gift. However, the Court further stated that the fact that a deed purports to be a sale for nominal consideration, paid or unpaid, does not constitute clear and convincing evidence that rebuts the direct evidence from the step-father's wife that the properties were a gift. The Court concluded that the real property was the husband's separate property. *See also Hall v. Barrett*, 126 S.W.2d 1045 (Tex. App.–Fort Worth 1939, no writ)(Court stated that "must ado is made of the recited consideration of "Ten Dollars" paid to the grantor. All of us know that this is the usual and customary formal recitation used in a deed of gift.")

Similarly, other cases have allowed parol evidence to be admitted to show the true consideration or that there was no consideration given. *See Tarrant v. Schultz*, 441 S.W.2d 868, 870 (Tex. App,–Houston [14th Dist.] 1969, writ ref'd. n.r.e.). In *Bahr v. Kohr*, 980 S.W.2d 723 (Tex. App.–San Antonio 1998, no pet.), the Court held that parol evidence was admissible to rebut the presumption of community property and based upon the proffered parol evidence ultimately held that the property was the wife's separate property.

On the other hand, there are other cases that support the opposite position and did not admit parol evidence in the circumstances of those cases. *See Massey v. Massey*, 807 S.W.2d 391, 405 (Tex. App.–Houston [1st Dist.] 1991, writ denied); *Johnson v. Driver*, 198 S.W.3d 359, 363 (Tex. App.–Tyler 2006, pet. denied)(citing *Massey*).

6. Gifts to Both Spouses

If a third party attempts to make a gift to the community estate, each spouse acquires an undivided one-half interest in the subject matter of the gift as his or her separate property. *Dutton v. Dutton*, 18 S.W.3d 849 (Tex. App. – Eastland 2000, pet. denied); *Jones v. Jones*, 804 S.W.2d 623 (Tex. App.- Texarkana 1991, no writ); *McLemore v. McLemore*, 641 S.W.2d 395 (Tex. App. – Tyler 1982, no writ); *Roosth v. Roosth*, 889 S.W.2d 445, 457 Tex. App.–Houston [14th Dist.] 1994, no writ)(engagement gifts and wedding gifts to both spouses were one-half the separate property of each); *Marshall v. Marshall*, 735 S.W.2d 587, 597 (Tex. Civ. App.–Dallas 1987, writ ref'd n.r.e.)*; Tittle v. Tittle*, 220 S.W.2d 637 (Tex. 1949). Section 3.001(2) and Article XVI, Section 15 of the Texas

Constitution require that any property acquired by gift during the marriage is separate property, therefore gifts to the community are not possible.

7. Gifts from Parents or Grandparents

When a grantor conveys property to a natural object of the grantor's bounty, such as a parent to a child or grandparent to a grandchild, a rebuttable presumption is created that the property conveyed is a gift. The party claiming the property was not a gift must prove lack of donative intent by clear and convincing evidence. *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ)(parents' transfer of a property interest to a child is presumptively a gift but may be rebutted by evidence showing the facts and circumstances surrounding the conveyance); *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App. – San Antonio 1983, writ ref'd n.r.e.)*; Hallum v. Hallum*, WL 4910232 (Tex. App.–Houston [1st Dist.] 2010, no pet. h.)(not reported)(a stepfather considered husband "part of his bounty, thus giving rise to the presumption that the stepfather conveyed real property to husband as a gift); *In re Royal*, 107 S.W.3d 846 (Tex. App.–Amarillo 2003, no pet.)(wife presented sufficient evidence to support the trial court's finding that the gift (forgiveness of debt) in the amount of $40,000 was a gift to both parties, rather than solely to the grandson).

The same elements for determining a gift (i.e. donative intent, delivery and acceptance) apply to transfers between certain related persons, but the burden of proof in the establishment of gift shifts from the party asserting a gift to the party disputing transfer by gift. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.–San Antonio 1983, writ ref'd n.r.e.); *see Matter of Marriage of Royal*, 107 S.W.2d 846 (Tex. App. – Amarillo 2003, no pet.)(grandparent's testimony that they forgave part of a loan they had made for spouses for the purchase of house was a gift to the husband was rebutted by contrary evidence of a gift to the husband and wife).

Testimony from a spouse's parent that property is a gift to one spouse alone is sufficient to establish separate property without tracing. *Wells v. Wells*, 251 S.W.3d 834 (Tex. App.–Eastland 2008).

8. Interspousal Gifts

One spouse may give the other his or her interest in community property, whereupon the property becomes the recipient spouse's separate property. *Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726 (Tex. App. – Corpus Christi 1993, writ denied). A gift of property from one spouse to the other is presumed to include all of the income and property that may arise from the original gift property. *Tex. Fam. Code Ann. § 3.005; Tex. Const., Art. XVI, Section 15).*

If a spouse's separate funds are used to purchase real property during the marriage, and title to the property is taken in the names of both spouses, it is presumed that the spouse whose funds were spent to acquire the property intended to make a gift to the other spouse of one-half of the contribution made to acquire the property. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975); *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.)(deed to property purchased with husband's separate

property taken in names of both spouses created a presumption of a gift); *In re Marriage of Morris*, 12 S.W.3d 877 (Tex. App.–Texarkana 2000, no pet.)(taking title to husband's separate realty in names of both spouses makes gift to wife of one-half interest); *Whorrall v. Whorrall*, 691 S.W.2d 32 (Tex. App. – Austin 1985, writ dism'd w.o.j.); *Babb v. McGee*, 507 S.W.2d 821 (Tex. Civ. App.–Dallas 1974, writ ref'd n.r.e.)(a conveyance from one spouse to the other spouse creates a presumption that the grantor spouse intended a gift to the grantee spouse).

A conveyance of real estate to one spouse during the marriage generally creates a presumption of community property; however, if a deed recites that the conveyance is to the spouse as his or her separate property, this overrides the community presumption and creates a new presumption that the conveyed property is the separate property of the grantee spouse. See *Hodge v. Ellis*, 277 S.W.2d 900 (Tex. 1955); *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ).

This shifts the burden to the other spouse to rebut the separate property presumption, and failure to rebut results in a conclusive finding of separate property. *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.)(deed to property purchased with husband's separate property in joint names of spouses created a presumption of a gift which disappeared when husband testified that he did not intend a gift but wife then proved by clear and convincing evidence husband had intended to make a gift to her); *Pace v. Pace*, 160 S.W.3d 706 (Tex. App. – Dallas 2005, pet. denied)(house titled in both spouse's name but the wife was able to trace the purchase money to her separate funds and the house was determined to be exclusively wife's separate property); *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ); *Harrison v. Harrison*, 321 S.W.3d. 829 (Tex. App.–Houston [14th Dist.] 2010, no pet. h.). Thus, after such deed recitals have been introduced into evidence, the spouse claiming that the property belongs to the community has the burden of proof on the matter. *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.); *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ); *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426 (Tex. 1970).

Where the spouse challenging the characterization of the property as separate was not a party to the conveyance, the deed recitations are rebuttable by parol evidence. *Hodge v. Ellis*, 277 S.W.2d 900 (Tex. 1955); *Pemelton v. Pemelton*, 809 S.W.2d 642 (Tex. App. - Corpus Christi 1991), *rev'd on other grounds,* 836 S.W.2d 145(Tex.1992)(obligation to pay consideration recited in deed was community debt where wife's separate estate was insufficient to meet obligation and there was no recitation that grantors were looking solely to wife's separate estate for payment, even though grantors, wife's parents, forgave each promissory note as it came due, as grantors could have discontinued this practice, leaving community liable for balance of debt).

If a spouse takes title to his or her separate real property in the names of both spouses, a presumption arises that the spouse who purchased the property with separate property intended to make a gift is made to the other spouse of an undivided one-half interest in the property. *Matter of Marriage of Morris*, 12 S.W.3d 877 (Tex. App.–Texarkana 2000, no pet.); *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.)(where husband took title of separate property lake lot in names of husband and wife, court held husband had gifted an undivided one-half interest in the lake lot to wife); *Peterson v. Peterson*, 595 S.W.2d 889 (Tex. Civ. App.–Austin 1980, writ dism'd w.o.j.)(presumption overcome

by husband's testimony that no gift was intended). In *Whorall v. Whorall*, 691 S.W.2d 32, 35 (Tex. App.–Austin 1985, writ dism'd), the wife's testimony that she did not intend a gift was sufficient to support trial court's finding of separate property.

In *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.), the Court noted that when property is purchased with separate property of a spouse, but title to the property is taken in the names of both spouses, a presumption arises that the spouse who purchased the property with separate property intended to make a gift to the other spouse of an undivided one-half interest in the property. The presumption is rebutted and is of no further significance if the spouse whose separate property was used to make the purchase denies the intent to make a gift. At that point, the court's review is centered upon the legal and factual sufficiency of the evidence to establish a gift by clear and convincing evidence. The wife in *Long* proved by clear and convincing evidence that the husband intended to make a gift.

In *Magness v. Magness*, 241 S.W.3d 910 (Tex. App. – Dallas 2007, pet. denied), the wife owned a home and real estate prior to the marriage. During the marriage, the wife refinanced the home and executed a deed which allegedly conveyed a one-half interest in the home to the husband. At trial, the wife testified that she signed the deed as part of the refinancing and that she did not intend the deed to be a gift transferring any ownership to her husband. The trial court found that each spouse owned a one-half separate interest in the home. The wife appealed and the court of appeals found that although the inception of title would dictate that the house was the separate property of the wife, the wife's execution of the deed raised a fact question as to the wife's intent to make a gift to her husband of an interest in the property. The Court stated that "[a] deed for property from one spouse as grantor to the other spouse as grantee creates a presumption the grantee spouse received the property as separate property by gift." This presumption may be rebutted by proof of fraud, accident, or mistake. The wife did not testify to any facts indicating that she had executed the deed because of fraud, accident, or mistake, she only testified that is was not her intent to make a gift (conclusory statement, not factual evidence). Therefore the court affirmed the trial court since there was no evidence of fraud, accident, or mistake to overcome the presumption of gift.

E. Devise or Descent

Property acquired by one of the spouses by devise or descent is that spouse's separate property. *Tex. Const. art. XIV § 15; Tex. Fam. Code Ann. § 3.001(2)*; *Walton v. Johnson*, 879 S.W.2d 942 (Tex. App. – Tyler 1994, writ denied)(wife failed to establish that bank accounts established from funds left her by her father were her separate property, as she failed to account for discrepancy between amounts she received from father's estate and amounts in accounts; however, mineral properties were wife's separate property where evidence showed with no genuine dispute that specific properties were traced to original devise from father).

"Devise" means the acquisition of property by last will and testament. "Descent" means the acquisition of property by inheritance without a will. *Pattern Jury Charge 202.3.*

Whether by devise or descent, legal title vests in beneficiaries upon the death of the decedent. *Tex. Probate Code, Section 37*; *Dyer v. Eckols*, 808 S.W.2d 531 (Tex. App.–Houston [14th Dist.] 1991, *writ dism'd by agr.)*.

F. Recovery for Personal Injury

Any recovery for a spouse's personal injuries sustained during the marriage is that spouse's separate property, after deducting any recovery for medical expenses and lost wages during the marriage. *Tex. Fam. Code Ann. § 3.001(3); Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972); *Licata v. Licata*, 11 S.W.3d 269 (Tex. App.–Houston [14th Dist.] 1999, pet. denied)(pain and suffering payments in settlement of personal injury are wife's separate property); *Slaton v. Slaton*, 987 S.W.2d 180 (Tex. App.–Houston [14th Dist.] 1999, pet. denied)(medical malpractice recovery for injuries to wife proven to be over 90% her separate property).

Although an injured spouse owns as his or her separate property any recovery for disfigurement, past and future physical pain and suffering, and mental suffering, damages for medical expenses, lost wages, and loss of earning capacity are community property. *Slaton v. Slaton*, 987 S.W.2d 180 (Tex. App.–Houston [14th Dist.] 1999, pet. denied); *Osborn v. Osborn*, 961 S.W.2d 408 (Tex. App. – Houston [1st Dist.] 1997, no writ); *Moreno v. Alejandro*, 775 S.W.2d 735 (Tex. App. – San Antonio 1989, writ denied).

Damages for the other spouses' loss of consortium are that spouse's separate property. *Osborn v. Osborn*, 961 S.W.2d 408 (Tex. App. – Houston [1st Dist.] 1997, no writ); *Wittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978).

Tort damages received during marriage for pre-marriage claims are separate property. *Smith v. Smith*, 22 S.W.3d 140 (Tex. App.–Houston [14th Dist.] 2000, no pet.)(lawsuit proceeds were husband's separate property where he was defrauded by a third party prior to the marriage and filed suit and recovered a judgment after the marriage).

The spouse who receives a settlement from a personal injury lawsuit during the marriage has the burden to prove by clear and convincing evidence what part of the settlement was separate property. *Cottone v. Cottone*, 122 S.W.3d 211 (Tex. App.–Houston [1st Dist.] 2003, no pet.); *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ); *Moreno v. Alejandro*, 775 S.W.2d 735 (Tex. App. – San Antonio 1989, writ denied); *Licata v. Licata*, 11 S.W.3d 269, 273 (Tex. App.–Houston [14th Dist.] 1999, no pet); *Henslee v. Henslee*, WL 2982928 (Tex. App.–Tyler 2010, no pet. h.)(not reported)(trial court did not err by concluding that all of husband's personal injury settlement was community property where the husband failed to sustain his burden of demonstrating what part of the proceeds was community and what was separate). Failure to demonstrate which part of settlement proceeds are separate and which part are community results in the conclusion that all the proceeds are community property. *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ); *Moreno v. Alejandro*, 775 S.W.2d 735 (Tex. App. – San Antonio 1989, writ denied). It is therefore essential that the injured spouse present evidence that no part of the settlement proceeds represented lost wages or

medical expenses, or, if part of the settlement was in payment of either of these categories, how much was paid for each and how much was paid for the personal injuries. *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ); *Moreno v. Alejandro*, 775 S.W.2d 735 (Tex. App. – San Antonio 1989, writ denied). It seems that a personal injury lawyer who settles a case for a married client must anticipate that the spouses might someday divorce.

G. Property Acquired in Exchange for Separate Property–Mutations and Tracing

Once the character of a property interest is determined, whether separate property or community property, the property interest will retain that legal character after undergoing a change in form and shall not be altered by the sale, exchange or substitution of the property interest. *Gleich v. Bongio*, 99 S.W.2d 881 (Tex. 1937). Property acquired in exchange for separate property becomes the separate property of the spouse whose separate property was exchanged. *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App.- Corpus Christi 1997, no writ). Similarly, the proceeds of the sale of separate property are the separate property of the spouse whose property was sold. *Scott v. Scott*, 805 S.W.2d 835 (Tex. App. –Waco 1991, writ denied).

"The character of separate property is not changed by the sale, exchange, or change in form of the separate property. If the separate property can be definitely traced and identified, it remains separate property regardless of the fact that the separate may undergo mutations or changes in form." *Texas Patter Jury Charges – Family, PJC 202.4.* As long as separate property can be traced and identified, it remains separate property regardless of the fact that it may undergo mutations and changes. *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953); *Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987)*;* *Harris v. Harris*, 765 S.W.2d 798, 802 (Tex. App.–Houston [14th Dist.] 1989, writ denied).

Because all property possessed by either spouse during or upon dissolution of their marriage is presumed to be community property, a party making a separate property claim, must trace and clearly identify the claimed separate property. *Tex. Fam. Code Ann. § 3.003(a); Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975); *Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1965). Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. *Slaton v. Slaton,* 987 S.W.2d 180 (Tex. App. – Houston [14th Dist.] 1999, pet. denied); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App. – Fort Worth 1995, no writ); *Walton v. Johnson*, 879 S.W.2d 942 (Tex. App. – Tyler 1994, writ denied); *Hilliard v. Hilliard*, 725 S.W.2d 722 (Tex. App. – Dallas 1985, no writ).

The degree of proof necessary to establish that property is separate property is clear and convincing evidence. *Tex. Fam. Code Ann. § 3.003(b)*. See also *In re Bivins*, 162 S.W.3d 415, 420 (Tex. App.–Waco 2005, orig. proceeding); *Zagorski v. Zagorski*, 116 S.W.3d 309, 314 (Tex. App.–Houston[14th Dist.] 2003, pet. denied); *Beard v. Beard*, 49 S.W.3d 40, 55 (Tex. App.–Waco 2001, pet. denied). Clear and convincing evidence is proven if a reasonable trier of fact could form a firm belief or conviction that its finding was true. *Stavinoha v. Stavinoha*, 126 S.W.3d 604 (Tex. App.– Houston [14th Dist.] 2004, no pet.).

The spouse claiming that disputed property is his or her separate property must trace and identify the property to show that it was originally his or her separate property or that it was acquired with his or her separate property. *McKinley v. McKinley,* 496 S.W.2d 540 (Tex. 1973); *Barnard v. Barnard*, 133 S.W.3d 782 (Tex. App.– Fort Worth 2004, pet. denied); *Zagorski v. Zagorski*, 116 S.W.3d 309 (Tex. App.– Houston [14th Dist.] 2003, pet. denied); *In re Marriage of Moore*, 890 S.W.2d 821 (Tex. App. – Amarillo 1994, no writ); *Hopf v. Hopf*, 841 S.W.2d 898 (Tex. App. – Houston [14th Dist.] 1992, no writ). Tracing involves establishing the origin of the property through evidence showing how the spouse claiming the asset as separate property obtained possession of the property. *Hilliard v. Hilliard*, 725 S.W.2d 722, 723 (Tex. App.–Dallas 1985, no writ); *Smith v. Smith*, 22 S.W.3d 140, 144 (Tex. App.–Houston [14th Dist.] 2000, no pet.); *Norton v. Norton*, WL 2816212 (Tex. App.–Amarillo 2010, no pet. h.)(not reported)(even though $6,000 of community funds were deposited into husband's account containing his separate property, court held that husband traced his separate property funds).

Once the character of a property interest is determined, whether separate property or community property, the property interest will retain that legal character after undergoing a change in form and shall not be altered by the sale, exchange or substitution of the property interest. *Gleich v. Bongio*, 99 S.W.2d 881 (Tex. 1937).

Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the presumption of community property by tracing the assets on hand during marriage back to property that, because of its time and manner of acquisition, is separate in character. *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953); *Celso v.* Celso, 864 S.W>2d 652, 654 (Tex. App.–Tyler 1993, no writ); *Walton v. Johnson*, 879 S.W.2d 942 (Tex. App. – Tyler 1994, writ denied); *Hilliard v. Hilliard*, 725 S.W.2d 722 (Tex. App. – Dallas 1985, no writ); *In re McCloy*, 296 F.3d 370 (5th Cir. 2002). Thus, for instance, when separate funds can be traced through a joint bank account to specific property purchased with those funds, without surmise or speculation about funds withdrawn from the account in the interim, then the property purchased is also separate. *Welder v. Welder*, 794 S.W.2d 420 (Tex. App. – Corpus Christi 1990, no writ).

Mere testimony that property purchased with separate property funds without any tracing of the funds, has been held to be insufficient to rebut the community property presumption. *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App. – Houston [1st Dist.] 1995, no writ). However, some courts have held that the uncorroborated assertion of a spouse that property is her or her separate property will rise to the level of being clear and convincing evidence and support a finding of separate property. *Pace v. Pace*, 160 S.W.3d 706 (Tex. App.–Dallas 2005); *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex. App.–Tyler 1993, no writ)(where evidence is uncontroverted that husband's separate assets were used to purchase house then evidence is clear and convincing that husband traced purchase of house to his separate property assets); *Holloway v. Holloway*, 671 S.W.2d 55 (Tex. App.–Dallas 1983, writ dism'd)(party's uncontroverted testimony alone sufficient to establish separate property nature of asset); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App. – Fort Worth 1995, no writ)(uncontradicted testimony of wife that investment accounts and T-bill were either gifts from her father or proceeds from sale of separate real estate was at least some evidence of the character of the property).

H. Form of Title

The form of the title to property does not determine the character of the property as separate or community, but if the instrument conveying the property recites that the property is one spouse's separate property, or if the consideration for the property is from one spouse's separate estate, or both, a presumption that the property is separate property arises. *Hodge v. Ellis*, 154 Tex. 341, 277 S.W.2d 900 (1955); *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ); *Pemelton v. Pemelton*, 809 S.W.2d 642 (Tex. App. - Corpus Christi 1991), *rev'd on other grounds,* 836 S.W.2d 145(Tex. 1992).

A conveyance of real estate to one spouse during the marriage generally creates a presumption of community property; however, if a deed recites that the conveyance is to the spouse as his or her separate property, this overrides the community presumption and creates a new presumption that the conveyed property is the separate property of the grantee spouse. See *Hodge v. Ellis*, 277 S.W.2d 900 (Tex. 1955); *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ). This shifts the burden to the other spouse to rebut the separate property presumption, and failure to rebut results in a conclusive finding of separate property. *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.)(deed to property purchased with husband's separate property in joint names of spouses created a presumption of a gift which disappeared when husband testified that he did not intend a gift but wife then proved by clear and convincing evidence husband had intended to make a gift to her); *Pace v. Pace*, 160 S.W.3d 706 (Tex. App. – Dallas 2005, pet. denied)(house titled in both spouse's name but the wife was able to trace the purchase money to her separate funds and the house was determined to be exclusively wife's separate property); *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ). Thus, after such deed recitals have been introduced into evidence, the spouse claiming that the property belongs to the community has the burden of proof on the matter. *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.); *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App. – Beaumont 1992, no writ); *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426 (Tex. 1970).

Where the spouse challenging the characterization of the property as separate was not a party to the conveyance, the deed recitations are rebuttable by parol evidence. *Hodge v. Ellis*, 277 S.W.2d 900 (Tex. 1955); *Pemelton v. Pemelton*, 809 S.W.2d 642 (Tex. App. - Corpus Christi 1991), *rev'd on other grounds,* 836 S.W.2d 145(Tex.1992) (obligation to pay consideration recited in deed was community debt where wife's separate estate was insufficient to meet obligation and there was no recitation that grantors were looking solely to wife's separate estate for payment, even though grantors, wife's parents, forgave each promissory note as it came due, as grantors could have discontinued this practice, leaving community liable for balance of debt).

If a spouse takes title to his or her separate real property in the names of both spouses, a presumption arises that the spouse who purchased the property with separate property intended to make a gift is made to the other spouse of an undivided one-half interest in the property. *Matter of Marriage of Morris*, 12 S.W.3d 877 (Tex. App.–Texarkana 2000, no pet.); *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.)(where husband took title of separate property lake lot in names of husband and wife, court held husband had gifted an undivided one-half interest in the lake lot to wife); *Peterson*

v. Peterson, 595 S.W.2d 889 (Tex. Civ. App.–Austin 1980, writ dism'd w.o.j.)(presumption overcome by husband's testimony that no gift was intended). In *Whorall v. Whorall*, 691 S.W.2d 32, 35 (Tex. App.–Austin 1985, writ dism'd), wife's testimony that she did not intend a gift was sufficient to support trial court's finding of separate property.

In *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.), the Court noted that when property is purchased with separate property of a spouse, but title to the property is taken in the names of both spouses, a presumption arises that the spouse who purchased the property with separate property intended to make a gift to the other spouse of an undivided one-half interest in the property. The presumption is rebutted and is of no further significance if the spouse whose separate property was used to make the purchase denies the intent to make a gift. At that point, the court's review is centered upon the legal and factual sufficiency of the evidence to establish a gift by clear and convincing evidence. The wife in *Long* proved by clear and convincing evidence that the husband intended to make a gift.

IV. BUSINESS INTERESTS

A. In General

Businesses and business interests may be community property, and thus may be divisible upon divorce, whether they are sole proprietorships, partnerships or corporations. *Smith v. Smith*, 836 S.W.2d 688 (Tex. App. – Houston [1st Dist.] 1992, no writ)(sole proprietorships); *Farley v. Farley*, 930 S.W.2d 208 (Tex. App. – Eastland 1996, no writ)(partnership interest); *McIntyre v. McIntyre*, 722 S.W.2d 53 (Tex. App. – San Antonio, 1986)(partnership interest); *Matter of Marriage of Thurmond*, 888 S.W.2d 269 (Tex. App. – Amarillo 1994, writ denied); *Rathmell v. Morrison*, 732 S.W.2d 6 (Tex. App. – Houston [14th Dist.] 1987, no writ). As with other property, a spouse attempting to claim that a business interest is his or her separate property must overcome the community property presumption by tracing the origin of the interest. *Hopf v. Hopf*, 841 S.W.2d 898 (Tex. App. – Houston [14th Dist.] 1992, no writ).

B. Sole Proprietorships

Where one spouse is the sole proprietor of a business before marriage which he or she continues to operate after the marriage, or where one spouse begins a sole proprietorship with separate funds during the marriage, the profits earned during marriage are presumptively community property. *Tex. Fam. Code Ann. § 3.002; In the Matter of the Marriage of York*, 613 S.W.2d 764 (Tex. Civ. App.–Amarillo, 1981, no writ). The separate property invested in the business may be traceable; if it is not, the spouse who operates the business may wish to seek reimbursement for the separate property investment.

If a spouse started a business before his or her marriage and continued it afterward, the separate and community property components of the business are likely to be commingled, as assets the spouse owned before the marriage are separate property and the income of the business earned after the

marriage is community property. *Hopf v. Hopf*, 841 S.W.2d 898 (Tex. App. – Houston [14th Dist.] 1992, no writ)(interest in building which husband owned before marriage was his separate property, but income and accounts receivable from his CPA business, which was located in the building, were community property). If the spouse is unable to trace the separate property part of the business upon divorce, he or she may nonetheless be entitled to reimbursement for the investment of the separate property in the community business. *Schmidt v. Huppman*, 73 Tex. 112, 11 S.W. 175 (1889); *Hartman v. Hartman*, 253 S.W.2d 480 (Tex. Civ. App.– Austin 1952, no writ); *Schecter v. Schecter*, 579 S.W.2d 502 (Tex. Civ. App.–Dallas 1978, no writ).

The business' earnings after the divorce are not subject to division. *Butler v. Butler*, 975 S.W.2d 765 (Tex. App.–Corpus Christi 1998, no writ).

Usually, a sole proprietorship's assets will be awarded to one spouse or the other, usually the one who has been running the business, and other property or an equalizing judgment will be awarded to the other spouse. *See Farley v. Farley*, 930 S.W.2d 208 (Tex. App. – Eastland 1996, no writ); *Hopf v. Hopf*, 841 S.W.2d 898 (Tex. App. – Houston [14th Dist.] 1992, no writ). However, the court may award both spouses a percentage of the assets, liabilities, and profits of the business. *In re Marriage of Trujillo*, 580 S.W.2d 873 (Tex. Civ. App.- Texarkana 1979, no writ)(suggesting that it may not be wise to divide a going business between antagonistic parties).

C. Partnerships

Partnership property is not the property of the partners, but of the partnership, and neither a partner nor his or her spouse has an interest in partnership property that can be transferred, either voluntarily or involuntarily. *Harris v. Harris*, 765 S.W.2d 798 (Tex. App.-- Houston [14th Dist.] 1989, writ denied);*Gibson v. Gibson*, 190 S.W.3d 821 (Tex. App. – Fort Worth 2006, no pet.). Partnership property is therefore neither separate nor community property. *Harris v. Harris*, 765 S.W.2d 798 (Tex. App.-- Houston [14th Dist.] 1989, writ denied). The partner's interest in the partnership itself, however, is his or her personal property, and may be community property.

The only partnership property right a partner has that is subject to a community or separate property characterization is the partner's interest in the partnership, that is his or her right to receive a share of the partnership profits and surplus. *Harris v. Harris*, 765 S.W.2d 798 (Tex. App.-- Houston [14th Dist.] 1989, writ denied); *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App.–Dallas 1987, writ ref'd n.r.e.).

Under the inception of title rule, if the interest in the partnership is acquired before marriage, the interest is separate property. *Welder v. Lambert*, 44 S.W. 281 (Tex. 1898); *Harris v. Harris*, 765 S.W.2d 798 (Tex. App.-- Houston [14th Dist.] 1989, writ denied); *Cox v. Cox*, 439 S.W.2d 862 (Tex. Civ. App.–San Antonio 1969, no writ). The same is true where the interest (whether acquired as an assignee or by one who is accepted as a partner) is acquired by gift or inheritance. A partnership is formed by an agreement between two or more partners. *See Tex. Bus. Org. Code Section 154.001(b).*

The court in a divorce cannot award a community property partnership interest to the non-partner spouse. *McKnight v. McKnight*, 543 S.W.2d 863 (Tex. 1976). Even if the spouses are the sole partners in the partnership, the court may not award specific partnership property upon their divorce, as the partnership property is not community property. *Roach v. Roach*, 672 S.W.2d 524 (Tex. App. – Amarillo 1984, no writ).

If the court awards a spouse a percentage of a partnership interest as part of the division of community property, the spouse is entitled to that percentage of the partnership's future revenue. *York v. York*, 678 S.W.2d 110 (Tex. App. – El Paso 1984, no writ).

One cannot "pierce the veil" of a partnership like one can a corporation. *Pinebrook Properties, Ltd. v. BrookhavenLake Property Owners Ass'n*, 77 S.W.3d 487 (Tex. App. – Texarkana 2002, pet. denied); *Lifshutz v. Lifshutz*, 63 S.W.3d 511 (Tex. App. – San Antonio 2001, pet. denied).

1. Distributions of Partnership Profits or Income During Marriage

Distributions of a partner's share of profits and income during marriage are community property, even if the partner's interest is separate property. *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App.–Dallas 1987, writ ref'd n.r.e.); *Harris v. Harris*, 765 S.W.2d 798 (Tex. App.–Houston [14th Dist.] 1989, writ denied).

In *Marshall*, the husband owned a separate property interest in a partnership engaged in oil and gas exploration and production. The partnership acquired all of the oil and gas leases before the marriage. The partnership disbursed $542,316 to the husband during the marriage. The husband argued that only the $22,400 paid as salary was community property. The Court rejected the husband's argument and held that distributions of partnership income and profits were community property. The *Marshall* Court noted:

> "A withdrawal from a partnership capital account is not a return of capital in the sense that it may be characterized as a mutation of a partner's separate property contribution to the partnership and thereby remain separate. Such characterization is contrary to the UPA and implies the partner retains an ownership interest in his capital contribution. He does not; the partnership entity becomes the owner, and the partner's contribution becomes partnership property which cannot be characterized as either separate or community property of the individual partners. Thus, there can be no mutation of a partner's separate contribution; that rule is inapplicable in determining the characterization of a partnership distribution from a partner's capital account."

The *Marshall* court held that all monies disbursed by the partnership were made from current income. The partnership agreement provided that "any and all distributions . . . of any kind or character over and above the salary here provided . . . shall be charged against any such distributee's share of the profits of the business." The court held that on the facts of the case, all of the partnership distributions

that the husband received were either salary under the partnership agreement or distributions of profits of the partnership and therefore community property.

The case of *Lifshutz v. Lifshutz*, 199 S.W.3d 9 (Tex. App.–San Antonio 2006, pet. denied) also addressed the issue of distributions from a partnership. In the facts of that case, the Court of Appeals held that the distributions of partnership income and profits were community property.

For an excellent discussion of the characterization of partnership distributions, see James M. Wingate's article titled "Whose Money Is It? The Characterization of Partnership Distributions" presented at the State Bar of Texas New Frontiers in Marital Property Law course in Scottsdale, Arizona. October 28-29, 2010.

2. Undistributed Profits

Profits earned but retained for reasonable needs of business remain part of "partnership property" (whether in the form of cash in the bank, increased inventory, or otherwise). *Jones v. Jones*, 699 S.W.2d 583 (Tex. App.–Texarkana 1985, no writ); *McKnight v. McKnight*, 543 S.W.2d 863 (Tex. 1976).

D. Corporations

Under the inception of title rule, stock in a corporation that was incorporated during the marriage is community property, and stock acquired before marriage, or during the marriage by gift, devise, or descent, is separate property. *Tex. Fam. Code Ann. § 3.001*; *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984). An increase in the value of corporate stock belonging to a separate estate that is due to natural growth or the fluctuations of the market remain separate property. *Dillingham v. Dillingham*, 434 S.W.2d 459 (Tex. Civ. App.– Fort Worth 1968, writ dism'd). If the increase in value is due, at least in part, to the time, toil and talent of either or both spouses, the stock remains separate property, but the community estate may have a right to reimbursement. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984); *Lucy v. Lucy*, 622 S.W.3d 770 (Tex. App.–El Paso 2005, no pet. hist.).

For an excellent discussion of characterizing transactions involving closely held entities, see James M. Wingate's 2010 article titled "Characterizing Transactions Involving Closely Held Entities."

1. Ownership of Shares

A shareholder's interest in the corporation, symbolized by his or her shares in the corporation, does not change when the corporation acquires or disposes of assets; thus, if the shares are separate property, they remain so, even if they appreciate in value during the marriage. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984).

Corporate shares are subject to the presumption that property possessed by a spouse upon dissolution of marriage is community property, but the presumption may be rebutted by a showing that

the shares were separate property when they were acquired or were acquired with separate property under the inception of title rule. *Tex. Fam. Code Ann. § 3.003(a);* See *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App. – Houston [14th Dist.] 1975, writ dism'd). The interest in the corporation arises when the shareholder spouse acquires the right to receive the stock, not the date on which he or she actually acquires possession. *Fuhrman v. Fuhrman*, 302 S.W.2d 205 (Tex. Civ. App. – El Paso 1957, writ dism'd).

a. Hypothetical

If the wife signed a promissory note before marriage to purchase stock in a company, but does not receive the stock certificates until after marriage, what is the character of the stock? It is my opinion that the stock is the wife's separate property. Under the inception of title rule, property is characterized as separate or community at the time of inception of title to the property. When the character as separate property attaches, it is immaterial that part of the unpaid purchase price is thereafter paid from community funds, since the status of property as being either separate or community is determined by the time of its acquisition. However, the community estate may be entitled to reimbursement for community funds used to discharge the separate property debt.

The terms "owned and claimed" as used in the Texas Family Code mean that where the right to the property accrued before the marriage, the property would be separate, even though the legal title or evidence of the title might not be obtained until after marriage. Inception of title occurs when a party first has the right of claim to the property by virtue of which title is finally vested. *Welder v. Lambert* (Tex. 1898); *Smith v. Smith*, 22 S.W.3d 140 (Tex. App. – Houston [14th Dist.] 2000, no pet.)(lawsuit proceeds were husband's where he was defrauded by a third party prior to marriage and filed suit and recovered a judgment after marriage); *see also Creamer v. Brioschi* (Tex. 1908).

What if the wife in the above hypothetical never actually receives the stock certificates until after the marriage? This should not matter. The interest in the corporation arises when the shareholder spouse acquires the right to receive the stock, not the date on which he or she actually acquires possession. *Fuhrman v. Fuhrman*, 302 S.W.2d 205 (Tex. Civ. App. – El Paso 1957, writ dism'd).

2. Capitalization With Separate Property

If a spouse shows that a corporation in which he or she holds shares was capitalized solely with his or her separate property, the corporate shares will be separate property. *Hunt v. Hunt*, 952 S.W.2d 564 (Tex. App. – Eastland 1997, no writ)(husband's interest in corporation formed during parties' marriage, but capitalized entirely with helicopters that husband and his father had owned as partners before father's death and before parties' marriage, was husband's separate property); *Allen v. Allen*, 704 S.W.2d 600 (Tex. App. - Fort Worth 1986, no writ); *Holloway v. Holloway*, 671 S.W.2d 51 (Tex. App. – Dallas 1983, writ dism'd)(husband traced separate funds into his initial subscription to stock); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982)(court found that capitalization was traceable to husband's separate estate).

A spouse who incorporates a going business cannot argue that inception of title in the corporation arose with the unincorporated business. *Allen v. Allen*, 704 S.W.2d 600 (Tex. App. - Fort Worth 1986, no writ). A corporation comes into existence when the Secretary of State issues a certificate of incorporation. The character of the stock depends upon the consideration furnished to the corporation in exchange for the stock (i.e., the character of the assets contributed during the formation of the corporation). *Id. at 604*.

4. Dissolution of Corporation

If a spouse's interest in the corporation is separate property, the assets he or she receives upon dissolution are also separate property. *Hilliard v. Hilliard*, 725 S.W.2d 722 (Tex. App.- Dallas 1985, no writ).

5. Increase in Value of Separate Stock

The increase in value of separate property stock due to market conditions is separate property. *Dillingham v. Dillingham*, 434 S.W.2d 459 (Tex. Civ. App.–Fort Worth 1968, writ dism'd). The legal title to stock in a corporation is not affected by the acquisition of additional assets by the corporation or by the fact that, in the absence of fraud, the directors of a corporation may, in their discretion, invest its earnings in such assets instead of distributing them to the shareholders. *Stringfellow v. Sorrells*, 18 S.W. 689 (Tex. 1891).

6. Reimbursement

The community estate may be entitled to reimbursement for community funds used for the maintenance of a separate property corporate interest. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App. – Houston [14th Dist.] 1975, writ dism'd). The community may also be reimbursed for community labor used to benefit and enhance the separate property corporate interest beyond that reasonably necessary to manage and preserve the interest, less the remuneration received for the labor in the form of salary, bonuses, dividends, and other benefits received by the community estate. *Jensen v. Jensen,* 665 S.W.2d 107 (Tex. 1984); *Lifshutz v. Lifshutz*, 199 S.W.3d 9 (Tex. App.–San Antonio 2006, pet. denied); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982). The community estate may have an equitable right of reimbursement if the increase in value is attributable to under compensation of the spouse for labor during marriage. *Lucy. Lucy*, 162 S.W.3d 770 (Tex. App. – El Paso 2005, no pet.). A party can waive the right to reimbursement on a premarital or postmarital agreement. *Tex. Fam. Code §3.410*; see *Fischer-Stoker v. Stoker*, 174 S.W.3d 272 (Tex. App. – Houston [14th Dist.] 2005, pet. denied).

7. Liquidating Dividends

Property or funds received in liquidation upon dissolution of a corporation belong to the estate of the original stock. If the original stock was separate, the liquidating dividend remains separate.

Legrand-Brock v. Brock, 246 S.W.3d 318 (Tex. App. – Beaumont 2008, pet. denied); *Wells v. Hiskett*, 288 S.W.2d 257 (Tex. Civ. App.–Texarkana 1956, writ ref'd n.r.e.).

8. Alter Ego

A corporation exists as a separate entity from its shareholders. However, this distinction can be ignored for certain purposes. The separate identity of a corporation will be ignored (i.e., the corporate veil pierced) where the corporation is the alter ego of the shareholder, and there is such a unity between the corporation and an individual that the separateness has ceased to exist. *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986)(holding that shareholders of corporation may be liable for debts of corporation under theory of constructive fraud).

The theory of alter ego is properly applied to "characterize corporate assets as part of the community estate" in a divorce action. *Young v. Young*, 168 S.W.3d 276 (Tex. App. – Dallas 2005, no pet.); *Lifshutz v. Lifshutz*, 61 S.W.3d 511 (Tex. App. – San Antonio 2001, pet. denied); *Zisblatt v. Zisblatt*, 693 S.W.2d 944 (Tex. Civ. App.–Fort Worth 1985, writ dism'd)(ruling that corporate assets were to be considered community property, as husband's separate property corporation was his alter ego, where corporation owned such items as family home and its furnishings).

E. Goodwill

Goodwill is divisible upon divorce if it exists apart from a professional's personal skills, abilities, and reputation attached to a trade or business. *Parker v. Parker*, 897 S.W.2d 918 (Tex. App. – Fort Worth 1995, writ denied); *Finch v. Finch*, 825 S.W.2d 218 (Tex. App. – Houston [1st Dist.] 1992, no writ)(because goodwill attached to husband's automotive repair business in which other persons performed some of the work, and not to husband personally, goodwill was divisible upon divorce). Where the goodwill does not exist independently from one of the spouses, it is not subject to division. *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972) (medical practice); *Guzman v. Guzman*, 827 S.W.2d 445 (Tex. App. – Corpus Christi 1992, writ denied)(CPA practice).

Personal goodwill which does not exist independently of the professional's skills is not property of the marital estate and is thus not subject to division upon divorce. *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972); *Guzman v. Guzman*, 827 S.W.2d 445 (Tex. App. – Corpus Christi 1992, writ granted). Goodwill which exists independently of the professional's skills maybe subject to division. *Guzman v. Guzman*, 827 S.W.2d 445 (Tex. App. – Corpus Christi 1992, writ granted); *Hirsch v. Hirsch*, 770 S.W.2d 924 (Tex. App. - El Paso 1989, no writ); *Finn v. Finn*, 658 S.W.2d 735 (Tex. App. - Dallas 1983, writ ref'd n.r.e.); *Allen v. Allen*, 704 S.W.2d 600 (Tex. App.–Fort Worth 1986).

Thus, although goodwill is not a divisible portion of a spouse's individually owned private professional practice, goodwill in a professional corporation which exists independently of the spouse's professional skills may be subject to division upon divorce. *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App. – Texarkana 1996, writ denied); *Guzman v. Guzman*, 827 S.W.2d 445 (Tex. App. – Corpus Christi 1992, writ denied); *Finn v. Finn*, 658 S.W.2d 735 (Tex. App. – Dallas 1983, writ ref'd

n.r.e.)(goodwill existed independently of husband, who was attorney in 85-member firm that had been in business for ninety years); *Geesbreght v. Geesbreght*, 570 S.W.2d 427 (Tex. Civ. App. – Fort Worth 1978, writ dism'd) (doctor/husband's interest in medical corporation included goodwill as element of value, where corporation employed several doctors to render emergency medical services, and identity of particular doctors and relationships between doctors and patients were generally not significant to practice); *Nowzaradan v. Nowzaradan*, 2007 WL 441709 (Tex. App. – Houston [1st Dist.] 2007, no pet.)(memo op.).

V. CHARACTERIZATION OF SPECIFIC ASSETS

A. Bank Accounts

1. Generally

The deposit of community and separate funds to the same account does not divest the separate funds of their identity and establish the entire account as community property, as long as the separate funds can be traced and the trial court is able to determine accurately the interest of each party in the account. *Welder v. Welder*, 792 S.W.2d 420 (Tex. App. – Corpus Christi 1990, no writ); *Norton v. Norton*, WL 2816212 (Tex. App.–Amarillo 2010, no pet. h.)(not reported)(even though $6,000 of community funds were deposited into husband's account containing his separate property, court held that husband traced his separate property funds). Where a joint bank account contains both community and separate funds, it is presumed that the community funds are withdrawn before the separate funds, and where there are sufficient funds at all times to cover the separate property balance in the account at the time of divorce, it is presumed that the balance remains separate property. *Welder v. Welder*, 792 S.W.2d 420 (Tex. App. – Corpus Christi 1990, no writ); see also *Hill v. Hill*, 971 S.W.2d 153 (Tex. App. – Amarillo 1998, no writ).

When separate and community funds are commingled in a manner defying segregation and identification, it is presumed that the entire fund consists of community property. *Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987); *Robles v. Robles*, 965 S.W.2d 605 (Tex. App. – Houston [1st Dist.] 1998, no writ); *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App. – Houston [1st Dist.] 1995, no writ). However, the presumption can be dispelled through proof illustrating that the separate properties which went in never came out. Thus, a showing that community and separate funds were deposited in the same account does not divest the separate funds of their identity and establish the entire amount as community when the separate funds can be traced and the trial court can accurately determine each party's interest. *Zagorski v. Zagorski*, 116 S.W.3d 309 (Tex. App.–Houston [14th Dist.] 2003, pet. denied); *Welder v. Welder*, 794 S.W.2d 420 (Tex. App. – Corpus Christi 1990, no writ); *Holloway v. Holloway*, 671 S.W.2d 51 (Tex. App. – Dallas 1983, writ dism'd).

The problem with tracing through bank accounts today is the difficulty in getting the statements from the financial institution. In the past it was easier to obtain financial statements and it was possible to trace through bank accounts in long-term marriages. However, most financial institutions today may not have statements available as they either destroy the old records or handle transactions on-line.

There are three main rules for tracing separate property: the community out first rule, the clearinghouse or identical sum inference method and the minimum sum balance method. Other rules for tracing include pro rata approach, item tracing, and value tracing. The appropriateness of a tracing rule or theory depends on the particular facts of a case.

2. Community Out First Rule

The community out first rule is a tracing rule that has been developed by the courts to determine the character of monies withdrawn from an account containing separate and community funds. Under this rule, the presumption is that community funds are drawn out first before any withdrawal of separate funds. *See Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.–Dallas 1955, writ dism'd w.o.j.). Thus, separate funds deposited in a joint account sink to the bottom, and community funds are withdrawn first. *Zagorski v. Zagorski*, 116 S.W.3d 309 (Tex. App.–Houston [14th Dist.] 2003, pet. denied)(community withdrawals more than depleted the community funds in the account and the remaining funds were the husband's separate property); *Robles v. Robles*, 965 S.W.2d 605 (Tex. App. – Houston [1st Dist.] 1998, no writ); *Welder v. Welder*, 794 S.W.2d 420 (Tex. App. - Corpus Christi 1990, no writ). Withdrawals are presumed to be from separate funds only when all community funds have been exhausted. *Sibley v. Sibley*, 286 S.W.2d 658 (Tex. 1955).

If the claimant shows that separate funds were deposited into the account and that the balance of the account never reached zero, it is presumed that the balance contains separate property equaling the amount of the separate funds initially deposited less withdrawals encroaching upon the deposit or deposits. *Hill v. Hill*, 971 S.W.2d 153 (Tex. App. – Amarillo 1998, no pet.). The community out first rule may be rebutted by contrary evidence. *Smith v. Smith*, 22 S.W.3d 140 (Tex. App. – Houston [14th Dist.] 2000, no pet.) (Court held it could be assumed without actually deciding on the issue that the community out first presumption is a rebuttable one).

3. Clearinghouse or Identical Sum Inference Methods

The clearinghouse method may be useful if a party had an account into which separate funds were temporarily deposited and then withdrawn shortly thereafter to purchase assets which are claimed as separate property. The clearinghouse method assumes that after one or more identifiable sums of separate funds went into the account, identifiable withdrawals were made that are clearly the withdrawal of the separate funds and are therefore separate property themselves. *Estate of Hanau v. Hanau*, 730 S.W.2d 664 (Tex. 1987); *Peterson v. Peterson*, 595 S.W.2d 889 (Tex. Civ. App.–Austin 1980, writ dism'd w.o.j.); *Latham v. Allison*, 560 S.W.2d 481 (Tex. Civ. App.–Fort Worth 1978, writ ref'd n.r.e.).

The identical sum inference method is similar to the clearinghouse method except that it involves only one deposit, rather than a series of deposits, followed by an identical withdrawal, usually a short time later. *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973).

4. Minimum Sum Balance Method

The minimum sum balance method is useful for funds on account in which a portion can be conclusively proven to be separate property, such as an account balance immediately prior to marriage, and there have been few and identifiable transactions within the account. The party seeking to prove the amount of separate funds traces the account through each transaction to show that the balance of the account never went below the amount proven to be separate property. This theory presumes that only separate property remains after all other withdrawals are made. *Pardon v. Pardon,* 670 S.W.2d 354 (Tex. App.–San Antonio 1984, no writ); *Snider v. Snider,* 613 S.W.2d 8 (Tex. Civ. App.–Dallas 1981, no writ); *Huval v. Huval*, 2007 WL 1793771 (Tex. App.– Beaumont 2007, no pet.)(memo op.).

5. Pro Rata Approach

Under the pro rata approach, if mixed funds are withdrawn from an account, the withdrawal should be pro rata in proportion to the respective balance of separate property funds and community property funds in the account. By using the pro rata approach, it would not be necessary to analyze the character of each withdrawal.

6. Item Tracing

An item of separate property on hand at dissolution of marriage must be traced to its inception of title. The proponent of separate property characterization must establish by clear and convincing evidence that the item on and was either acquired as separate property before marriage or by gift, devise or descent during marriage, or by the use of separate property funds or separate property credit. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975).

7. Reverse Commingling

Reverse commingling occurs when community property and separate property have been hopelessly mixed and the entire account becomes separate property. In *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.–Dallas 1955, writ dism'd w.o.j.), the husband managed his wife's separate property funds and commingled them with community property funds. The husband commingled community property with wife's separate property to the extent the community and wife's separate property became so commingled such that it could not be identified. Based on the application of trust principles, the husband had a fiduciary duty to protect wife's separate property, thus the entire mass became wife's separate property. "Where the managing spouse has received community funds and the time has come to account for such funds, the managing spouse has the burden of accounting for their proper use." *Mazique v. Mazique*, 742 S.W.2d 805, 807 (Tex. App.–Houston [1st Dist.] 1987, mand. overruled).

B. Children

1. Earnings of a Child

The earnings of an unemancipated child and any property purchased from these earnings are the community property of the parties. *Insurance Co. of Texas v. Stratton*, 287 S.W.2d 320 (Tex. Civ. App.– Waco 1956, writ ref'd n.r.e.).

2. Injury to a Child

The damages recoverable by parents for injury to or the death of a child are community property to the extent that such damages are based on the loss of services of the child, which services belong to the community. *Hawkins v. Schroeter*, 212 S.W.2d 943 (Tex. Civ. App.–San Antonio 1948, no writ). However, recovery by the parents for the loss of companionship and society and damages for mental anguish for the death of his or her minor child are separate property. *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

C. Disability Benefits

Even though recoveries for personal injury are the injured spouse's separate property, disability benefits received as part of an employee benefit package are community property, *Ex parte Burson*, 615 S.W.2d 192, 194 n. 2 (Tex. 1981); *Newsom v. Petrilli*, 919 S.W.2d 481 (Tex. App. – Austin 1996, no writ); *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App. – Houston [1st Dist.] 1995, no writ), unless the entire disability occurred before the parties' marriage. *Lewis v. Lewis*, 944 S.W.2d 630 (Tex. 1997); *see also Newsom v. Petrilli*, 919 S.W.2d 481 (Tex. App. – Austin 1996, no writ)(disability benefits were community property, even though injury leading to disability had occurred before marriage, where disabling condition was not direct result of injury, but appeared gradually over several years), even if compensation for the disability was received during the marriage. *Lewis v. Lewis*, 944 S.W.2d 630 (Tex. 1997)(workers' compensation settlement for premarital injury received during marriage).

Section 3.008 of the Texas Family Code provides as follows:

"Section 3.008. Property Interest in Certain Insurance Proceeds.

> (b) If a person becomes disabled or is injured, any disability insurance payment or workers' compensation payment is community property to the extent it is intended to replace earnings lost while the disabled or injured person is married. To the extent that any insurance payment or workers' compensation payment is intended to replace earnings while the disabled or injured person is not married, the recovery is the separate property of the disabled or injured spouse."

Military disability benefits are not divisible upon divorce. *Wallace v. Fuller*, 832 S.W.2d 714 (Tex. App. – Austin 1992, no writ).

According to federal statute, Veteran's Benefits are not property. *38 U.S.C.A. Section 101 (West 1991)*. They are not community property and cannot be divided upon divorce. *Ex parte Burson*,

615 S.W.2d 192, 194-95 (Tex. 1981); *see Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2028 (1989)(veteran's disability payments are not divisible on divorce, due to preemption).

D. Employment Compensation – Benefits (Non-Retirement), Wages, Future Income and Bonuses

1. Termination Payments

Termination payments may be community property. *Matter of Marriage of Wade*, 923 S.W.2d 735 (Tex. App. – Texarkana 1996, writ denied)(insurance agent husband's termination payments based on total commissions for year preceding retirement were community property; payments were deferred compensation earned throughout employment because largest component of commissions in any given year was attributable to policy renewals).

2. Early retirement incentives

A payment which is received during marriage as an incentive for early retirement and which is entirely discretionary with the employer is entirely community property. *Whorrall v. Whorrall*, 691 S.W.2d 32 (Tex. App. – Austin 1985, writ dism'd); but see *Henry v. Henry*, 48 S.W.3d 468 (Tex. App.–Houston [14th Dist.] 2001, no pet.)(severance package not a retirement benefit; it was an inducement for Henry to leave company, purely discretionary with company.)

3. Current wages

Depending on the inception of title of a spouse's current wages (i.e. when the wages were earned, not paid), the wages can be classified as either separate or community property. *Keller v. Keller*, 141 S.W.2d 308 (Tex. 1940); *Licata v. Licata*, 11 S.W.3d 269 (Tex. App. – Houston [14th Dist.] 1999, pet. denied) (income from attorney's completed and referred cases for which right to income had vested was community property); *Bell v. Moores*, 832 S.W.2d 749 (Tex. App. – Houston [14th Dist.] 1992, writ denied); *Moore v. Moore*, 192 S.W.2d 929 (Tex. App. – Fort Worth 1946, no writ).

4. Future income

Future income of a spouse is that spouse's separate property. *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App.– Fort Worth 2004, no pet.)(court found that husband's "guaranteed" contract (future income) as a baseball player with the Toronto Blue Jays, executed during the marriage, was not community property.); *Von Hohn v. Von Hohn*, 260 S.W.3d 631 (Tex. App.–Tyler 2008, no pet.)(a spouse is not entitled to a percentage of his or her spouse's future earnings).

An insurance agent's future renewal commissions on insurance policies written by the agent during marriage, but not acquiring to him until after divorce are a mere expectancy and therefore are not divisible upon divorce. *Cunningham v. Cunningham*, 183 S.W.2d 985, 986 (Tex. Civ. App.–Dallas 1944, no writ); *See Vibrock v. Vibrock*, 561 S.W.2d 776, 777 (Tex. 1977)(Texas Supreme Court in

refusing to grant writ due to no reversible error, stated that it neither approved nor disapproved of the suggestion by the court of appeals that renewal commissions are separate property).

In the case of *Vibrock v. Vibrock*, 549 SW. 2d 775 (Tex. App.–Fort Worth 1977), the wife sought to divide the right to future income in the form of renewal premiums on all insurance policies contracted by the husband, as an agent, prior to the date of divorce. The Court held that the future income on renewal commissions from insurance policies written during marriage was not subject to division at the time of the divorce since the husband's right to that income was subject to conditions precedent which would have to occur after the date of the parties' divorce. The Court said that not only would the husband be obliged to continue his contract with his insurance company, he also had to service the business he had placed on the books. The contract provided that his entitlement to the renewal premiums would be in recognition of "continuous full-time service and as compensation for services (to be) rendered and keeping business in force." The Court noted that the husband's property right in the renewal premiums had not yet come into existence at the time of the divorce. Further, the property rights may never come into existence. The husband has an anticipatory right which was neither an ascertainable, vested or divisible interest. Arguably, if a contract is subject to conditions precedent which have yet to occur on the date of divorce, the contract will not be subject to division by the court at the time of divorce.

In the case of *In re Marriage of Garrett*, 683 P.2d 1166 (Ariz. 1983), an attorney's contingency fee contract does not involve a mere expectancy in which no enforceable rights exist in the holder of the expectancy. Therefore, the court held that an attorney's contingency fee contract is a valuable property right, though the contingency upon which it is based has not been fulfilled. The attorney's services performed during the marriage in fulfillment of the contract are community property and the community is entitled to what the percentage of the time expended as community labor bears to the time expended in reaching the ultimate recovery.

The case of *Murray v. Murray*, 276 S.W.3d 138 (Tex. App.–Fort Worth 2008) dealt with a husband who was, and continued to be, employed as an independent broker in a multiple-level marketing company that provided discounted rates on health care. As an independent broker, the husband sold monthly memberships in the discounted health plans and recruited other brokers to do the same. The members and brokers recruited by the husband, as well as members and brokers recruited by them, and so on, were husband's "downline." At the time of the divorce, there were thousands of members and brokers in husband's downline. The 2003 divorce decree divided the husband's residual income generated from his downline, as it existed on August 4, 2003, 60% to the wife and 40% to the husband. After the divorce, the wife noticed that her checks for 60% of the residual income began to decrease. In July 2007, the wife filed a petition for enforcement, or in the alternative clarification.

The trial court's clarification order indicated that the wife was entitled to 60% of the residual commissions from "the specific persons or entities that are identified as the base and down-line brokers of [husband and wife] existing on the date of 08/04/03."

The husband appealed the trial court's clarification order, and the court of appeals affirmed as modified. The court of appeals held that the trial court had the power to clarify the 2003 divorce decree since it was ambiguous, but it did not have the power to award the wife any residual income that constituted an expectancy. The court held that although the downline income stream earned during the marriage does not constitute an expectancy and is therefore community property, any potential growth of the downline income stream after August 4, 2003 is an expectancy because the growth is contingent on the husband or his brokers adding new members or brokers. As such, the clarification order should be modified to ensure that the wife does not receive any income generated that is the result of brokers and members added after August 4, 2003.

5. <u>Bonuses</u>

Bonuses are typically paid to an employee for his or her work performed over a period of time. The equitable manner to characterize a bonus is to take the number of months (or days) the employee worked during the designated time period during the marriage, and divide it by the number of months (or days) in the relevant time period to determine the percentage for the community portion of the bonus. For example, if an employee's bonus is $100,000 for work performed in 2011, and the parties were divorced on July 1, 2011, then the community portion of the bonus would be $50,000. Typically bonuses are paid a few months after they are actually earned, so it is important to be aware that this is an asset of the marriage if the bonus is not paid until after the divorce.

Signing bonuses may not all be community property even if the monies are received during the marriage. *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App.– Fort Worth 2004, no pet.)(court found that husband's "guaranteed" contract (future income) as a baseball player with the Toronto Blue Jays, executed during the marriage, was not community property.) There may be conditions on a signing bonus that make part of the bonus separate. In the *Loaiza* case, the Court found that certain post-divorce payments under an employment contract that was executed during the marriage was the husband's separate property, because in order to receive the payments, the husband had to perform services after the date of the divorce. *Id.* at 906. Therefore, compensation earned by the efforts of a party prior to the date of a marriage or after the date of divorce are separate property, regardless of when the income is received.

E. Insurance

The court must specifically divide or award the rights of each spouse in an insurance policy in a divorce decree. *Tex. Fam. Code Ann. § 7.004.*

1. Insurance Other Than Life Insurance

Any payment of insurance proceeds under a policy issued to the community, providing coverage for community property, and paid for by community assets, is community property. *Chubb Lloyds Ins. Co. of Texas v. Kizer*, 943 S.W.2d 946 (Tex. App. – Fort Worth 1997, writ denied).

Casualty loss insurance proceeds take on the character of the asset that suffered the casualty. *Tex. Fam. Code Ann. §3.008(a).*

Section 3.008(a) of the Texas Family Code provides as follows:

> "Insurance proceeds paid or payable that arise from a casualty loss to property during marriage are characterized in the same manner as the property to which the claim is attributable."

Disability payments and worker's compensation payments are community property to the extent they are payments to replace earnings during marriage. Otherwise the payments are separate property. *Tex. Fam. Code Ann. §3.008(b).*

If the spouses' rights in an insurance policy are not divided upon divorce as required by § 7.004 of the Family Code, the proceeds of a valid claim under the policy are payable as follows:

a. if the interest in the property insured was awarded solely to one former spouse by the decree, to that former spouse;
b. if an interest in the property insured was awarded to each former spouse, to the former spouses in proportion to the interests awarded; or
c. if the insurance coverage is directly related to the person of one of the former spouses, to that former spouse. *Tex. Fam. Code Ann. § 7.005(b).*

2. Life Insurance

The proceeds of life insurance purchased with community funds, or of life insurance purchased during the marriage on the life of a third person with one of the spouses named as the beneficiary, are community property. *Jackson v. Smith*, 703 S.W.2d 791 (Tex. App. – Dallas 1985, writ ref'd n.r.e.); *Dent v. Dent*, 689 S.W.2d 521 (Tex. App. – Fort Worth 1985, no writ). The cash surrender value of a life insurance policy acquired during marriage is also community property to the extent of the community funds used to create the cash surrender value. *Grost v. Grost*, 561 S.W.2d 223 (Tex. Civ. App. – Tyler 1977, writ dism w.o.j.).

As with real property, the inception of title rule governs the separate or community character of life insurance policies. *Barnett v Barnett*, 67 S.W.3d 107 (Tex. 2001); *Camp v. Camp*, 972 S.W.2d 906 (Tex. App. – Corpus Christi 1998, pet. denied); *McCurdy v McCurdy*, 372 S.W.2d 381 (Tex. Civ. App.-- Waco 1963, writ ref'd)(policy that insured first received as employment benefit before marriage was separate property).

A life insurance policy issued to a spouse before marriage is separate property. The policy, however, is subject to a claim of reimbursement to the community estate for the premiums paid by the community during the marriage. *Pritchard v. Snow*, 530 S.W.2d 889, 893 (Tex. Civ. App.–Houston [1st Dist.] 1975, writ ref'd n.r.e.). A term insurance policy purchased prior to marriage is separate property under the inception of title rule. However, if during the marriage the term insurance policy

expires and is replaced with another term life insurance policy, the replacement policy is not a mutation of the prior policy, but it is community property. *Barnett v Barnett*, 67 S.W.3d 107 (Tex. 2001); *Camp v. Camp*, 972 S.W.2d 906 (Tex. App. – Corpus Christi 1998, pet. denied).

If a divorce decree is rendered after an insured has designated his or her spouse as a beneficiary under a life insurance policy in force at the time the decree is rendered, a provision in the policy in favor of the insured's former spouse is not effective unless:

- the decree designates the insured's former spouse as the beneficiary;
- the insured redesignates the former spouse as the beneficiary after rendition of the decree; or
- the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse. *Tex. Fam. Code Ann. § 9.301(a).*

If the designation of the former spouse is ineffective, the proceeds of the policy are payable to the alternative beneficiary or to the insured's estate. *Tex. Fam. Code Ann. § 9.301(b)*; *Sever v. Massachusetts Mut. Life Ins. Co.*, 944 S.W.2d 486 (Tex. App. – Amarillo 1997, writ denied)(estate); *In re Group Life Ins. Proceeds of Mallory*, 872 S.W.2d 800 (Tex. App. – Amarillo 1994, no writ)(alternative beneficiaries).

If the policy is governed by ERISA, ERISA preempts the Texas redesignation requirement. *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994), *cert. denied,* 513 U.S. 1081; but see *Mannings v. Howe*, 212 F.3d 866 (5th Cir. 2000)(Tex.) cert. denied, 121 S. Ct. 1401 (2001) (ERISA does not pre-empt state laws with regards to life insurance, only retirement benefits).

In *Egelhoff v. Egelhoff*, 532 U.S. 141, 211 S.Ct. 1322 (2001), the United States Supreme Court held that ERISA requires that a former spouse who remains a named beneficiary on an ERISA governed life insurance policy and pension plan be awarded the proceeds from such assets despite contrary state law. Under *Egelhoff*, it appears that plan administrators in Texas are bound to follow ERISA and make proceeds payable to a named beneficiary ex-spouse even though Family Code Section 9.301 would provide otherwise. *But see Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003)(state law properly permits removal of ex-spouse as beneficiary under ERISA plan).

The fact that insurance policies are term policies with no cash value does not change their character as community or separate property. *In re Levi*, 183 B.R. 468 (Bkrtcy. N.D.Tex.1995). Even if a life insurance policy provides only for term insurance and has no cash value, it is still a property right that can be awarded to one of the spouses on divorce. *Camp v. Camp*, 972 S.W.2d 906 (Tex. App.–Corpus Christi 1998, writ denied).

F. Lottery Winnings

During the marriage, a prize from a lottery ticket purchased with separate property funds is community property. *Dixon v. Sanderson*, 10 S.W.2d 535 (Tex. 1888); *see also Stanley v. Riney*, 907 S.W.2d 636 (Tex. App.–Tyler 1998, no writ)(court held lottery ticket and proceeds were community property).

G. Mineral Interests

Minerals in place are a part of the realty and thus impressed with the same character as the realty. *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953). When mineral interests are extracted from the fee simple, the effect is a piecemeal sale of the underlying property. *Id.* The use of separate funds to develop or operate community property oil and gas interests, or of community funds to develop or operate separate interests, does not change the character of the property, but may give rise to a reimbursement claim. *Cone v. Cone*, 266 S.W.2d 480, 483 (Tex. Civ. App.–Amarillo 1953, writ dism'd), 266 S.W.2d 860 (Tex. 1954). Working interests on separate property land are separate property. *Matter of Marriage of Read*, 634 S.W.2d 343, 346 (Tex. App.–Amarillo 1982, writ dism'd).

When a spouse owns a business the purpose of which is the acquisition and development of oil and gas interests, the profits from that business belong to the community. If separate funds were used, there could be a claim for reimbursement. *Matter of Marriage of Read*, 634 S.W.2d 343, 346 (Tex. App.–Amarillo 1982, writ dism'd).

Royalties. Mineral royalties are considered to be the proceeds of the sale of part of real property, so that if the property is separately owned, the royalty payments are also separate property. *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953); *Welder v. Welder*, 794 S.W.2d 420 (Tex. App. – Corpus Christi 1990, no writ).

Bonus Payments. A bonus payment from an oil and gas lease belonging to a separate estate is separate property. *Lessing v. Russek,* 234 S.W.2d 891 (Tex. Civ. App.– Austin 1950, writ ref'd n.r.e.).

Delay Rentals. Delay rentals from separate property are community property. *Lessing v. Russek,* 234 S.W.2d 891 (Tex. Civ. App.– Austin 1950, writ ref'd n.r.e.); *McGarraugh v. McGarraugh*, 177 S.W.2d 296 (Tex. Civ. App.–Amarillo 1943, writ dism'd).

H. Patents

A patent in the name of one spouse that was acquired during marriage is community property. *Shestawy v. Shestawy*, 150 S.W.3d 772 (Tex. App.–San Antonio 2004, pet. denied); *Rose v. Hatten*, 417 S.W.2d 456 (Tex. Civ. App. – Houston [1st Dist.] 1967, no writ). The Houston Court of Appeals has held that income from patents and income from all other separately owned intellectual property is community property. *Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App.–Houston [1st Dist.] 2003, no pet.

I. Pets

The characterization of a pet as separate or community property is determined by the pet's date of purchase. *Schneider v. Schneider*, 2004 WL 254247 (Tex. App. – Fort Worth 2004, pet. dism'd) (memo op.)(dog purchased before marriage with both spouses' separate funds was owned by both spouses as tenants in common).

J. Prejudgment and Postjudgment Interest

The Houston Court of Appeals held, in a suit involving the purchase of a townhouse, prejudgment and postjudgment interest is to be characterized when the interest accrued. *Smith v. Smith*, 22 S.W.3d 140 (Tex. App. – Houston [14th Dist.] 2000, no pet.)(held that prejudgment and postjudgment interest earned during marriage was community property even though the actual damages recovered by the spouse were separate property).

K. Professional Degrees and Licenses

A professional school degree is not divisible upon divorce. *Frausto v. Frausto*, 611 S.W.2d 656 (Tex. Civ. App. – San Antonio 1980, writ dism'd w.o.j.).

L. Profits

Profits made by a spouse through trade, speculation, investment or venture, whether using community or separate funds, are community property. *In the Matter of the Marriage of York*, 613 S.W.2d 764 (Tex. Civ. App.–Amarillo 1981, no writ).

M. Real Property

Under the inception of title rule, real property acquired before marriage is separate property. *Tex. Fam. Code Ann. § 3.001*; *Wilkerson v. Wilkerson*, 992 S.W.2d 719, (Tex. App. – Austin 1999, no pet.). When real property is acquired under a contract for deed or an installment contract, the inception of title relates back to the time the contract was executed, not the time when legal title was ultimately conveyed, *Riley v. Brown*, 452 S.W.2d 548 (Tex. Civ. App. – Tyler 1970, no writ).

If one spouse entered into a contract for deed before marriage, the property is separate property even if the conveyance of legal title occurs during the marriage and the deed names both spouses as grantees. *Wilkerson v. Wilkerson*, 992 S.W.2d 719 (Tex. App. – Austin 1999, no pet.); *Dawson v. Dawson*, 767 S.W.2d 949 (Tex. App. – Beaumont 1989, no writ). If property purchased in part out of one spouse's separate funds and in part out of community property, property will be held as tenants in common between the spouse and the community estate. *In re Marriage of Daugherty*, 42 S.W.3d 331 (Tex. App. – Texarkana 2001, no pet.).

If one person signed an earnest money contract and paid the earnest money before marriage and thereafter the couple received the deed in both their names during the marriage and both spouses signed the note and deed of trust during the marriage, the inception of title rule dictates that the realty is the

separate property of the spouse who signed the earnest money contract. *Carter v. Carter*, 736 S.W.2d 775, 779 (Tex. App.–Houston [14th Dist.] 1987, no writ); *Wierzchula v. Wierzchula*, 623 S.W.2d 730 (Tex. App.–Houston [1st Dist.] 1981, no writ).

The separate character of real property is not changed because the property was improved with funds borrowed on community credit, because both parties signed a note secured by a deed of trust on this property, or because both parties' names are on the deed of trust. *Leighton v. Leighton*, 921 S.W.2d 365 (Tex. App.– Houston [1st Dist.] 1996, no writ); see *Long v. Long*, 234 S.W.3d 34 (Tex. App.–El Paso 2007, no pet.)(deed to property purchased with husband's separate property taken in names of both spouses created a presumption of a gift).

a. <u>Fixtures</u>

Whatever is affixed to the land becomes part of the land. *Cantu v. Harris*, 660 S.W.2d 638, 640 (Tex. App.–Corpus Christi 1983, no writ).

b. <u>Crops</u>

Crops planted during the marriage are community property. *McGarraugh v. McGarraugh*, 177 S.W.2d 296 (Tex. Civ. App.–Amarillo 1943, writ dism'd).

c. <u>Timber</u>

Timber grown on separate property is community property. *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App. – Houston [1st Dist.] 1995, no writ)

N. Retirement Benefits

Unmatured retirement benefits are a form of deferred compensation, and such benefits earned during the employee's marriage are community assets subject to division upon divorce. *Matter of Marriage of Wade*, 923 S.W.2d 735 (Tex. App.– Texarkana 1996, writ denied). A court entering a divorce decree is required to determine the rights of both spouses in the parties' pensions, retirement plans, annuities, individual retirement accounts, employee stock option plans, stock options, or similar plans. *Tex. Fam. Code Ann. § 7.003*. Generally, retirement benefits that accrued prior to the parties' marriage are the employee's separate property, while those that accrue during the marriage are community property, and the court can distribute only the portion of the benefits that accrued during marriage. *Wallace v. Fuller*, 832 S.W.2d 714 (Tex. App. – Austin 1992, no writ); *Sanderlin v. Sanderlin*, 929 S.W.2d 121 (Tex. App. – San Antonio 1996, writ denied); *Hopf v. Hopf*, 841 S.W.2d 898 (Tex. App. – Houston [14th Dist.] 1992, no writ).

1. Defined Benefit Plans

A defined benefit plan is an employer-sponsored retirement plan in which an employee's benefit will be based upon a formula which usually accounts for the employee's terminal earnings (average earnings of a certain number of years close in time to the employee's projected termination or retirement), service period or period of employment, and age. The investments and management of the plan are controlled by the employer and not the employee.

The principles and formulas set forth in *Berry v. Berry*, 647 S.W.2d 945 (1983) and *Taggart v. Taggart*, 552 S.W.2d 422 (1977) are the benchmarks used by the courts in dealing with the character and division of defined benefit plans. The statutory formula enacted in 2005 set out in Section 3.007(a)-(b), which was used to determine the separate and community character of a spouse's defined benefit plan, was repealed effective September 1, 2009.

2. Defined Contribution Plans

According to the Texas Family Code, a spouse's separate property interest in a defined-contribution plan (such as 401(k) plans, employee stock ownership plans, profit-sharing plans and money-purchase plans) can be determined using the characterization rules that apply to non-retirement assets, namely the inception of title rule and tracing. *Tex. Fam. Code §3.007©.* All benefits earned during marriage are presumed to be community property and a spouse can rebut that presumption by using the inception of title rule and tracing. *Tex. Fam. Code §3.007©.*

Section 3.007 of the Texas Family Code was passed in 2005. Prior to this date, attorneys simply used the amount in the account on the date of the marriage to obtain the value of the separate property interest, and they subtracted the value of the account on the date of marriage from the value of the account on the date of divorce to calculate the community interest in the account. With the new statute, regular characterization and tracing principals can be used to calculate a party's separate interest. The ability to trace through the account can be beneficial to clients whose retirement accounts have grown significantly due to investments and growth of assets in the account. However, tracing through years of statements and transactions can be cost prohibitive and possibly impossible if statements are not available. Since the statute states that a defined contribution retirement plan "may" be traced using tracing principles, this author believes that it is simply an option to trace each asset in the account and that the subtraction method is still available.

Non-vested benefits in a defined contribution plan are subject to characterization as either separate or community property. *Dewey v. Dewey*, 745 S.W.2d 514, 518 (Tex. App.–Corpus Christi 1988, writ denied).

O. Social Security Benefits

Social Security benefits, including disability benefits, are the separate property of the recipient spouse. *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Richard v. Richard*, 659 S.W.2d 746 (Tex. App. – Tyler 1983, no writ).

A divorced spouse may, however, receive a secondary Social Security benefit based on the other spouse's earning record. The former spouse of an individual entitled to Social Security retirement or disability benefits is entitled to benefits if he or she:

- Applies for such benefits;
- Is at least 62 years old;
- Is not currently married; and
- Is not entitled to benefits on his or her own work record, or is entitled to old age or disability insurance benefits based on a primary insurance amount which is less than one half of the primary insurance amount of the spouse. *42 U.S.C.A. § 402(b),* ©.

In addition, the spouse receiving the secondary benefit must have been validly married to the other spouse for at least ten years, and the divorce must be final. *42 U.S.C.A. §§ 416(d)(1), (4).*

P. Stock

1. Cash Dividends

Dividends paid in cash on either separate or community property stock are community property. *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395 (Tex. Civ. App.– Amarillo 1970, writ ref'd n.r.e.). Cash dividends received on mutual fund shares owned as separate property are community property. *Bakken v. Bakken*, 503 S.W.2d 315 (Tex. Civ. App.–Dallas 1973, no pet.).

2. Stock Dividends

Dividends paid in shares of stock on separate property are separate property. *Wohlenberg v. Wohlenberg*, 485 S.W.2d 342 (Tex. Civ. App.– El Paso 1972, no writ); *Tirado v. Tirado,* 357 S.W.2d 468 (Tex. Civ. App.–Texarkana 1962, writ denied)(stock dividends received during marriage on separate property stock are separate property).

3. Stock Splits

Stock splits on separate property stock are separate property. *Tirado v. Tirado,* 357 S.W.2d 468 (Tex. Civ. App.–Texarkana 1962, writ denied); *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.–Houston [14th Dist.] 1975, writ dism'd w.o.j.).

Q. Stock Options/Restricted Stock

A stock option is the right to acquire a specific number of shares of a certain stock at a set price for a period of time. Employee stock options may constitute community property subject to division upon divorce if the options are a form of deferred compensation or an earned property right based on past service. *Demler v. Demler*, 836 S.W.2d 696 (Tex. App.–Dallas 1992, no writ); *Acosta v. Acosta*, 836 S.W.2d 652 (Tex. App.–El Paso 1992, writ denied). Whether the options are granted to provide

compensation for past or present services, or whether they are used to provide incentive, they usually expire with termination of the employment.

The separate or community interest in employer provided stock option plans or restricted stock plans is determined using a formula set forth in Section 3.007 of the Texas Family Code as follows:

Section 3.007(d) - (e)

(d) A spouse who is a participant in an employer-provided stock option plan or an employer-provided restricted stock plan has a separate property interest in the options or restricted stock granted to the spouse under the plan as follows:

(1) if the option or stock was granted to the spouse before marriage but required continued employment during marriage before the grant could be exercised or the restriction removed, the spouse's separate property interest is equal to the fraction of the option or restricted stock in which:

(A) the numerator is the sum of:

(I) the period from the date the option or stock was granted until the date of marriage; and

(ii) if the option or stock also required continued employment following the date of dissolution of the marriage before the grant could be exercised or the restriction removed, the period from the date of dissolution of the marriage until the date the grant could be exercised or the restriction removed; and

(B) the denominator is the period from the date the option or stock was granted until the date the grant could be exercised or the restriction removed.; and

(2) if the option or stock was granted to the spouse during the marriage but required continued employment following the dissolution of the marriage before the grant could be exercised or the restriction removed, the spouse's separate property interest is equal to the fraction of the option or restricted stock in which:

(A) the numerator is the period from the date of dissolution of the marriage until the date the grant could be exercised or the restriction removed; and

(B) the denominator is the period from the date the option or stock was granted until the date the grant could be exercised or the restriction removed.

(e) The computation described by Subsection (d) applies to each component of the benefit requiring varying periods of employment before the grant could be exercised or the restriction removed.

R. Trusts

1. Trusts in General

A trust is defined as a fiduciary relationship with respect to property arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of someone else. *Restatement 3d Trusts, Section 2, Definition of Trust.* A person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship. *Restatement 3d Trusts, Section 2, Definition of Trust, comment b.* The person who creates a trust is the settlor (also trustor or grantor). The property held in trust is trust property. The person who holds property in trust is the trustee. A person for whose benefit property is held in trust is a beneficiary. *Restatement 3d Trusts, Section 3.*

A spouse's interest in a trust can be characterized as separate or community property. A trust generally involves two interests – ownership of the corpus of the trust (i.e. the property that makes up the trust); and ownership of the income from the trust. If a spouse is a trustee, he or she holds legal title, but not equitable title, to the trust property, and the trust property is neither the separate nor the community property of the trustee spouse.

If a spouse is the beneficiary of a trust, he or she holds equitable, but not legal, title to the trust property; the spouse has not "acquired" the property, and it is therefore not community property, unless the spouse has a present possessory right to the property. *Matter of the Marriage of Long*, 542 S.W.2d 712 (Tex. Civ. App. - Texarkana 1976, no writ); *Buckler v. Buckler*, 424 S.W.2d 514 (Tex. Civ. App. – Fort Worth 1967, writ dism'd w.o.j.).

Trusts can be a useful device in protecting separate property during a marriage, however, care must be used in creating the trust. This is also true if a spouse has a trust that was established prior to the marriage or has a trust interest received through gift, devise or descent.

It a trust was created prior to the marriage, or the spouse's interest in the trust was acquired by gift or inheritance, then the interest will likely be characterized as separate property. However, many trusts generate income and the question arises as to the character of the income generated by the trust. The type of distribution made (such as distribution of corpus or income) is also considered in characterization.

The current state of the law leaves much room for debate regarding the characterization of trust distributions and income from trusts.

2. Trust Corpus

If the corpus is funded by separate property, the corpus will be separate property; if the corpus is funded with community property, the corpus will be community property. *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App.–Corpus Christi 1997, no writ); *Lemke v. Lemke*, 929 S.W.2d 662 (Tex. App. – Fort Worth 1996, writ denied)(corpus of trust created during marriage with traced separate property was separate property); *Cleaver v. Cleaver*, 935 S.W.2d 491 (Tex. App. – Tyler 1996, no writ)(corpus

of trust established before marriage was separate property, and income was also separate property); *Hardin v. Hardin*, 681 S.W.2d 241 (Tex. App.–San Antonio 1984, no writ)(corpus of trust created by gift was separate property).

A distribution of the trust's corpus to a spouse during marriage retains the character of the corpus. *Taylor v. Taylor*, 680 S.W.2d 645 (Tex. App.–Beaumont 1984, writ ref'd n.r.e.)(discretionary pay trust -- income and profits from the business that was part of the trust corpus intended by the trustors to be part of the corpus of the trust).

3. **Trust Income**

A spouse can be the beneficiary of trust income. When analyzing the character of trust income, several factors regarding the trust must be considered:

a. Was the income distributed or undistributed during the marriage;
b. Who created the trust – a third party of a spouse for his or her own benefit (self-settled trust);
c. Does the spouse have any interest in the corpus of the trust; and
d. If the income was undistributed, did the spouse have a right to compel a distribution during marriage (i.e. was the distribution discretionary or mandatory under the trust instrument).

4. **Distributed Income from Trust**

Income distributed during marriage from a third-party trust that a spouse has a beneficial interest in the corpus is considered community property. *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App.–Corpus Christi 1997, no writ)(income distributed during marriage from third-party trust in which the wife had an expectancy interest in the corpus was community property). In this situation, even if the corpus of the trust is considered the spouse's separate property, any income generated from the corpus during marriage is considered community property.

However, it has been held that income distributed from trusts created by third parties, and the property purchased with that income, is the separate property of the beneficiary. *Hardin v. Hardin*, 681 S.W.2d 241 (Tex. App.–San Antonio 1984, no writ)(mandatory pay trust -- the right to receive the income was a gift and therefore the separate property of the beneficiary); *Taylor v. Taylor*, 680 S.W.2d 645 (Tex. App.–Beaumont 1984, writ ref'd n.r.e.)(discretionary pay trust -- income and profits from the business that was part of the trust corpus intended by the trustors to be part of the corpus of the trust). The rationale for this was that the grantor had expressed an intent to make any distributions from the trust to be the beneficiary's separate property.

There are no cases that have directly addressed the characterization of income distributed during the marriage from a self-settled trust. Under general characterization rules, it would seem that any

income distributed from a self-settled trust during the marriage, regardless of whether the spouse retained a beneficial interest in the corpus, would be community property.

5. **Undistributed Trust Income**

If a spouse has no interest in the corpus of a third-party trust, then any undistributed income that is earned during the marriage from the trust is separate property. *Cleaver v. Cleaver*, 935 S.W.2d 491 (Tex. App. – Tyler 1996, no writ)(third party discretionary trust in which wife had no interest in corpus; undistributed income earned during marriage was separate property).

If a spouse has an interest in the corpus of a third-party trust, then the character of any undistributed income that is earned during marriage from the trust will depend on whether the distribution was mandatory or discretionary.

Discretionary Pay Trust – If undistributed income earned during marriage is not required to be distributed under the terms of the trust agreement (i.e. it is a discretionary trust where the trustee has absolute discretion as to the distribution of the income), the undistributed income in the trust is separate property. *In Re Marriage of Burns*, 573 S.W.2d 555 (Tex. Civ. App.-- Texarkana 1978, writ dism'd)(undistributed income earned during marriage was separate property because beneficiary did not have past or present right to compel distribution); *Buckler v. Buckler*, 424 S.W.2d 514, 515 (Tex. App.–Fort Worth 1967, writ dism'd)(undistributed trust income is not community property if the trustee has the right to withhold it from the beneficiary); *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App.–Corpus Christi 1997, no writ); *Lemke v. Lemke*, 929 S.W.2d 662 (Tex. App. – Fort Worth 1996, writ denied)(since neither spouse actually or constructively acquired the undistributed trust income during marriage, such income remained a part of the respective trust and was not subject to division by the court as it was not community property); *Currie v. Currie*, 518 S.W.2d 386 (Tex. Civ. App.–San Antonio 1974, writ dism'd)(undistributed trust income is not community property where there is no obligation to make a distribution).

Mandatory Pay Trust – Undistributed income on trust corpus that accrues during the marriage is community property if that income that should have been distributed from the trust to the beneficiary under the trust agreement (mandatory trust). *In re Marriage of Long*, 542 S.W.2d 712 (Tex. Civ. App.–Texarkana 1976, no writ)(trust beneficiary became entitled to receipt of one-half of the trust corpus during the marriage and chose to leave the vested portion in the control of the trustee; held that the income from that vested portion was community property); *Cleaver v. Cleaver*, 935 S.W.2d 491 (Tex. App. – Tyler 1996, no writ)(if the spouse has the right to distribution of income from the trust, the income is community property).

In *Dickinson v. Dickinson*, 324 S.W.3d 653 (Tex. App.–Fort Worth 2010, no pet. h.), the court held that where there was no evidence that the husband was entitled to receive, or that he did receive, any income from a trust during the marriage; his only interest is the remainder interest in the real property, which he was not entitled to until his father's death which was subject to another person's life estate. The Court held that the husband showed by clear and convincing evidence that his remainder

interest in the trust corpus was obtained by devise and is, therefore, his separate property that the trial court was not entitled to award to the wife.

6. ***Sharma v. Routh***

Sharma v. Routh, 302 S.W.3d 355 (Tex. App.–Houston [14th Dist.] 2009, opinion on rehearing) involved two testamentary trusts where income was distributed to a spouse during marriage. The Court of Appeals ultimately held that the husband in that case did not have a present possessory right to any part of the corpus of testamentary trusts such that the distributions from which during the marriage were his separate property.

In *Sharma*, the husband had previously been married for almost 20 years until his spouse, Alice, died. The trusts, referred to as a "Family Trust" and a "Marital Trust" were established by Alice's will. Prior to his remarriage, the Marital Trust was initially funded with two psychiatric hospitals, realty and shares of stock. The Family Trust was initially funded with shares of stock. Alice's will name the husband as both the trustee and the beneficiary of both trusts. The will requires that the net income of the Marital Trust be distributed to the husband at least quarterly. Likewise, under certain circumstances and to a specified extent, the trustee of the Family Trust is required to distribute to the husband income or principal therefrom.

Prior to his marriage to his new wife, the husband, as trustee of the Marital Trust, sold the realty and improvements for the two hospitals to a nonprofit organization in exchange for a promissory note for approximately $30 Million. The Marital Trust also received a promissory note for approximately $3 Million from a hospital. The Family Trust received a promissory note for approximately $740,000. All of the notes called for periodic payments of principal and interest. The interest portion of the the payments on some of the notes is income to the Marital Trust which under Alice's will must be distributed to the husband. The husband also received distributions of income from the Family Trust. The husband donated all of the income from both trusts to a foundation without taking actual receipt of the money.

The Court of Appeals ultimately held that income distributions are community property only if the recipient has a present possessory right to part of the corpus, even if the recipient has chosen not to exercise that right, because the recipient's possessory right to access the corpus means that the recipient is effectively an owner of the trust corpus.

The Court held that:

(1) the Marital Trust is an irrevocable, testamentary trust;
(2) the trustee was require to distribute the income at least quarterly;
(3) under Alice's will, the husband had no interest in the remainder of the trust, which expired upon his death;
(4) the only potential right that the husband has to access the corpus is the will's requirement that the trustee distribute such amounts of principal as are necessary, when

added to the funds reasonably available to him from all other sources, to provide for his health, support and maintenance in order to maintain him, to the extent reasonably possible, in accordance to the standard of living to which he has been accustomed;

(5) at the time of the divorce, the husband had not received any distributions of trust corpus;

(6) at no time during his marriage to the new wife did the husband have a present possessory right to any part of the corpus.

The Court stated that the only way the husband could have acquired a present possessory interest in the trust corpus was if he, as Trustee, determined that an invasion and distribution of part of the corpus was necessary for his maintenance as set forth under the will. No evidence was presented that he ever made that determination or that he was ever entitled to receive distributions of trust corpus under that maintenance provision. As such, the husband had no present, possessory right to any part of the corpus, and thus was not effectively an owner of the trust during his marriage. Accordingly, the income was the husband's separate and the wife was not entitled to any of the accrued interest/income on the notes held by the trusts.

7. <u>Undistributed Income Retained in Self-Settled Trust</u>

If undistributed income earned during a marriage is required to be distributed under the terms of the trust agreement (i.e. mandatory trust), the undistributed income should be considered community property. If undistributed income earned during marriage is not required to be distributed under the terms of the trust agreement, the undistributed income in the trust retains the character of the corpus.

Lipsey v. Lipsey, 983 S.W.2d 345, 350-51 (Tex. App.–Fort Worth 1998, no pet.)(self-settled discretionary trust in which husband was sole beneficiary of separate property corpus; undistributed income earned during marriage was separate property).

Lemke v. Lemke, 929 S.W.2d 662 (Tex. App. – Fort Worth 1996, writ denied)(corpus of trust created during marriage with traced separate property was separate property; undistributed income earned during marriage was separate property).

S. Worker's Compensation Benefits

Any recovery for loss of earning capacity during the marriage is community property. *Tex. Fam. Code Ann. § 3.001(3)*. Workers compensation benefits received after a divorce are separate property, even if the injury was received during the marriage. *Bonar v. Bonar*, 614 S.W.2d 472 (Tex. Civ. App.– El Paso 1981, writ ref'd n.r.e.).

Section 3.008(b) of the Texas Family Code provides as follows:

"Section 3.008. Property Interest in Certain Insurance Proceeds.

(b) If a person becomes disabled or is injured, any disability insurance payment or workers' compensation payment is community property to the extent it is intended to replace earnings lost while the disabled or injured person is married. To the extent that any insurance payment or workers' compensation payment is intended to replace earnings while the disabled or injured person is not married, the recovery is the separate property of the disabled or injured spouse."

VI. DIVISION OF ASSETS AND LIABILITIES

A. Statutory Authority

A court entering a decree of divorce or annulment of a marriage must order a division of the parties' estate in a manner that the court deems just and right, having due regard for the rights of the spouses and any children of the marriage. *Tex. Fam. Code Ann. § 7.001*; *Neyland v. Raymond*, 324 S.W.3d 646 (Tex. App. – Fort Worth 2010). The court must also divide quasi-community property and property acquired in exchange for quasi-community property. *Tex. Fam. Code Ann. § 7.002*; *Zorilla v. Wahid*, 83 S.W.3d 247 (Tex. App.–Corpus Christi 2002, no pet.)(just and right division applies to property acquired while domiciled in another state that would have been community property if the acquiring spouse was domiciled in Texas at time of acquisition).

Division under these statutes is the sole method used to divide community property upon divorce, *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998); *Marr v. Marr*, 905 S.W.2d 331 (Tex. App. – Waco 1995, no writ), although the court's decree may include an agreement between the parties. *Keim v. Anderson*, 943 S.W.2d 938 (Tex. App. – El Paso 1997, no writ); *Clanin v. Clanin*, 918 S.W.2d 673 (Tex. App. – Fort Worth 1996, no writ).

The court's power to render a judgment for divorce or annulment does not, by itself, give the court jurisdiction to divide the spouses' community property or confirm their separate property. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 324 (Tex. 1998). The court's jurisdiction to render a divorce or an annulment (in rem jurisdiction) is separate from its jurisdiction to divide and confirm the spouses' marital property (personal jurisdiction). Therefore, it is possible for a court to have jurisdiction to end a marriage but not jurisdiction to divide or confirm the spouses' marital property. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 324 (Tex. 1998). If a Texas court has personal jurisdiction over both spouses, the court can divide and confirm all marital property that is located within the state.

If a Texas court does not have the power to adjudicate or convey title to property located in another state, a Texas court can, through its exercise of personal jurisdiction over a party, indirectly affect title to property located in another state. *Greenpeace v. Exxon Mobil*, 133 S.W.3d 804, 809 (Tex. App.–Dallas 2004, pet. denied).

B. Necessity of Division

The court must order the division of the parties' community property when its jurisdiction is invoked in a divorce action. *Matelski v. Matelski*, 840 S.W.2d 124 (Tex. App.- Fort Worth 1992, no writ); *Gutierrez v. Gutierrez*, 643 S.W.2d 786 (Tex. App. – San Antonio 1982, no writ). The property division is a part of the divorce action, and cannot be severed from the divorce action. *Burguieres v. Farrell*, 87 S.W.2d 463 (Tex. 1935); *Biaza v. Simon*, 879 S.W.2d 349 (Tex. App. – Houston [14th Dist.] 1994, writ denied); *Vautrain v. Vautrain*, 646 S.W.2d 309 (Tex. App. – Fort Worth 1983, writ dism'd). A divorce cannot be finalized without dividing the community property. *Phillips v. Phillips*, 75 S.W.3d 564 (Tex. App.– Beaumont 2002, no pet.). However, the lack of a community estate to be divided does not nullify a divorce. *Matelski v. Matelski*, 840 S.W.2d 124 (Tex. App.- Fort Worth 1992, no writ). Moreover, the court is not required to divide each asset equally, or even to divide each asset at all, as long as the division is just and right. *Conroy v. Conroy*, 706 S.W.2d 745 (Tex. App. – El Paso 1986, no writ).

Additionally, in 2003, the Texas Legislature amended the Texas Family Code to make it mandatory for a trial court to confirm a spouse's quasi-community property in a divorce action. *Tex. Fam. Code § 7.002(b),* ©. See e.g., *Hamlin v. Featherston*, 2005 WL 792686 (Tex. App.– Fort Worth 2005, no pet.) (memo op.) (Footnote 8, party argued that trial court abused its discretion by not confirming party's separate property but court held no authority to support that claim).

C. Effect of Parties' Agreement

The terms of the parties' agreement as to the division of their property is binding on the court unless the court finds that the agreement is not just and right. *Tex. Fam. Code Ann. § 7.006(b)*; *Clanin v. Clanin*, 918 S.W.2d 673 (Tex. App – Fort Worth 1996, no writ). The court may recite the terms of the agreement in the decree, *Keim v. Anderson*, 943 S.W.2d 938 (Tex. App. – El Paso 1997, no writ); *Clanin v. Clanin*, 918 S.W.2d 673 (Tex. App. – Fort Worth 1996, no writ); *Lohse v. Cheatham*, 705 S.W.2d 721 (Tex. App. – San Antonio 1986, writ dism'd), or may incorporate it by reference. *Keim v. Anderson*, 943 S.W.2d 938 (Tex. App. – El Paso 1997, no writ); *Soto v. Soto*, 936 S.W.2d 338 (Tex. App. –El Paso 1996, no writ); *Clanin v. Clanin*, 918 S.W.2d 673 (Tex. App. – Fort Worth 1996, no writ). In either case, the agreement thus becomes enforceable as a judgment of the court. *Rivera v. Office of Atty. Gen.*, 960 S.W.2d 280 (Tex. App. – Houston [1st Dist.] 1997, no pet.); *Chess v. Chess*, 627 S.W.2d 513 (Tex. App. – Corpus Christi 1982, no writ).

D. Effect of Failure to Divide Property

A decree that fails to dispose of the property of either party is interlocutory and unappealable. *Biaza v. Simon*, 879 S.W.2d 349 (Tex. App. – Houston [14th Dist.] 1994, writ denied).

Former spouses become tenants in common as to assets that were not divided upon their divorce. *In re Marriage of Notash*, 118 S.W.3d 868 (Tex. App.–Texarkana 2003, no pet.); *Buys v. Buys*, 898 S.W.2d 903 (Tex. App. – San Antonio 1994, writ granted), *rev'd on other grounds*, 924 S.W.2d 369 (Tex.1996). After the time for appeal has elapsed, a party may seek the division of such property through an action to partition the property, *Tex. Fam. Code Ann. § 9.201*, which is conducted

under the general laws pertaining to partition suits between co-tenants, rather than under the laws applicable to the division of property upon divorce. *Halamka v. Halamka*, 799 S.W.2d 351 (Tex. App. – Texarkana 1990, no writ).

E. Court's Discretion

While the trial court's discretion in dividing the couple's community property is not unlimited, *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App. – Houston [14th Dist.] 1996, no writ), courts are vested with wide discretionary powers in the division of community property, and a court's decision on the matter will not be overturned absent a clear abuse of discretion. *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981); *Smith v. Smith*, 22 S.W.3d 140 (Tex. App. – Houston [14th Dist.] 2000, no pet.); *Winkle v. Winkle*, 951 S.W.2d 80 (Tex. App. – Corpus Christi 1997, writ denied); *Dankowski v. Dankowski*, 922 S.W.2d 298 (Tex. App. – Fort Worth 1996, writ denied); *Rider v. Rider*, 887 S.W.2d 255 (Tex. App. – Beaumont 1994, n.w.h) *Massey v. Massey*, 807 S.W.2d 391 (Tex. App. – Houston [1st Dist.] 1991, writ denied).

1. Trial Court Error in Characterization or Valuation

If reversible error is found in a specific part of the division of the property that materially affects the trial court's just and right division of the entire community estate, the appellate court must remand the entire community estate for a new division, unless the mischaracterization has only a de minimis effect on the division. *Jacobs v. Jacobs*, 687 S.W.2d 731 (Tex. 1985); *In Matter of the Marriage of Taylor*, 992 S.W.2d 616 (Tex. App.–Texarkana 1999, no writ)(trial court erred in characterizing separate real property as community property and inaccurately valued cattle of such a magnitude that it materially affected the division of the community; therefore the judgement of the trial court was reversed and remanded for a new division of the community estate); *Butler v. Butler*, 975 S.W.2d 765 (Tex. App.–Corpus Christi 1998, no writ)(trial court announced a 60/40 division in favor or wife; since the court erred in the division, the property division was reversed). *Robles v. Robles*, 965 S.W.2d 605 (Tex. App.–Houston [1st Dist.] 1998, no writ); see also; *Pace v. Pace*, 160 S.W.3d 706 (Tex. App.–Dallas 2005, pet. denied); *Zeptner v. Zeptner*, 111 S.W.3d 727 (Tex. App.–Fort Worth 2003, no pet.)(trial court errors on issues of reimbursement and characterization sufficiently serious to warrant remand for new division of the community estate); *Vandiver v. Vandiver*, 4 S.W.3d 300 (Tex. App.–Corpus Christi 1999, no pet.)(trial court's mischaracterization of $500,000 in investment accounts as the wife's separate property did not require reversal for a redivision of the community estate because the trial court had found that its property division was just and right regardless of any mischaracterization); *Tate v. Tate*, 55 S.W.3d 1 (Tex. App.–El Paso 2000, no pet.); *Gupta v. Gupta*, WL 2540487 (Tex. App.–Austin 2010, no pet. h.)(not reported)(trial court did not abuse its discretion in dividing community estate based on wife's expert testimony over husband's expert testimony on the value of husband's medical practice).

Further, when an appellate court remands a property division, a jury trial is mandatory upon proper request. *Walston v. Walston*, 119 S.W.3d 435 (Tex. App.–Waco 2003, no pet.). When the trial court mischaracterizes separate property as community property and the owner is divested of separate

property, the error requires reversal. *Gana v. Gana*, 2007 WL 1191904 (Tex. App.–Houston [14th Dist.] Apr. 24, 2007, no pet. h.); see also *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772, 780 (Tex. App.–San Antonio 2004, no pet.).

If there is no evidence identifying, describing and valuing the community estate, the trial court cannot make a just and right division of the community estate. *Hollis v. Hollis*, WL 3440330 (Tex. App. – Tyler 2010, no pet. h.)(not reported). In the *Hollis* case, the wife filed an inventory and appraisement, but she failed to appear at trial. At trial, the husband filed his own inventory and appraisement and he testified at trial. The trial court awarded the husband an unequal share of the total property and awarded the wife all of the property disclosed on her inventory that it had not awarded to the husband. The court of appeals reversed finding that because the husband presented insufficient evidence valuing the entire community estate, the trial court lacked sufficient evidence upon which to exercise its discretion in determining a just and right division of the community estate.

2. Jury Decision on Division of Property Advisory.

Although a jury may determine disputed fact questions in connection with the character and value of the parties' marital property which decision will be binding on the court, the trial judge is not bound by the jury's division of the property. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975); *Walston v. Walston*, 119 S.W.3d 435 (Tex. App. – Waco 2003, no pet.)(court cannot ignore jury's answers as to valuation and character of property); *Matter of Marriage of DeVine*, 869 S.W.2d 415 (Tex. App. – Amarillo 1993, writ denied); *Smith v. Smith*, 935 S.W.2d 187 (Tex. App. – Tyler 1992, no writ). The division of property in a divorce action is exclusively within the province of the trial judge, not the jury. *Walter v. Walter*, 127 S.W.3d 396 (Tex. App. – Dallas 2004, no pet.); *Massey v. Massey*, 807 S.W.2d 391 (Tex. App. – Houston [1st. Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993).

F. Separate Property

1. Court May Not Divest Separate Property

The phrase "estate of the parties," as used in section 7.001 of the Family Code, refers only to community property and therefore the court may only divide the community estate of the parties in a just and right manner. *Johnson v. Johnson*, 804 S.W.2d 296 (Tex. App. – Houston [1st Dist.] 1991, no writ); *Halamka v. Halamka*, 799 S.W.2d 351 (Tex. App. – Texarkana 1990, no writ); *Giesler v. Giesler,* WL 2330362 (Tex. App. – Austin 2010, no pet. h.)(not reported)(court cannot divest a spouse of title to separate property, no matter how small, by awarding in to the other spouse).. The trial court may not, in ordering the division of the parties' property, divest a party of his or her separate property. *Langston v. Langston*, 82 S.W.3d 686 (Tex. App.–Eastland 2002, no pet.); *Schlafly v. Schlafly*, 33 S.W.3d 863 (Tex.App.–Houston [14th Dist.] 2000, pet. denied); *Butler v. Butler*, 975 S.W.2d 765 (Tex. App.–Corpus Christi 1998, no writ)(court erred in awarding wife 50% of husband's counseling clinic, including 50% of all future income; this income will be produced by husband's post-divorce efforts which is his separate property and cannot be divided); *Osborn v. Osborn*, 961 S.W.2d 408 (Tex. App.

– Houston [1st Dist.] 1997, no writ); *Matter of Marriage of Thurmond*, 888 S.W.2d 269 (Tex. App. – Amarillo 1994, writ denied); *Hopf v. Hopf*, 841 S.W.2d 898 (Tex. App. – Houston [14th Dist.] 1992, no writ); *Butler v. Butler*, 975 S.W.2d 765 (Tex. App.–Corpus Christi 1998, no writ)(court erred in awarding wife 50% of husband's counseling clinic, including 50% of all future income; this income will be produced by husband's post-divorce efforts which is his separate property and cannot be divided); *Dickinson v. Dickinson*, 324 S.W.3d 653 (Tex. App.–Fort Worth 2010, no pet. h.).

In *Kite v. Kite*, WL 1053014 (Tex. App.–Houston [1st Dist.] 2010, no pet. h.)(not reported), the trial court erred by divesting husband of separate property proceeds from the sale of a marital residence. The marital residence was built on real property that the husband received as a gift. Because the marital residence was built on the husband's separate property, it is separate property, even though husband and wife used community funds to improve husband's separate property by building the marital residence.

2. Court May Set Aside Separate Property

However, the trial court can set aside a separate property homestead to the other spouse for the use and benefit of children while they are minors. *Gerami v. Gerami*, 666 S.W.2d 241 (Tex. App.-- Houston [14th Dist.] 1994, no writ). A separate property homestead may also be awarded to the other spouse for use and occupancy. *Smith v. Rabago*, 672 S.W.2d 38 (Tex. App.-- Houston [14th Dist.] 1984, no writ).

3. Sale of Separate Property

Court cannot order the sale of a spouse's separate property, except if the separate estate and the community estate both own an interest, or if the community has a lien on separate property to secure the payment of a claim for reimbursement. *Gerami v. Gerami*, 666 S.W.2d 241 (Tex. App.-- Houston [14th Dist.] 1984, no writ).

If the parties jointly own the property as separate property, the court may partition the property under the laws applicable to partition suits between co-tenants. *Halamka v. Halamka*, 799 S.W.2d 351 (Tex. App. Texarkana 1990, no writ). The trial court may consider the partition action concurrently with the divorce proceeding. *Id*.

4. Lien on separate property

The court can place a lien on a separate proper homestead to secure a reimbursement claim to the community for improvements made by the community to the separate estate. *Heggen v. Pemelton,* 836 S.W.2d 145 (Tex. 1992); *Langston v. Langston*, 82 S.W.3d 686 (Tex. App.– Eastland 2002, no pet.); *Smith v. Smith*, 715 S.W.2d 154 (Tex. App.–Texarkana 1986, no writ). Otherwise, trial court's may not impose liens on a spouse's separate property for the general purpose of securing a just and right division of marital property. *Heggen v. Pemelton,* 836 S.W.2d 145 (Tex. 1992); *Wilkerson v. Wilkerson*, 992 S.W.2d 719 (Tex. App.–Austin 1999, no pet.)(real property purchased before marriage

was husband's separate property and it could not be impressed with an owelty lien or a constructive trust unless the lien was to secure the other spouse's right of reimbursement). However, trial courts generally may impose equitable liens on one spouse's separate property as a means for securing the discharge of payments owed by one spouse to the other. *Heggen v. Pemelton,* 836 S.W.2d 145 (Tex. 1992); *Winkle v. Winkle*, 951 S.W.2d 80 (Tex. App.–Corpus Christi 1997, writ denied). Such liens, however, are permissible only against the separate property to which improvement was made at community expense. *Smith v. Smith*, 715 S.W.2d 154 (Tex. App.–Texarkana 1986, no writ).

G. Equal Division Not Necessary

The court need not divide the community property equally between the parties, *Williams v. Williams*, 325 S.W.2d 682 (Tex. 1959); *Matter of Marriage of Moore*, 890 S.W.2d 821 (Tex. App. – Amarillo 1994, no writ); *Cravens v. Cravens*, 533 S.W.2d 372 (Tex. App.–El Paso 1975, no writ)(property division does not have to be equal), but may order an unequal division where a reasonable basis exists for doing so. *Hailey v. Hailey*, 176 S.W.3d 374 (Tex. App.–Houston [1st Dist.] 2004, no pet.); *Marriage of Jeffries*, 144 S.W.3d 636 (Tex. App.–Texarkana 2004, no pet.) (disproportionate division reversed); *Smith v. Smith*, 143 S.W.3d 206 (Tex. App.–Waco 2004, no pet.) (no reasonable basis supported disproportionate division of community estate); *LaFrensen v. LaFrensen*, 106 S.W.3d 876 (Tex. App.–Dallas 2003, no pet.) (court upheld a property division on the ground that it was "just and right" even though it was unequal); *Zorilla v. Wahid*, 83 S.W.3d 247 (Tex. App.–Corpus Christi 2002, no pet.) (no abuse of discretion to award 60% to wife and 40% to husband); *Tenery v. Tenery*, 935 S.W.2d 430 (Tex. App. – San Antonio 1995, no writ); *Vannerson v. Vannerson*, 857 S.W.2d 659 (Tex. App. – Houston [1st Dist.] 1993, writ denied); *Pemelton v. Pemelton*, 809 S.W.2d 642 (Tex. App. – Corpus Christi 1991,), *rev'd on other grounds,* 836 S.W.2d 145(Tex. 1992); *Neyland v. Raymond*, 324 S.W.3d 646 (Tex. App. – Fort Worth 2010)(a trial court may award an unequal division of the marital estate when a reasonable basis exists for doing so).

Although the property need not be divided equally, it must be divided equitably, *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App. – Houston [14th Dist.] 1996), no writ), and circumstances must justify the award of more than one half of the community estate to one party. *Osorno v. Osorno*, 76 S.W.3d 509 (Tex. App.–Houston [14th Dist.] 2002, no pet.); *Falor v. Falor*, 840 S.W.2d 683 (Tex. App. – San Antonio 1992, no writ); *Smith v. Smith*, 836 S.W.2d 688 (Tex. App. – Houston [1st Dist.] 1992, no writ); *Simpson v. Simpson*, 727 S.W.2d 662 (Tex. App.–Dallas 1987, no writ)(spouse's earning capacity alone could justify a disproportionate division); *Zorilla v. Wahid*, 83 S.W.3d 247 (Tex. App.–Corpus Christi 2002, no pet.)(just and right division applies to property acquired while domiciled in another state that would have been community property if the acquiring spouse was domiciled in Texas at time of acquisition);

Each case must be examined on its own merits to determine whether an unequal distribution is justified. *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App.–Fort Worth 2004, no pet.) (wife awarded 77% of community estate); *Wright v. Wright*, 65 S.W.3d 715 (Tex. App.–Eastland 2001, no pet.) (88/12 division in favor of wife upheld as just and right in 32-year marriage when husband, who had a greater education and earning capacity and better health than wife, was a philandering alcoholic who treated

his wife cruelly); *Kimsey v. Kimsey*, 965 S.W.2d 690 (Tex. App.–El Paso 1998, writ denied)(trial court's ultimate division need not be equal as long as it is equitable and the circumstances justify a disproportionate division); *Dawson-Austin v. Austin*, 920 S.W.2d 776 (Tex. App. – Dallas 1996), *rev'd on other grounds*, 968 S.W.2d 319 (Tex. 1992); *Massey v. Massey*, 807 S.W.2d 391 (Tex. App. – Houston [1st Dist.] 1991, writ denied).

1. Equal Division Not Abuse of Discretion

Even where the balance of the equities favors one spouse, the equal division of the community property is not an abuse of discretion. *Rafferty v. Finstad*, 903 S.W.2d 374 (Tex. App. – Houston [1st Dist.] 1995, writ denied); *Humble v. Humble*, 805 S.W.2d 558 (Tex. App. – Beaumont 1991, writ denied).

2. Factors For Court to Consider

In making an unequal division of property, the court may consider many factors, including:

- education of the parties;
- the parties' respective earning power;
- the parties' business and employment opportunities;
- disparity in the parties incomes or earning ability;
- the parties' physical health;
- disparity in the parties' ages;
- the parties' probable need for future support;
- the award of custody of the parties' children;
- the relative sizes of the parties' separate estates;
- the parties' relative financial condition and obligations;
- length of the marriage;
- fault in the breakup of the marriage;
- either spouse's dissipation of the estate, including excessive community property gifts to others or waste of community assets;
- benefits the party not at fault would have received from the continuation of the marriage;
- nature of property to be divided;
- tax consequences;
- expenses paid while divorce pending; and
- attorneys' fees.

See *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981); *Hailey v. Hailey*, 176 S.W.3d 374 (Tex. App. – Houston [1st Dist.] 2004, no pet.); *Handley v. Handley*, 122 S.W.3d 904 (Tex. App. – Corpus Christi 2003, no pet.); *LaFrensen v. La Frensen*, 106 S.W.3d 876 (Tex. App. – Dallas 2003, no pet.); *Farley v. Farley*, 930 S.W.2d 208 (Tex. App. – Eastland 1996, no writ); *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App. – Houston [14th Dist.] 1996, no writ); *Panozzo v.*

Panozzo, 904 S.W.2d 780 (Tex. App. –Corpus Christi 1995, no writ); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App. – Fort Worth 1995, no writ); *Vannerson v. Vannerson*, 857 S.W.2d 659 (Tex. App. – Houston [1st Dist.] 1993, writ denied); *Roever v. Roever*, 824 S.W.2d 674 (Tex. App. – Dallas 1992, no writ); *Neyland v. Raymond*, 324 S.W.3d 646 (Tex. App. – Fort Worth 2010).

a. Fraud

In determining the division of community property, the court may consider proof of one spouse's dishonesty or intent to deceive, constituting actual fraud, regarding the community assets, *Schleuter v. Schleuter*, 975 S.W.2d 584 (Tex. 1998), and may also consider evidence of one spouse's constructive fraud in transactions involving community property, taking into account: *Massey v. Massey*, 807 S.W.2d 391 (Tex. App. – Houston [1st Dist.] 1991, writ denied):

a. the size of the property disposed of in relation to the total size of the community estate
b. the adequacy of the remaining estate to support the other spouse
c. the relationship of the parties involved in the transaction.

Unfairly disposing of other spouse's community property results in presumption of constructive fraud. *Connell v. Connell*, 889 S.W.2d 534 (Tex. App. – San Antonio 1994, writ denied). However, the mere fact that a community property business venture lost money because of the acts of one spouse, even if it ended in bankruptcy, does not constitute fraud. *Connell v. Connell*, 889 S.W.2d 534 (Tex. App. – San Antonio 1994, writ denied); see also *Andrews v. Andrews*, 677 S.W.2d 171 (Tex. App. – Austin 1984, no writ) (a spouse's good faith, but unwise, investment of community funds resulting in losses to the community estate does not justify an unequal distribution of the remaining community property upon divorce).

b. Fault

The court may consider evidence of one spouse's fault contributing to the breakup of the marriage, even in an action in which insupportability is the only ground for divorce pled, *Velasco v. Haberman*, 700 S.W.2d 729 (Tex. App. – San Antonio 1985, no writ); *In re Jackson's Marriage,* 506 S.W.2d 261 (Tex. Civ. App. – Amarillo 1974, writ dism'd), although it may also decline to consider such evidence. *Massey v. Massey*, 807 S.W.2d 391 (Tex. App.–Houston [1st Dist.] 1991, writ denied)(court may consider fault, but is not obligated to do so); *Guttierez v. Guttierez*, 791 S.W.2d 659 (Tex. App. – San Antonio 1990, no writ).

The court may consider the fault of one of the parties in its division whether the divorce is granted solely on fault grounds, or on both fault and no-fault grounds. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758 (Tex. 1980); *Hourigan v. Hourigan*, 635 S.W.2d 556, 556-57 (Tex. App.–El Paso 1981, no writ). Also, a court has discretion to hear evidence of fault if it decides to hear the case on no-fault grounds. *Vautrain v. Vautrain*, 646 S.W.2d 309, 312 (Tex.

App.–Fort Worth 1983, writ dism'd). A court may also consider a spouse's cruel treatment of the other spouse in dividing the property, even though the court grants the divorce on the no-fault ground of insupportability. Further, a court is not required to consider a spouse's fault in dividing the property even if the court grants the divorce on fault grounds. *Murff v. Murff,* 615 S.W.2d 696 (Tex. 1981).

Courts seem especially willing to divide the property unequally when one spouse has physically abused the other. See, for instance, *Ohendalski v. Ohendalski*, 203 S.W.3d 910 (Tex. App.–Beaumont 2006, no pet.); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App. – Fort Worth 1995, no writ)(72.9% of community property awarded to wife, based in part on husband's violent and abusive nature which contributed to divorce); *Finch v. Finch*, 825 S.W.2d 218 (Tex. App. – Houston [1st Dist.] 1992, no writ) (65% of community assets awarded to wife who testified that husband had abused her and her daughter).

c. Length of Marriage

Where the marriage was of brief duration, the court may be more likely to divide the community property equally. See, for instance, *Patt v. Patt*, 689 S.W.2d 505 (Tex. App. – Houston [1st Dist.] 1985, no writ) (wife who had never worked outside home and possessed no marketable skills awarded family home after long marriage); *Trevino v. Trevino*, 555 S.W.2d 792 (Tex. Civ. App. – Corpus Christi 1977, no writ) (community estate divided equally after three-year marriage).

d. Disparity in Earning Power

Although the court may award a larger portion of the community estate to the spouse with less education and employment experience, it need not do so, and may be less likely to do so if the community estate is very large and an equal division would satisfy the less employable spouse's financial needs. *Hanson v. Hanson*, 672 S.W.2d 274 (Tex. App.- Houston [14th Dist.] 1984, writ dism'd w.o.j.).

e. Custody of Children

The award to one spouse of custody of the couple's children justifies an unequal division of the community property in favor of that spouse to balance the added financial burden on him or her. *Boriack v. Boriack*, 541 S.W.2d 237 (Tex. Civ. App. – Corpus Christi 1976, writ dism'd). The spouse appointed managing conservator of the children is often awarded the marital home.

f. Tax Consequences

A court dividing community property upon divorce may consider tax consequences stemming from the division of community property. *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App. – Texarkana 1996, writ denied); *Baccus v. Baccus*, 808 S.W.2d 694 (Tex. App. – Beaumont 1991, no writ). Although one court has stated that the trial court is not required to consider the tax ramifications in the division. *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App. – Texarkana 1996, writ

denied), another has stated that it is reversible error for the court to refuse to do so, particularly when the tax liability is substantial and one of the parties is without means to pay it. *Baccus v. Baccus*, 808 S.W.2d 694 (Tex. App. – Beaumont 1991, no writ). The Texas Family Code was amended in 2005 to expressly allow the court to consider in its division of the marital state: (1) whether a specific asset will be subject to taxation; and (2) if the asset will be subject to taxation, when the tax payment is due. Tex. Fam. Code §7.008. The court may not allow one party credit for future tax liability where the question of whether such liability will arise is can be answered only through speculation or surmise. *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App. – Texarkana 1996, writ denied); *Harris v. Holland*, 867 S.W.2d 86 (Tex. App. – Texarkana 1993, no writ).

g. Size of Separate Estate

Even though a court may not divest a spouse of his or her separate property, the court may consider the size of a spouse's separate property estate when dividing the community property. *Padon v. Padon*, 670 SW.2d 354, 358-59 (Tex. App.–San Antonio 1984, no writ).

h. Expenses While Divorce is Pending

The court can consider the expenses of one spouse paid to maintain community property while the divorce is pending. *LaFrensen v. LaFrensen*, 106 S.W.3d 876 (Tex. App.–Dallas 2003, no pet.) (Husband's IRA awarded to wife because she exhausted hers to maintain family business during divorce.).

3. Allocation of Debts

A debt created by a spouse during marriage is presumed to be an obligation of the community, and the court must divide the parties' debts as well as their assets upon divorce. *Taylor v. Taylor*, 680 S.W.2d 645 (Tex. App. – Beaumont 1984, writ ref'd n.r.e.). In dividing the couple's debt as part of its division of the community property, the court may not modify the creditor's rights with regard to the debt. *Blake v. Amoco Federal Credit Union*, 900 S.W.2d 108 (Tex. App. – Houston [14th Dist.] 1995, no writ)(divorce court cannot alter ex-spouse's liability on joint debt). See *Smith v. Smith*, 143 S.W.3d 206 (Tex. App.–Waco 2004, no pet.) (trial court abused its discretion when it failed to consider the fact that wife assumed three community debts when dividing the community estate); see also *In the Matter of Jeffries*, 144 S.W.3d 636 (Tex. App.–Texarkana 2004, no pet.).

Courts usually assign a community debt from a business or property to the spouse receiving the asset. See *Coggin v. Coggin*, 738 S.W.2d 365, 377-78 (Tex. App.–Corpus Christi 1987, no writ); *Janik v. Janik*, 634 S.W.2d 323, 325 (Tex. App.–Houston [14th Dist.] 1982, no writ).

Tax Liability – While tax liability is not technically a debt, the trial court may take the couple's tax liability into consideration in dividing the property. *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App.–Texarkana 1996, writ denied); *Mullins v. Mullins*, 785 S.W.2d 5 (Tex. App. – Fort Worth 1990, no writ). The court may properly assign all of the couple's tax liability to one of the spouses.

Vannerson v. Vannerson, 857 S.W.2d 659 (Tex. App. –Houston [1st Dist.] 1993, writ denied)(assignment to husband of liability for delinquent federal income taxes was not abuse of discretion where wife testified that husband had told her he had filed returns, and she had not known that he had not done so); *Baccus v. Baccus*, 808 S.W.2d 694 (Tex. App. – Beaumont 1991, no writ) (court properly assessed all of federal income tax liability for tax years in which parties were married and living together solely against husband, where husband had invested in tax shelter without disclosing investment to wife and investment contributed to tax liability of parties, husband had withheld from wife information concerning tax liability resulting from investment, and husband took no steps to pay income tax liability, including penalty and interest, when it was at its lowest amount, even though he had sufficient funds to do so). The court may even impose one party's tax liability on the other party. *Mullins v. Mullins*, 785 S.W.2d 5 (Tex. App. – Fort Worth 1990, no writ).

4. Division of Pension Benefits

There is no requirement that community retirement benefits be divided equally upon divorce. *Woods v. Woods*, 619 S.W.2d 590 (Tex. Civ. App. – Houston [14th Dist.] 1981, no writ). The court may award the entire amount of the benefits to one spouse, as long as the division of the entire community estate is just and right. *Tex. Fam. Code Ann. § 7.001* ; *Woods v. Woods*, 619 S.W.2d 590 (Tex. Civ. App. – Houston [14th Dist.] 1981, no writ). Courts frequently award each spouse his or her own benefits, *see, for instance*, *Hardin v. Hardin*, 681 S.W.2d 241 (Tex. App. – San Antonio 1984, no writ); *Walker v. Walker*, 608 S.W.2d 326 (Tex. Civ. App. – Eastland 1980, no writ).

H. Cases of Disproportionate Awards

1. Disproportionate Awards Upheld

The following cases have upheld disproportionate awards of community property based on the many factors discussed above:

a. *Fletcher v. Goetz*, 9 S.W.3d 442 (Tex. App.– Fort Worth 1999, n.w.h.). The husband was awarded a greater division of the community estate, which the Court of Appeals upheld.

b. *Vandiver v. Vandiver*, 4 S.W.3d 300 (Tex. App. – Corpus Christi 1999, no pet.). The court in *Vandiver* upheld a division of property in favor of the wife. The trial court considered several factors in granting the wife a disproportionate division, including the husband's greater earning power and ability to support himself, his education and future employability, his fault in the break up of the marriage, the wife's need for future support, the nature of the property involved in the division, the husband's failure to follow court orders, the wife's health problems, the needs of the child of the marriage, community indebtedness and liabilities, reimbursement, the size and nature of the separate estates, and attorney's fees to be paid by the parties.

c. *Frommer v. Frommer*, 981 S.W.2d 811 (Tex. App. – Houston [1st Dist.] 1998, no pet.). In *Frommer*, the court upheld a disproportionate division in favor of the wife. The husband was

a medical doctor, had an annual income of approximately $750,000 and was likely to continue to make between $45,000 and $65,000 per month. The wife, on the other hand, had only a high school diploma. During the marriage, the wife did not work outside the home and, prior to her marriage, she earned approximately $2,000 per month as an interior decorator. Further, the husband had substantial separate property including a $250,000 equity in a home, his professional association that was valued around $300,000, including art and furnishings purchased for approximately $150,000, a Mercedes-Benz car, and a one-quarter interest in a partnership owning and receiving profits from the operation of a dialysis unit. The wife's separate property, on the other hand, consisted of only an automobile and certain jewelry which was given to her by the husband during their marriage.

d. *Kimsey v. Kimsey*, 965 S.W.2d 690 (Tex. App.– El Paso 1998, pet. denied). The husband in Kimsey complained that although he was awarded 62.2% of the community assets, he was awarded 96.5% of the community debts. There was a great disparity with respect to the relative earning capacities and abilities of the parties. Each party was 59 years of age. The wife attended college but did not obtain a degree. Husband, on the other hand, obtained a degree in business administration and completed one semester of a post graduate program in petroleum engineering. After leaving school and active duty in the army, the husband became self-employed in the oil and gas business. Over the years, the husband was successful in his business ventures. The trial court found that the husband had significantly greater future business opportunities than the wife and an ability to retire the debts.

e. *Abernathy v. Fehlis*, 911 S.W.2d 845 (Tex. App. – Austin 1995, n.w.h.). The court in Abernathy upheld a disproportionate division in favor of the wife due to several factors, including the husband's separate property inheritance.

f. *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App. – Fort Worth 1995, no writ). The court in *Faram* found that the trial court did not abuse its discretion in dividing the marital estate. In *Faram*, the wife was awarded 72.9% of the community estate. The trial court took into consideration the husband's abusive and violent nature. Further, the husband earned a steady income and retirement benefits, and the wife had never worked out of the home. The husband also had received a large portion of the personal property acquired during the marriage. The trial court also found that the husband committed waste of the community estate by acquiring property, incurring debt, and escalating attorney's fees after the couple's separation. Further, because of the husband's conduct during the lawsuit, including his failure to disclose evidence during discovery, the trial court ordered him to pay the wife's attorney's fees of over $22,000.

g. *Golias v. Golias*, 861 S.W.2d 401 (Tex. App. – Beaumont 1993, no writ). In Golias, the court held that the property division was within the trial court's discretion. The court did not find that the trial court had abused its discretion in awarding the wife 79% of the community estate, even though the trial court stated it was going to award 75% of the community estate to the wife.

h. *Falor v. Falor*, 840 S.W.2d 683 (Tex. App. – San Antonio 1992, no writ). The *Falor* court held that the trial court did not abuse its discretion when it awarded the wife a much greater share of the community estate. The Falor court found that the trial court found that the husband

disposed of approximately $28,000 worth of community assets without the wife's knowledge and consent for non-community purposes. The trial court also considered the existence of the husband's separate estate, relative earning capacities of the parties (the husband earned about $36,000 per year, while the wife earned about $16,000 per year), and the wife's obligations as the sole managing conservator of the couple's two children.

I. *Finch v. Finch*, 825 S.W.2d 218 (Tex. App. – Houston [1st Dist.] 1992, no writ). The court in *Finch* awarded the wife approximately 65% of the community estate. In Finch, the husband had greater business opportunities than the wife. Further, the record showed that the husband abused the wife and the wife's daughter, and the husband had a greater earning capacity.

j. *Eikenhorst v. Eikenhorst*, 746 S.W.2d 882 (Tex. App.–Houston [1st Dist.] 1988, no writ). In *Eikenhorst*, the wife was awarded 56% of the community estate. The husband was a radiologist who earned approximately $220,000 per year plus an additional $30,000 that was contributed to his pension plan. The wife earned $10.00 per hour as a part-time nurse. The court awarded the wife custody of the children and found that the husband was at fault in the breakup of the marriage.

k. *Oliver v. Oliver*, 741 S.W.2d 225 (Tex. App.–Fort Worth 1987, no writ). In *Oliver*, the wife was awarded 80% of the community estate. The husband was a computer programmer, and the wife was a maid who lacked a college education.

l. *Rafidi v. Rafidi*, 718 S.W.2d 43 (Tex. App.–Dallas 1986, no writ). In *Rafidi*, the wife was awarded between 85% and 90% of the community estate. The husband was a petroleum engineer with three college degrees and the wife had only a high school education. The wife also had a medical problem and a minor daughter and three adult children living with her. The court further found that the husband had hidden community assets.

m. *Rutledge v. Rutledge*, 709 S.W.2d 389 (Tex. App.–Fort Worth 1986, writ ref'd n.r.e.). The wife in *Rutledge* was awarded 60% of the community estate. The husband was a retired airline pilot in his late sixties with income from oil investments; the wife was in her late forties and had no marketable job skills and no separate property.

n. *Conroy v. Conroy*, 706 S.W.2d 745 (Tex. App. – El Paso 1986, no writ). The court found that a disproportionate division of the community estate in favor of the wife was not an abuse of discretion where the wife was 47 years old and had not worked outside the home at any time during the 24 year marriage, the husband had income in excess of $3,000 per month, the wife had no income and poor prospects for any immediate alleviation of debt, and the wife assumed responsibility of the child and the mortgage on the family home, and the husband was at fault in the break up of the marriage.

o. *Roberts v. Roberts*, 663 S.W.2d 75 (Tex. App.–Waco 1983, no writ). The court awarded the wife more than 50% of the community property. The wife as 55 years of age and had

health problems, and her daughter had health problems and medical expenses from an automobile accident. The wife lacked steady income, and the husband received $40,000 annual salary plus pension benefits. The court found that the husband was at fault in the breakup of the marriage.

p. *Cluck v. Cluck*, 647 S.W.2d 338 (Tex. App. – San Antonio 1982, writ dism'd). An award of the bulk of the community estate to the wife was not an abuse of discretion where the wife had not been employed during the marriage and did not have promising employment prospects, and the husband was a successful attorney who received his professional practice in total.

q. *Hourigan v. Hourigan*, 635 S.W.2d 556 (Tex. Civ. App.–El Paso 1981, no writ). The court awarded the husband most of the community estate because the wife had abandoned the husband and child. The court reasoned that the wife's duty to support the child would be satisfied out of her share of the community property.

r. *Hausler v. Hausler*, 636 S.W.2d 874 (Tex. App.–Waco 1982, no writ). The court awarded the wife more than 50% of the community estate considering the fact that both adult children lived with her and would probably look to her for support.

s. *Huls v. Huls*, 616 S.W.2d 312 (Tex. Civ. App.–Houston [1st Dist.] 1981, no writ). The court in *Huls* awarded the family business to the husband and awarded the wife 85% of the community estate where the wife was a quadriplegic.

t. *Gaston v. Gaston*, 608 S.W.2d 332 (Tex. Civ. App.–Tyler 1980, no writ). The husband was awarded more than 50% of the community property where he was unable to work due to a heart condition.

u. *Taylor v. Taylor*, WL 2542549 (Tex. App.–Houston [14th Dist. [2010, no pet. h.)(not reported). Wife was awarded a disproportionate division in her favor based on the parties' conduct – wife paid for the home, expenses for the home, and property taxes with money from her 401K, and she also sold personal property to make payments on the home when husband was incarcerated. Husband was at fault for the dissolution of the marriage as a result of his conviction for sexual assault against wife's child.

v. *Gupta v. Gupta*, WL 2540487 (Tex. App.–Austin 2010, no pet. h.)(not reported). The Court held that the trial court did not abuse its discretion in dividing the community estate based on wife's expert testimony over husband's expert testimony on the value of husband's medical practice.

2. Disproportionate Awards Reversed

The following disproportionate awards were reversed on appeal:

a. *Archambault v. Archambault*, 763 S.W.2d 50 (Tex. App.–Beaumont 1988, no writ). The trial court awarded 75.49% of the community estate to the husband and 26.51% to the wife. The Beaumont Court of Appeals reversed this award because it was not supported by any reasonable basis.

b. *Welch v. Welch*, 694 S.W.2d 374 (Tex. App.–Houston [1st Dist.] 1985, no writ). The trial court abused its discretion in awarding the wife assets valued at $93,000 and the husband property subject to debts that exceeded the value of the property by $23,000. The wife had a real estate license and worked as a secretary. The husband was using all available funds to pay his failing company's creditors and was unable to pay himself a salary. The husband further had custody of a 14-year old daughter and was paying child support for a 17-year old daughter.

c. *Zamora v. Zamora*, 611 S.W.2d 660 (Tex. Civ. App.–Corpus Christi, 1980, no writ). The Corpus Christi Court of Appeals held that the trial court abused its discretion in awarding the wife property valued at $27,677 while the husband received property totaling a negative net value. Even though the husband had a slightly greater earning capacity and business opportunities than the wife, the differences did not justify such a disproportionate distribution.

d. *Erger v. Erger*, 590 S.W.2d 186 (Tex. Civ. App.–Fort Worth 1979, writ dism'd). The Fort Worth Court of Appeals held that the trial court abused its discretion in awarding the wife $46,000 and the husband $29,000 in community property when both were of equal age and experience.

e. *Thomas v. Thomas*, 525 S.W.2d 200 (Tex. Civ. App.–Houston [1st Dist.] 1975, no writ). The Houston Court of Appeals reversed a property division awarding 56% of the community estate to the husband because the record did not show any circumstances that would justify the unequal division. The husband was an engineer who earned $23,500 per year, and the wife earned $9,900 per year as a secretary.

I. Methods of Dividing Property

1. In General

The trial court will usually first determine that each spouse should receive an approximate percentage of the community property and then divide the property according to those percentages. If the actual division does not correspond roughly to the percentages the court has assigned, the error is likely to be reversible. See, for instance, *Butler v. Butler*, 975 S.W.2d 765 (Tex. App. – Corpus Christi 1998, no writ) (where trial court intended to award 60% of marital estate to husband and 40% to wife, erroneous calculation resulting in 75% of community estate to wife and 25% to husband required remand); *Cook v. Cook*, 679 S.W.2d 581 (Tex. App. – San Antonio 1984, no writ) (reversal required where court had intended to award wife 60% of community assets, but because of characterization and valuation errors actually awarded her about 40%).

2. Partition in Kind

A court dividing a divorcing couple's community property should first determine whether the property is subject to partition in kind. *Walston v. Walston*, 971 S.W.2d 687 (Tex. App. – Waco 1998, writ denied); *Finch v. Finch*, 825 S.W.2d 218 (Tex. App. – Houston [1st Dist.] 1992, no writ). This is the preferable method of dividing the estate. *Finch v. Finch*, 825 S.W.2d 218 (Tex. App. – Houston [1st Dist.] 1992, no writ). An in-kind division does not necessarily require that each item of property be divided in half, but contemplates the award to each party of individual items of personal property so that the overall division of the community property is just and right. *Walston v. Walston*, 971 S.W.2d 687 (Tex. App. – Waco 1998, writ denied).

In determining if the community property is subject to division in kind, or whether a money judgment to one party would be more appropriate, the trial court should consider the nature and type of the property involved and the relative conditions, circumstances, capabilities and experience of parties. *Walston v. Walston*, 971 S.W.2d 687 (Tex. App. – Waco 1998, writ denied)(trial court abused its discretion in not dividing the household furnishings in kind -- court awarded husband and wife a 50% undivided interest in the household furnishings to be sold by a receiver who would divide the net proceeds 50/50); see also *Re Marriage of Jackson*, 506 S.W.2d 261 (Tex. Civ. App. – Amarillo 1974, writ dism'd w.o.j.).

3. Sale of Property and Division of Proceeds

If the parties' community property is not subject to division in kind, the court may appoint a receiver to sell the property and divide the proceeds as directed by the court. *Walston v. Walston*, 971 S.W.2d 687 (Tex. App. – Waco 1998, writ denied); *Vannerson v. Vannerson*, 857 S.W.2d 659 (Tex. App. – Houston [1st Dist.] 1993, writ denied). Homestead property may be divided in this way; *Vannerson v. Vannerson*, 857 S.W.2d 659 (Tex. App. – Houston [1st Dist.] 1993, writ denied). Note, however, that the court may not order that homestead property be sold and the proceeds used to pay unsecured debts, *Brock v. Brock*, 586 S.W.2d 927 (Tex. App. – El Paso 1979, no writ), although the property may be ordered sold to satisfy a debt to a creditor who may reach homestead property. See *Vannerson v. Vannerson*, 857 S.W.2d 659 (Tex. App. – Houston [1st Dist.] 1993, writ denied)(trial court's order that marital home be sold and proceeds applied to federal tax lien upheld).

4. Money Judgment

The trial court may award a money judgment to one spouse against the other as a means of dividing the marital property. *Finch v. Finch*, 825 S.W.2d 218 (Tex. App. – Houston [1st Dist.] 1992, no writ); *Roever v. Roever*, 824 S.W.2d 674 (Tex. App. – Dallas 1992, no writ). This solution, often called owelty, may be used as a means for the wronged spouse to recoup the value of his or her share of the community estate lost through the other spouse's actions, *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998), and is especially relied on when the community estate has been encumbered and over-collateralized as a means of recouping the value of the property lost by its disposition, encumbrance, or collateralization, but may be used to equalize the property division for any reason. *Massey v. Massey*, 807 S.W.2d 391 (Tex. App. – Houston [1st Dist.] 1991, writ denied). For instance, if one spouse is awarded a particularly valuable asset, such as the family home or a business interest, the court

may make an equalizing award of cash to the other. See, for instance, *Farley v. Farley*, 930 S.W.2d 208 (Tex. App. – Texarkana 1996, no writ).

5. Award of Attorneys' Fees

The court may, in its discretion, award one party his or her reasonable attorneys' fees as part of the just and fair division of the couple's community property; such an award is not based on the recipient's success at trial or on appeal. *Parker v. Parker*, 897 S.W.2d 918 (Tex. App. – Fort Worth 1995, writ denied). In making the award, the court is to consider the needs of the parties and all surrounding circumstances. *Capellen v. Capellen*, 888 S.W.2d 539 (Tex. App. – El Paso 1994, writ denied); *McClure v. McClure*, 870 S.W.2d 358 (Tex. App. – Fort Worth 1994, no writ).

Where an award of attorneys' fees is part of the division of the community estate, the decree cannot be reversed only as to the fee award; if the appellate court determines that the fee award was improper, it must remand the case for redivision of the entire community estate, *Thomas v. Anderson*, 861 S.W.2d 58 (Tex. App. – El Paso 1993, no writ), as the appellate court does not have the authority to render judgment dividing the marital property. *Robles v. Robles*, 965 S.W.2d 605 (Tex. App. – Houston [1st Dist.] 1998, no writ).

6. Formation of Business Entity

If the parties have large community property holdings which they are unwilling to break up, they may agree to form a business entity into which the holdings will be deposited, and that each former spouse will own a certain percentage of the entity. See, for instance, *Phillips v. Phillips*, 820 S.W.2d 785 (Tex. 1991) (spouses agreed to form partnership to hold their oil and gas interests, with husband as sole general partner and wife as sole limited partner, and with each to perform certain duties and receive certain benefits).

7. Real estate located outside Texas

With respect to real estate located outside Texas, generally the court cannot render judgment affecting title to such property. *In the Marriage of Glaze*, 605 S.W.2d 721 (Tex. Civ. App. – Amarillo 1980, no writ). However, the court may order a spouse to execute a deed transferring title to the property to the other spouse. *In the Marriage of Glaze*, 605 S.W.2d 721 (Tex. Civ. App. – Amarillo 1980, no writ). The court issuing such an order must have personal jurisdiction over the spouse whom the court orders to execute the deed. *Brock v. Brock*, 586 S.W.2d 927 (Tex. Civ. App. – El Paso 1979, no writ).

J. Appellate Review

Trial courts have broad discretion in making a "just and right" division of the community estate, and this discretion is not disturbed on appeal unless a clear abuse of discretion is shown. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981).

Once reversible error affecting the "just and right" division of the community estate is found, the court of appeals must remand the entire community estate for a new division. *Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985). Only the trial court may make a just and right division of community property. Tex. Fam. Code Ann. § 7.001. The appellate court's role is to determine only if the trial courts abused its discretion in making the division. See *Jacobs v. Jacobs*, 687 S.W.2d 731 (Tex. 1985); *McKnight v. McKnight*, 543 S.W.2d 863 (Tex. 1976). If the trial court mischaracterizes community property as separate property, then the property does not get divided as part of the community estate. If the mischaracterized property has value that would have affected the trial court's just and right division, then the mischaracterization is harmful and requires the appellate court to remand the entire community estate to the trial court for a just and right division of the properly characterized community property. *Zeptner v. Zeptner*, 111 S.W.3d 727 (Tex. App.– Fort Worth 2003, no pet.). If, on the other hand, the mischaracterized property had only a de minimis effect on the trial court's just and right division, then the trial court's error is not an abuse of discretion. *Vandiver v. Vandiver*, 4 S.W.3d 300 (Tex. App. – Corpus Christi 1999, no pet.).