

CHARACTERIZATION OF PROPERTY IN A NUTSHELL

**Kathryn J. Murphy
Goranson Bain, PLLC
6900 N. Dallas Parkway, Suite 400
Plano, Texas 75024
214.473.9696
kmurphy@gbfamilylaw.com**

2018

KATHRYN J. MURPHY
GORANSON BAIN AUSLEY, PLLC
6900 North Dallas Parkway, Suite 400
Plano, Texas 75024
(214) 473.9696
Email: kmurphy@gbfamilylaw.com
Website: www.gbfamilylaw.com

EDUCATION:

J.D. 1989 Southern Methodist University, Dallas, Texas
B.A. 1986 University of Texas at Tyler, Tyler, Texas, with Honors
Honors: Distinguished Student Award
Full Academic Tuition Scholarship
Speech Performance Award
President's Honor Roll

PROFESSIONAL ACTIVITIES AND AFFILIATIONS:

Partner - Goranson Bain Ausley, PLLC
Board Certified Family Law - Texas Board of Legal Specialization

Fellow - American Academy of Matrimonial Lawyers (2005 - Present)
Board Member- American Academy of Matrimonial Lawyers (2015-2017)
Fellow - International Academy of Matrimonial Lawyers
Fellow - Texas Chapter of the Academy of Matrimonial Lawyers (Executive Committee (2006 - 2010; Past President)
Member - Texas Academy of Family Law Specialists
Member/Chair- Family Law Council, State Bar of Texas (2005 - Present)(Executive Committee, Chair 2016-2017; Immediate Past-Chair)
Member - The Collaborative Alliance (President 2015)
Member - Collaborative Divorce Texas
Member - International Academy of Collaborative Professionals
Member - State Bar of Texas (Family Law Section)
Member - American Bar Association (Family Law Section)
Member - College of the State Bar of Texas
Member - Dallas Bar Association (Family Law Section)
Member - Collin County Bar Association (Family Law Section)
Member - Denton County Bar Association
Member - Plano Bar Association
Co-Chair - DAYL People's Law School (1995 & 1996)
Instructor - Southeastern Paralegal Institute (1993-1996)
Member - Fee Dispute Committee - Dallas Bar Association (1998 - 2000)
Fellow - Collin County Bench Bar Foundation
Lifetime Fellow - Texas Family Law Foundation (State Bar of Texas)
Fellow - Texas Bar Foundation – Nominating Committee Member
Chairman - Program Committee, Collin County Bench Bar Conference, 2000

Past Board Member- Advisory Board in CASA of Collin County
Member - Grievance Committee, District 1A (2002 - 2007); (Chair – 2006-2007)
Certificate - Advanced Mediation - Family Law (1995)
Member - Annette Stewart Inn of Court (Board Member 2005-2012)

SPECIAL RECOGNITIONS AND HONORS:

Named the “Best Lawyers in America” 2015, 2017 and 2019 Family Law “Lawyer of the Year” in Dallas – only a single lawyer in each practice area within a community is honored with this distinction.

Recipient of the Dan Price Award from the State Bar of Texas in 2018 – this award is presented to a lawyer who has had a significant impact on the Family Law Section for the past year – teaching, writing and advancing the practice of family law.

University of Texas at Tyler, Alumni Association Distinguished Alumni Award (2016)

Listed in D Magazine – "Best Lawyers in Dallas" Family Law (2001, 2005, 2006, 2007, 2008, 2009, 2010, 2017, 2018).

Listed in D Magazine – “Best Female Lawyers in Dallas” (2010).

Listed in D Magazine – “Best Personal Lawyers in Dallas” (2009).

Listed in “The Best Lawyers in America” – Woodward and White Press (2003 - 2017).

Listed in Texas Monthly – “Top 50 Women Texas Super Lawyers” (2003 - 2017).

Listed in Texas Monthly – “Top 100 Texas Super Lawyers” (2004 - 2009; 2011; 2013-2017).

Listed in Texas Monthly – “Top 100 Dallas/Fort Worth Super Lawyers” (2003-2009; 2011-2017).

Listed in Texas Monthly – “Texas Super Lawyer” in the area of Family Law (2003 - 2017).

Best Family Law CLE Article, State Bar of Texas, 2004.

Annette Stewart Inn of Court, Serjeant of the Inn Award – January 2013 (awarded to an attorney who has significantly contributed to the profession and the community through his or her career).

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*, Professional Solutions Group (2005).

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

Author, *Family Law at Your Fingertips*, Family Law Section, State Bar of Texas, 2015, 2016.

Author, *Family Law at Your Fingertips – Children Issues*, Family Law Section, State Bar of Texas, 2018.

CONTINUING LEGAL EDUCATION LEADERSHIP

CO-COURSE DIRECTOR, 39th Annual Advanced Family Law Course, State Bar of Texas (August 2013)

CO-COURSE DIRECTOR, INNOVATIONS – BREAKING BOUNDARIES IN CUSTODY LITIGATION, The University of Texas School of Law (January 2012)

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)

MODERATOR, Collin County Bench/Bar Conference (2000)

CO-CHAIR, Collin County Bench/Bar Conference (2001)

PUBLICATIONS AND PRESENTATIONS:

DRAFTING: ARE YOUR PLEADINGS AND DISCOVERY READY FOR TRIAL, State Bar of Texas (December 2018)

PROFESSIONALISM AND CIVILITY, American Academy of Matrimonial Lawyers (November 2018)

MARITAL AGREEMENTS, New Frontiers in Marital Property Law, State Bar of Texas (October 2018)

PREMARITAL AND POSTMARITAL AGREEMENTS, Advanced Family Law Course, State Bar of Texas (August 2018)

TRIAL PRESENTATION OF A CUSTODY CASE, Annual TAFLS Trial Institute, Texas Academy of Family Law Specialists (February 2018)

MARITAL PROPERTY AGREEMENTS, Advanced Family Law Course, State Bar of Texas (August 2017)

PROPERTY CASE LAW UPDATE, Marriage Dissolution Institute, State Bar of Texas (April 2017)

CHARACTERIZATION OF PROPERTY, Advanced Family Law Course, State Bar of Texas (August 2016)

PROFESSIONALISM – THE KEY TO A SATISFYING CAREER, Marriage Dissolution 101, State Bar of Texas (April 2016)

NEGOTIATION TECHNIQUES AND STRATEGIES, Advanced Family Law Course, State Bar of Texas (August 2015)

JUDGES PANEL, Innovations – Breaking Boundaries in Child Custody Litigation, State Bar of Texas (June 2015)

PROTECTIVE ORDERS AND FAMILY VIOLENCE, Southern Methodist University School of Law (October 2014)

NEGOTIATION TECHNIQUES AND STRATEGIES, 40th Annual Advanced Family Law Course, State Bar of Texas (August 2014)

EXPERTS, EXAMINATIONS AND ETHICS – A GUIDE TO MENTAL HEALTH EXPERTS – DIRECT AND CROSS, ATTACKING AND DEFENDING RECOMMENDATIONS, DAUBERT CHALLENGES AND PRACTICAL APPROACHES, Innovations – Breaking Boundaries in Child Custody Litigation, The University of Texas School of Law (June 2014)

USING A COMPUTER FORENSIC EXPERT, Family Law Technology Course, State Bar of Texas (December 2012)

PROPERTY UPDATE, Advanced Family Law Course, State Bar of Texas (August 2012)

TURBO CHARGE YOUR COLLABORATIVE PRACTICE, Advanced Family Law Course, State Bar of Texas (August 2012)

ATTORNEY'S FEES AGREEMENTS, Advanced Family Law Course, State Bar of Texas (August 2011)

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

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)

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)

CHARACTERIZATION OF PROPERTY

QUICK SUMMARY

- A. Separate Property Defined**
1. Property owned or claimed before marriage;
 2. Property acquired during marriage by gift, devise or descent;
 3. Recovery for personal injuries sustained during marriage, except for any recovery for loss of earning capacity – spouse who receives personal injury settlement must prove what part of settlement was separate property; and
 4. Property acquired in exchange for separate property, proceeds from the sale of separate property or property that can be traced to separate property.
- B. Community Property Defined** – Property, other than separate property, acquired by either spouse during marriage.
- C. Community Property Presumption** – All property possessed by either spouse during or upon dissolution of the marriage is presumed to be community property.
- D. Clear and Convincing Evidence** – The degree of proof necessary to establish that property is separate property is clear and convincing evidence.
- E. Income from Separate Property** – Unless spouses have agreed otherwise, all income acquired during marriage, whether from separate or community, is community property.
- F. Premarital and Postmarital Agreements** – Spouses can agree, either before or during the marriage, that property that would ordinarily be community property will be separate property.
- G. Agreements to Convert Separate Property to Community Property** – Spouses may agree that separate property be converted to community property, provided that certain formalities are met.
- H. Inception of Title Rule** – Property is characterized as separate or community at the time of the inception of title to the property.
- I. Proportional Ownership Interests/Mixed Character** – 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.

CHARACTERIZATION OF PROPERTY

I. Separate Property and Community Property

A. Separate Property Defined

1. Property owned or claimed before marriage;
2. Property acquired during marriage by gift, devise or descent; and
3. Recovery for personal injuries sustained during marriage, except for any recovery for loss of earning capacity during marriage. *TFC 3.001*.

B. Community Property Defined – Property, other than separate property (SP), acquired by either spouse during marriage. *TFC 3.002*.

C. Community Property Presumption – All property possessed by either spouse during or upon dissolution of the marriage is presumed to be community property (“CP”). *TFC 3.003(a)*. The introduction of contrary evidence ends the presumption of CP. *Harrison v. Harrison*, 321 S.W.3d 899 (Tex. App. – Houston [14th Dist.] 2010, no pet. h.).

D. Jury Trial – The jury may determine character and value of property, however, the judge divides the property. *Walston v. Walston*, 119 S.W.3d 435 (Tex. App. – Waco 2003, no pet.); *Walter v. Walter*, 127 S.W.3d 396 (Tex. App. – Dallas 2004, no pet.).

E. Clear and Convincing Evidence – The degree of proof necessary to establish that property is SP is **clear and convincing evidence**. *TFC 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 proven if a reasonable trier of fact could form a firm belief or conviction that its findings are true. *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772 (Tex. App.– San Antonio 2004, no pet.).

A spouse has the burden to provide clear and convincing evidence as to the exact nature of the portion of property that is SP, even though the other spouse concedes that some portion of property is the other spouse’s SP. *Zamarripa v. Zamarripa*, WL 1875580 (Tex. App.– Houston [14th Dist.] 2009, pet. denied)(not reported)(although W conceded that some portion of pension was H’s SP, it remained H’s burden to provide clear and convincing evidence as to the exact nature of that portion and trial court was not required to speculate about it); *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 a spouse’s testimony is contradictory by inventories in evidence or unsupported by documentary evidence); *Sink v. Sink*, 364 S.W.3d 340 (Tex. App.– Dallas 2012, no pet.)(mere testimony that certain property is SP insufficient to overcome CP presumption – a spouse claiming SP must point to specific evidence to support SP claims).

F. Evidence Required

1. **Evidence** – Some courts have held that uncorroborated assertions of a spouse that property is SP will constitute clear and convincing evidence. *Pace v. Pace*, 160 S.W. 706 (Tex. App.– Dallas 2005, pet. denied); *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex. App.– Tyler 1993, no writ)(where evidence is uncontroverted that H’s SP assets were used to purchase house, evidence is clear and convincing that H traced purchase of house to his SP assets); *Holloway v. Holloway*, 671 S.W.2d 55 (Tex. App.– Dallas 1983, writ dism’d)(party’s uncontroverted testimony alone sufficient to establish SP nature of asset); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App.– Fort Worth 1995, no writ)(W’s uncontradicted testimony that investment accounts and T-bill were either gifts from her father or proceeds from sale of SP real estate was some evidence of character).

Other cases have held that mere testimony that property purchased with SP funds without any tracing of the funds, was insufficient to rebut the CP presumption. *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App.– Houston [1st Dist.] 1995, no writ).

2. **Inventory and Appraisements** – Merely asserting on sworn inventory property is SP is insufficient to establish that fact – additional evidence is required. *Warriner v. Warriner*, 394 S.W.3d 240 (Tex. App.– El Paso 2012, no pet.).

Characterization of property in an Inventory and Appraisal does not always constitute a judicial admission. *Rivera v. Hernandez*, 441 S.W.3d 413 (Tex. App.–El Paso 2014, no pet. h.).

- G. Income from Separate Property** – Unless spouses have agreed otherwise, all income acquired during marriage, whether from SP or CP, is CP. *Yaklin v. Glusing, Sharpe & Krueger*, 875 S.W.2d 380 (Tex. App.– Corpus Christi 1994, no writ). However, the natural increase in value of a SP asset is SP.

- H. Quasi-Community Property** – “Quasi-community property” is property that is not CP but that is nonetheless divisible on divorce. Texas courts are permitted to treat property acquired in another state that would have been SP, in such state, as CP if, at the time of acquisition, the property would have been CP in Texas. *TFC 7.002*.

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 CP, regardless of the domicile of the spouses when they acquired the property or the legal system of the previous domicile. *Ismail v. Ismail*, 702 S.W.2d 216 (Tex. App.– Houston [1st Dist.] 1985, writ ref’d n.r.e.).

- I. Community Debt Presumption** – A debt which arises before marriage should be treated as the incurring spouse's separate debt and cannot be assigned to the other spouse. The spouse attempting to rebut this "community debt" presumption bears the burden of proof with clear and convincing evidence. *Viera v. Viera*, 331 S.W.3d 195 (Tex. App.– El Paso 2011, no pet. h.).

Property purchased on credit during a marriage is CP, unless there is 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 a spouse to repay a loan from SP funds is not controlling. *Welder v. Welder*, 794 S.W.2d 420 (Tex. App.– Corpus Christi 1990, no writ).

- J. 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 the marriage. *TFC 4.001 et seq., 4.101 et seq.* Parties about to marry can agree that property that would ordinarily be CP will be SP.

1. Spouses Can Partition CP to SP – Spouses may partition or exchange between themselves any part of their CP, then existing or to be acquired. Property or interests transferred to a spouse by a partition agreement becomes that spouse's SP. *TFC 4.102.*

2. Income from SP – Spouses may agree that income or property arising from SP is SP of the owner. *TFC 4.103.*

- K. Agreements to Convert SP to CP** – Spouses may agree that all or part of the SP owned by either or both of them is converted to CP, provided that certain formalities are met. *TFC 4.201-4.206. Alonso v. Alvarez*, 409 S.W.3d 754 (Tex. App.–San Antonio 2013, no pet. h.)(series of agreements can be used to convert SP to CP).

NOTE – Only existing property may be converted; spouses cannot agree that future gifts and inheritances will be CP when received.

- L. Court Cannot Divest SP Owner** – Court cannot divest a spouse of his/her SP in dividing the marital state and must award SP to the party that owns the interest. *Dickinson v. Dickinson*, 324 S.W.3d 653 (Tex. App.–Fort Worth 2010, no pet.h.)(although H's pleadings did not mention division of SP, SP cannot be divided; it must be awarded to party who holds SP interest).

1. **Mischaracterization** – If the court mischaracterizes SP as CP, the error requires remand, unless the mischaracterization has only a *de minimis* effect on the division. *Matter of Marriage of Morris*, 123 S.W.3d 864 (Tex. App.–Texarkana 2003, no pet.)(case reversed because trial court mischaracterized CP land as H's SP); *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 W's SP did not require reversal because trial court found its property division was just and right regardless of any mischaracterization).

M. Property Owned Before Marriage– Property a spouse owns or claims before marriage is that spouse's SP. *TFC 3.001(1)*; *Langston v. Langston*, 82 S.W.3d 686 (Tex. App.–Eastland 2002, no pet.). 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. *TFC 3.401-3.406*; *Matter of Marriage of Jordan*, 264 S.W.3d 850, 856 (Tex. App.–Waco 2008, no pet.)(home was H's SP as it was purchased before marriage even though it was refinanced during marriage although there may be a possible claim for reimbursement).

1. **Inception of Title Rule** – Property is characterized as SP or CP at the time of the inception of title to the property. *Camp v. Camp*, 972 S. W. 2d 906 (Tex. App.–Corpus Christi 1998, pet. denied).
2. **Owned and Claimed** – The terms "owned and claimed" as used in the Family Code mean that where the right to the property accrued before the marriage, the property would be SP, even though legal title or evidence of 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. *Smith v. Smith*, 22 S.W.3d 140 (Tex. App.–Houston [14th Dist.] 2000, no pet.)(lawsuit proceeds were H's where he was defrauded by a 3rd party prior to marriage and filed suit and recovered a judgment after marriage).

All property held by either spouse before marriage remains the SP of the 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). 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 SP. *Wilkerson v. Wilkerson*, 992 S.W.2d 719 (Tex. App.–Austin 1999, no pet.).

- N. Property Acquired After Marriage** – Property a spouse acquires after the marriage ends is his/her SP. *Burgess v. Easley*, 893 S.W.2d 87 (Tex. App.– Dallas 1994, no writ).
- O. Property Acquired During Separation** – Property a spouse acquires while separated from the other spouse is CP unless the manner in which property is acquired makes it SP 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.).
- P. Proportional Ownership Interests/Mixed Character** – 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. *TFC 3.006; 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 SP and partly with community credit, the separate and community states own the property as tenants in common, and each estate owns an undivided interest in the proportion that it supplies to the consideration. *Scott v. Scott*, 805 S.W.2d 835, 838 (Tex. App.– Waco 1991, writ denied).
- Q. Form of Title** – The form of the title to property does not determine the character of the property as SP or CP, but if the instrument conveying the property recites that the property is one spouse's SP, or if the consideration for the property is from one spouse's separate estate, or both, a presumption that the property is SP arises. *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App.– Beaumont 1992, no writ).

II. Gifts

- A. Gifts are Separate Property** – Property acquired during marriage by gift is the SP of the recipient spouse, whether the gift was from the other spouse or a third party. *TFC 3.001*; *Powell v. Powell*, 822 S.W.2d 181 (Tex. App.–Houston [1st Dist.] 1991, writ denied). The gift must be absolute and may not be open to future reconsideration. *Soto v. First Gibraltar Bank, FSB San Antonio*, 868 S.W.2d 400 (Tex. App.– San Antonio 1993, writ ref'd).
- B. 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 SP must establish:
1. Donor's intent to make a gift;
 2. Delivery of the property; and
 3. Acceptance of the property.
- Dorman v. Arnold*, 932 S.W.2d 225 (Tex. App.– Texarkana 1996, n.w.h.); *Scott v. Scott*, 805 S.W.2d 835, 839-40 (Tex. App.– Waco 1991, writ denied)(jury found W did not make a gift of money to H, even though she put a \$100,000 CD in his name alone since a gift cannot occur without the intent to make a gift).
- C. Promise to Give in the Future** – 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.).
- D. 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.).
- E. Delivery of Property** – A donor delivers property when he or she releases all dominion or control over it. *Soto v. First Gibraltar Bank, FSB San Antonio*, 868 S.W.2d 400 (Tex. App.– San Antonio 1993, writ ref'd). 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). 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).

F. Encumbered Property -- 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).

G. 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).

1. Minimal Consideration – 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 H and W by H's mother during marriage was CP, where W paid mother \$10 at time she executed deed, and H 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*, __ S. W .3d __ (Tex. App.– Houston [1st Dist.] 2010, no pet. h.)(not reported); *see also Hall v. Barrett*, 126 S.W.2d 1045 (Tex. App.– Fort Worth 1939, no writ)(court stated that "much 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.")

2. Parole Evidence – Some cases have allowed parol evidence to be admitted to show the true consideration or that there was no consideration given. *Bahr v. Kohr*, 980 S.W.2d 723 (Tex. App.– San Antonio 1998, no pet.). Other cases 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*).

H. 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 gift as his/her SP. *Dutton v. Dutton*, 18 S.W.3d 849 (Tex. App.– Eastland 2000, pet. denied). TFC Section 3.001(2) and Article XVI, Section 15 of the Texas Constitution require that any property acquired by gift during the marriage is SP, therefore gifts to the community are not possible.

- I. **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 has the burden of proving 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). Testimony from a spouse's parent that property is a gift to one spouse alone is sufficient to establish SP without tracing. *Wells v. Wells*, 251 S.W.3d 834 (Tex. App.–Eastland 2008, no pet.).

Relevant Cases:

Hallum v. Hallum, WL 4910232 (Tex. App.–Houston [1st Dist.] 2010, no pet. h.)(not reported)(a stepfather considered H "part of his bounty, thus giving rise to the presumption that the stepfather conveyed real property to H as a gift).

In re Royal, 107 S.W.3d 846 (Tex. App.– Amarillo 2003, no pet.)(W 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).

Matter of Marriage of Royal, 107 S.W.2d 846 (Tex. App.– Amarillo 2003, no pet.)(grandparent's testimony that they forgave part of loan they made to spouses to buy a house was a gift to H was rebutted by contrary evidence of a gift to H and W).

McMahen v. McMahan, 2014 Tex. App. Lexis 6154 (Tex. App.–Amarillo 2014)(mem. op.)(court found that W's parents' annual gift checks to H were intended to be gifts to H and therefore his SP at the time the gifts were made).

In re Marriage of Moncey, 404 S.W.3d 701 (Tex. App.– Texarkana 2013, no pet.)(evidence presented by W and others sufficient to establish there was no intent to make a gift to H – trial court's finding that land was W's SP was upheld).

J. Interspousal Gifts

1. **Gifts of Interest in CP** – One spouse may give the other his/her interest in CP, and the property becomes the recipient spouse's SP. *Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726 (Tex. App.- Corpus Christi 1993, writ denied).

Gifts Presumed to Include Income – 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. *TFC 3.005*.

2. **Presumption of Gift** – If a spouse takes title to his/her separate real property in the names of both spouses, a presumption arises that the spouse who purchased the property with SP 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 H took title of SP lake lot in names of H and W, court held H gifted undivided one-half interest in lake lot to W); *Peterson v. Peterson*, 595 S.W.2d 889 (Tex. Civ. App.– Austin 1980, writ dismissed w.o.j.)(presumption overcome by H's testimony that no gift was intended); *Whorall v. Whorall*, 691 S.W.2d 32, 35 (Tex. App.– Austin 1985, writ dismissed)(W testified she did not intend a gift; trial court's finding of SP was upheld).
3. **Real Estate** – A conveyance of real estate to one spouse during marriage generally creates a presumption of CP; however, if a deed recites that the conveyance is to the spouse as his/her SP, this overrides the community presumption and creates a new presumption that the property is the SP of grantee spouse. *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 burden to the other spouse to rebut the SP presumption, and failure to rebut results in a conclusive finding of SP.

In re Marriage of Skarda, 345 S.W.3d 665 (Tex. App. – Amarillo 2011, no pet.)(H refinanced SP house during marriage and signed deed conveying property to H and W as “joint tenants with a right of survivorship”– held that H transferred a one-half SP interest to W by gift).

Motley v. Motley, 390 S.W.3d 689 (Tex. App.– Dallas 2013, pet. denied)(court found refinance of W's SP and conveyance to H of undivided one-half interest in the property was a gift to H and therefore his SP).

Magness v. Magness, 241 S. W. 3d 910 (Tex. App.– Dallas 2007, pet. denied)(W signed a deed as part of refinancing and testified she did not intend the deed to be a gift transferring any ownership to H; court held each spouse owned a one-half separate interest in home – "[a] deed for property from one spouse as grantor to the other spouse as grantee creates a presumption grantee spouse received the property as SP by gift" – presumption may be rebutted by proof of fraud, accident, or mistake and W did not testify to any facts indicating this).

Pace v. Pace, 160 S.W.3d 706 (Tex. App.– Dallas 2005, pet. denied)(house titled in both spouse's name but W was able to trace purchase money to her separate funds and house determined to be W's SP).

Peterson v. Peterson, 595 S.W.2d 889 (Tex. Civ. App.– Austin 1980, writ dis'm'd w.o.j.)(presumption overcome by H's testimony that no gift was intended).

Harrison v. Harrison, 321 S.W.3d. 899 (Tex. App.–Houston [14th Dist.] 2010, no pet. h.)(court found gift of one-half of the property was intended).

- III. Devise or Descent** – Property acquired by one of the spouses by devise or descent is that spouse's SP. *TFC 3.001(2)*; *Walton v. Johnson*, 879 S.W.2d 942 (Tex. App.– Tyler 1994, writ denied).

"Devise" means the acquisition of property by last will and testament. "Descent" means the acquisition of property by inheritance without a will. Whether by devise or descent, legal title vests in beneficiaries upon the death of the decedent. *Probate Code 37*.

IV. Personal Injury Recoveries and Tort Damages

- A. Personal Injuries** – Any recovery for a spouse's personal injuries sustained during the marriage is that spouse's SP, after deducting any recovery for medical expenses and lost wages during the marriage. *TFC 3.001 (3)*; *Slaton v. Slaton*, 987 S.W.2d 180 (Tex. App.– Houston [14th Dist.] 1999, pet. denied).

Personal injuries include disfigurement, past and future physical pain and suffering and mental suffering.

- B. Medical Expenses, Lost Wages and Loss of Earning Capacity** – CP.

- C. Loss of Consortium** – Damages for the other spouses' loss of consortium are that spouse's SP. *Osborn v. Osborn*, 961 S.W.2d 408 (Tex. App.– Houston [1st Dist.] 1997, no writ).

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

- E. Burden of Proof** – 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 SP. *Cottone v. Cottone*, 122 S.W. 3d 211 (Tex. App.– Houston [1st Dist.] 2003, no pet.); *Licata v. Licata*, 11 S.W.3d 269, 273 (Tex. App.– Houston [14th Dist.] 1999, no pet).

Failure to demonstrate which part of settlement proceeds are SP and which part are CP results in conclusion that all of the proceeds are CP. *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); *Henslee v. Henslee*, WL 2982928 (Tex. App.– Tyler 2010, no pet. h.)(not reported)(trial court did not err by concluding that all of H's personal injury settlement was CP where he failed to sustain his burden of demonstrating what part of proceeds was CP and what part was SP).

V. Tracing/Mutation

- A. **Generally** – Once the character of a property interest is determined, whether SP or CP, the property interest will retain that character after undergoing a change in form and will not be changed by the sale, exchange, or substitution of the property interest. *Gleich v. Bongio*, 99 S.W.2d 881 (Tex. 1937).

Exchange of SP - Property acquired in exchange for SP becomes the SP of the spouse whose SP was exchanged. *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App.– Corpus Christi 1997, no writ).

Sale of SP - Proceeds of the sale of SP are the SP of spouse whose property was sold. *Scott v. Scott*, 805 S.W. 2d 835 (Tex. App.– Waco 1991, writ denied).

- B. **Tracing** – A spouse claiming that property is his/her SP must trace and clearly identify the property to show that it was originally his/her SP or that it was acquired with his/her SP. *Pearson v. Fillingim*, 332 S.W.2d 361 (Tex. 2011)(per curium)(H did not provide any evidence that mineral deeds were his SP).

If SP can be definitely traced and identified, it remains SP regardless of the fact that the SP may undergo mutations or changes in form. *Harris v. Harris*, 765 S.W.2d 798, 802 (Tex. App.– Houston [14th Dist.] 1989, writ denied). 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).

- C. **Commingled Property** – SP commingled with CP remains SP as long as its identity can be traced, but where SP has become so commingled with CP as to defy segregation and identification, the entire property is presumed to be CP. *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. App.– San Antonio 1990, no writ)(entire herd of cattle was CP, even though some cattle may initially have been H's SP).
- D. **Funds on Account** – As long as separate funds can be traced, they may be deposited in a joint account without losing their character as SP. *Celso v. Celso*, 864 S.W.2d 652 (Tex. App.– Tyler, 1993, no writ). The deposit of community and separate funds into the same account does not divest the separate funds of their identity and establish the entire account as CP, as long as the separate funds can be traced and the trial court can determine each party's interest. *Zagorski v. Zagorski*, 116 S.W.3d 309 (Tex. App.– Houston [14th Dist.] 2003, pet. denied). When SP and CP funds are commingled in a manner defying segregation and identification, it is presumed that the entire fund consists of CP. *Robles v. Robles*, 965 S.W.2d 605 (Tex. App.– Houston [1st Dist.]1998, no writ).

E. Tracing Principles

1. **Community Out First** – Where a joint bank account contains both CP funds and SP funds, it is presumed that CP funds are withdrawn before SP funds, and where there are sufficient funds at all times to cover the SP balance in the account at the time of divorce, it is presumed that the balance remains SP. *Hill v. Hill*, 971 S.W.2d 153 (Tex. App.– Amarillo 1998, no pet.).

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). 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).

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.).

2. **Clearinghouse** – The clearinghouse method assumes that after one or more identifiable sums of separate funds went into an account, and then identifiable withdrawals were made that are clearly the withdrawal of the separate funds, then the withdrawals are SP. *Estate of Hanau v. Hanau*, 730 S.W.2d 66 (Tex. 1987).
3. **Identical Sum Inference** – The identical sum inference method is similar to the clearinghouse method except that it involves only one deposit followed by an identical withdrawal, usually a short time later. *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973).
4. **Minimum Sum Balance** – The minimum sum balance method is useful for funds on account in which a portion can be conclusively proven to be SP, 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 SP. This theory presumes that only SP remains after all other withdrawals are made. *Huval v. Huval*, 2007 WL 1793771 (Tex. App.– Beaumont 2007, no pet.)(mem. op.).
5. **Pro Rata** – If mixed funds are withdrawn from an account, the withdrawal should be pro rata in proportion to the respective balance of SP funds and CP funds in the account. By using the pro rata approach, it would not be necessary to analyze the character of each withdrawal.

6. **Reverse Commingling** – Reverse commingling occurs when CP and SP have been hopelessly mixed and the entire account becomes SP, such as where one spouse is managing the SP of the other spouse. In *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.– Dallas 1955, writ dismissed w.o.j.), H managed W's SP funds and commingled them with CP funds to the extent CP and W's SP became so commingled such that it could not be identified. Based on the application of trust principles, H had a fiduciary duty to protect W's SP, thus the entire amount became W's SP. See *Mazique v. Mazique*, 742 S.W.2d 805, 807 (Tex. App.– Houston [1st Dist.] 1987, mand. overruled)(managing spouse has burden of accounting for proper use of funds).

VI. Business Interests

- A. **Sole Proprietorships** – Where one spouse is the sole proprietor of a business before marriage which he/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 CP. *TFC 3.002; In the Matter the Marriage of York*, 613 S.W.2d 764 (Tex. Civ. App.– Amarillo 1981, no writ).

If a spouse started a business before marriage and continued it afterward, the SP and CP components of the business are likely to be commingled, as assets the spouse owned before marriage are SP and the income of the business earned after marriage is CP. *Hopf v. Hopf*, 841 S.W.2d 898 (Tex. App.– Houston [14th Dist.] 1992, no writ)(interest in building which H owned before marriage was his SP, but income and accounts receivable from his CPA business, which was located in the building, were CP). If the spouse is unable to trace the SP part of the business, he/she may be entitled to reimbursement for the investment of the SP in the business. *Schechter v. Schechter*, 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).

B. Partnerships

1. **Partnership Property** – Partnership property is neither SP nor CP. The partner's interest in the partnership itself (i.e. the right to receive a share of the partnership profits and surplus) may be SP or CP. Partnership property is not the property of the partners, but of the partnership, and neither a partner nor a spouse has an interest in partnership property that can be transferred, either voluntarily or involuntarily. *Gibson v. Gibson*, 190 S.W.3d 821 (Tex. App.– Fort Worth 2006, no pet.).
2. **Transfer of Partnership Interest** – Unless prohibited by the partnership agreement, the partnership interest is transferable. *Tex. Bus. Org. Code 152.401*. However, the transferee does not have the right to participate in management decisions or conduct business on behalf of the partnership. *Tex. Bus. Org. Code 152.402*. A non-partner spouse who receives an interest in a partnership pursuant to a decree of divorce is deemed a transferee. *Tex. Bus. Org. Code 152.406(a)(1)*. Depending on the terms of transfer, the transferee only receives the right to receive distributions to which the partner would be entitled. *Tex. Bus. Org. Code 152.404*. The transferee does not become liable for partnership liabilities. *Tex. Bus. Org. Code 152.404(c)*.
3. **Inception of Title Rule Applies** – Under the inception of title rule, if the interest in the partnership is acquired before marriage, the interest is SP. *Harris v. Harris*, 765 S.W.2d 798 (Tex. App. – Houston [14th Dist.] 1989, writ denied). The same is true where the interest is acquired by gift or inheritance.
4. **No Piercing of Veil in Partnerships** – One cannot "pierce the veil" of a partnership in a divorce context. *Lifshutz v. Lifshutz*, 61 S.W.3d 511 (Tex. App.– San Antonio 2001, pet. denied); *but see In re Sewell (Alvarado Land Dev., Inc. v. Sewell)*, 413 B.R. 562 (Bankr. E.D. Tex. 2009; *Genssler v. Harris County*, 2010 WL 3928550 (Tex. App. – Houston [1st Dist.] 2010, no pet.)
5. **Distributions of Partnership Profits or Income** – Distributions of a partner's share of profits and income during marriage are CP, even if the partner's interest is SP. *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App.– Dallas 1987, writ ref'd n.r.e.); *Lifshutz v. Lifshutz*, 199 S.W.3d 9 (Tex. App.– San Antonio 2006, pet. denied).
6. **Undistributed Profits** – Profits earned but retained for reasonable needs of the 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).

C. Corporations

1. **Inception of Title Rule Applies** – Under the inception of title rule, stock in a corporation that was incorporated during the marriage is CP, and stock acquired before marriage, or during the marriage by gift, devise, or descent, is SP. *TFC 3.001*. 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 dismiss'd).
2. **Increase in Value** – An increase in the value of SP corporate stock that is due to natural growth or the fluctuations of the market remain SP. *Dillingham v. Dillingham*, 434 S.W.2d 459 (Tex. Civ. App.– Fort Worth 1968, writ dismiss'd). A shareholder's interest in the corporation does not change when the corporation acquires or disposes of assets. If the increase in value is due to the time, toil and talent of a spouse, the stock remains SP, but the community estate may have a right to reimbursement. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984); *TFC 3.402(a)(2)*.
3. **Reimbursement** – The community estate may be entitled to reimbursement for community funds used for the maintenance of a SP corporate interest. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.– Houston [14th Dist.] 1975, writ dismiss'd).

Jensen Reimbursement Claim – There is a common law reimbursement claim (*Jensen* claim) and a statutory claim. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984); *TFC 3.402(a)(2)*. The statutory claim is easier to prove than the common law claim in that it is only necessary to prove **inadequate compensation** for the time toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse. *TFC 3.402(a)(2)*. A salary expert can be hired in these situations, and also CPAs have tables for reasonable compensation.
4. **Capitalization With Separate Property** – If a corporation is capitalized solely with a spouse's SP, the shares will be SP. *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982).
5. **Ownership of Corporate Assets** – Corporate assets are owned by the corporation. *Legrand-Brock v. Brock*, 246 S.W.3d 318 (Tex. App. – Beaumont [9th Dist.] 2008, pet. denied). Individual stockholders have no ownership interest in corporate assets.

6. **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 SP, the liquidating dividend remains SP. *Legrand-Brock v. Brock*, 246 S.W.3d 318 (Tex. App.– Beaumont 2008, pet. denied).
7. **Dissolution of Corporation** – If a spouse's interest in the corporation is SP, the assets he/she receives upon dissolution are also SP. *Hilliard v. Hilliard*, 725 S.W.2d 722 (Tex. App.– Dallas 1985, no writ).
8. **Alter Ego** – A corporation exists as a separate entity from its shareholders. 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). Note that the corporation must be joined in an alter ego case.

The theory of alter ego can be 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 dismissed)(corporate assets held to be CP as H's SP corporation was his alter ego where corporation owned such items as family home and furnishings).

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

- A. Termination Payments** – Termination payments may be CP. *Matter of Marriage of Wade*, 923 S.W.2d 735 (Tex. App.– Texarkana 1996, writ denied)(insurance agent’s termination payments based on total commissions for year preceding retirement were CP; payments were deferred compensation earned throughout employment because largest component of commissions in any given year was attributable to policy renewals).
- B. 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 CP. *Whorrall v. Whorrall*, 691 S.W.2d 32 (Tex. App.– Austin 1985, writ dismissed); *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 H to leave company, purely discretionary with company.)
- C. Current Wages** – Wages are SP or CP depending on the inception of title of the wages (i.e. when the wages were earned, not paid). *Licata v. Licata*, 11 S.W.3d 269 (Tex. App.–Houston [14th Dist.] 1999, pet. denied)(income from attorney's completed cases for which right to income had vested was CP).
- D. Future Income** – Future income of a spouse is that spouse's SP. *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App.– Fort Worth 2004, no pet.)(court found that H's "guaranteed" contract (future income) as a baseball player executed during the marriage was not CP); *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/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 not divisible upon divorce. *Cunningham v. Cunningham*, 183 S.W.2d 985, 986 (Tex. Civ. App.– Dallas 1944, no writ).

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. *Vibroch v. Vibrock*, 549 SW. 2d 775 (Tex. App.–Fort Worth 1977, writ refused n.r.e.)(future income on renewal commissions from insurance policies written during marriage not subject to division on divorce since H's right to that income was subject to conditions precedent which would have to occur after the date of divorce – H would need to continue his contract with his insurance company and service the business on the books; H's property right in the renewal premiums had not yet come into existence at the time of the divorce and may never come into existence; H had an anticipatory right which was neither an ascertainable, vested or divisible interest);

Murray v. Murray, 276 S.W.3d 138 (Tex. App.– Fort Worth 2008, no pet. h.)(H was broker in a multiple-level marketing company – court did not have power to award W any residual income that constituted an expectancy).

- E. Bonuses** – Compensation earned by the efforts of a party prior to the date of a marriage or after the date of divorce are SP, regardless of when the income is received. 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 bonus. For example, if an employee's bonus is \$100,000 for work performed in 2015, and the parties were divorced on July 1, 2015, then the community portion of the bonus would be \$50,000.

- F. Signing Bonuses** – Signing bonuses may not all be CP even if the monies are received during the marriage if the spouse has to perform services after the date of divorce. *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App.– Fort Worth 2004, no pet.)(court found that H's "guaranteed" contract (future income) as a baseball player executed during the marriage was not CP.)

VIII. Insurance – The court must divide or award the rights of each spouse in an insurance policy in a decree. *TFC 7.004*.

A. Insurance Other Than Life Insurance

1. **Proceeds from Casualty Loss** – 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. *TFC 3.008(a)*.
2. **Disability and Worker’s Comp Payments** – Disability payments and worker's compensation payments are CP to the extent they are payments to replace earnings during marriage. To the extent that any insurance payment or worker's compensation payment is intended to replace earnings while the disabled or injured spouse is not married, the recovery is SP of the disabled or injured spouse. *TFC 3.008(b)*.
3. **Insurance Not Divided** – If the spouses' rights in an insurance policy are not divided upon divorce as required by TFC 7.004, 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. *TFC 7.005(b)*.

B. 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 CP. *Jackson v. Smith*, 703 S.W.2d 791 (Tex. App.– Dallas 1985, writ ref'd n.r.e.).

1. **Cash Surrender Value** – The cash surrender value of a life insurance policy acquired during marriage is also CP 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 dismissed w.o.j.).

2. **Inception of Title Rule** – The inception of title rule governs the character of life insurance policies. *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001). A life insurance policy issued to a spouse before marriage is SP. The policy, however, is subject to a claim of reimbursement to the community estate for 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 SP. 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 CP. *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001).

3. **Beneficiary Designation** – If a divorce decree is rendered after an insured has designated his/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:

- a. the decree designates the insured's former spouse as the beneficiary;
- b. the insured redesignates the former spouse as the beneficiary after rendition of the decree; or
- c. 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. *TFC 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. *TFC 9.301(b)*.

IX. Real Property

- A. **Inception of Title Rule** – Under the inception of title rule, real property acquired before marriage is SP. *TFC 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).
- B. **Contract Before Marriage** – If one spouse enters into a contract for deed before marriage, the property is SP 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.).
- C. **Character Not Changed** – When character as SP attaches, it is immaterial that part of the unpaid purchase price is later paid from CP funds, since the status of property as being either SP or CP is determined at the time of its acquisition. *Villarreal v. Villarreal*, 618 S.W.2d 99 (Tex. Civ. App.– Corpus Christi 1981, no writ).
- D. **Mixed Title** – If property purchased in part out of one spouse's SP funds and in part out of CP, 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.).
- E. **Property Improved or Refinanced** – 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 the 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).

The use of community funds to improve SP 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); *Kite v. Kite*, WL 1053014 (Tex. App.– Houston [1st Dist.] 2010, no pet. h.)(not reported)(H's real property remained SP even though community funds were used to improve H's SP by building the marital residence).

- F. **Deed Delivered After Marriage** – In *Burgess v. Easley*, 893 S.W.2d 87 (Tex. Civ. App.– Dallas 1995, no writ), property was deeded to H by his parents during marriage. Although the deed was dated during marriage, it was not recorded until after H and W divorced. Court found the property was H's SP since he had no right in the property until deed was delivered when it was filed after divorce.

- G. **Fixtures** – Whatever is affixed to the land becomes part of the land. *Cantu v. Harris*, 666 S.W.2d 638, 640 (Tex. App.– Corpus Christi 1983, no writ).
 - H. **Crops** – Crops planted during the marriage are CP. *McGarraugh v. McGarraugh*, 177 S.W.2d 296 (Tex. Civ. App.– Amarillo 1943, writ dism'd).
 - I. **Timber** – Timber grown on SP is CP. *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App. – Houston [1st Dist.] 1995, no writ).
- X. **Mineral Interests** – Minerals are a part of the realty and have the same character as the realty. *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953). The use of SP funds to operate CP oil and gas interests, or of CP funds to operate SP interests, does not change 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 SP land are SP. *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 are CP. 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).

- A. **Royalties** – Mineral royalties are considered to be the proceeds of the sale of part of real property, so if the property is SP, the royalty payments are also SP. *Welder v. Welder*, 794 S.W.2d 420 (Tex. App.– Corpus Christi 1990, no writ).
- B. **Bonus Payments** – A bonus payment from an oil and gas lease belonging to a separate estate is SP. *Lessing v. Russek*, 234 S.W.2d 891 (Tex. Civ. App.– Austin 1950, writ ref'd n.r.e.).
- C. **Delay Rentals** – Delay rentals from SP are CP. *Lessing v. Russek*, 234 S.W.2d 891 (Tex. Civ. App.– Austin 1950, writ ref'd n.r.e.).

XI. Retirement Benefits – Unmatured retirement benefits are a form of deferred compensation, and such benefits earned during an employee's marriage are CP. *Matter of Marriage of Wade*, 923 S.W.2d 735 (Tex. App. – Texarkana 1996, writ denied). Generally, retirement benefits that accrued prior to the parties' marriage are the employee's SP, while those that accrue during the marriage are CP, and the court can distribute only the portion of the benefits that accrued during marriage. *Sanderlin v. Sanderlin*, 929 S.W.2d 121 (Tex. App. – San Antonio 1996, writ denied). A QDRO is needed to divide qualified plans. NOTE that an IRA is not a qualified plan under the Internal Revenue Code, so QDRO's do not apply.

A. Defined Benefit Plans – A defined benefit plan, which is often referred to as a pension plan, calculates benefits using a fixed formula to calculate monthly lifetime payments that typically factor in final pay and number of years service with the employer. Retirees choose between single life annuities, which provide regular payments until the death of the pension recipient, and joint and survivor annuities, which continue to make payment to the spouse or ex-spouse after the death of the retired worker. A single life annuity generates a higher monthly payment, whereas a joint and survivor annuity generates a lower monthly payment due to the insurance against the risk that the retiree will die before the spouse or ex-spouse, leaving the survivor with insufficient income.

The principles and formulas set forth in *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983) and *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977) are the benchmarks used by the courts in dealing with the character and division of defined benefit plans. *Freeman v. Freeman*, 387 S.W.3d 772 (Tex. App.– El Paso 2012, no pet.)(*Taggart* formula properly used).

B. Defined Contribution Plans – A defined contribution plan (401(k) plans, profit sharing plans and money purchase plans) is an employer sponsored plan with an individual account for each participant. The benefit is based on contributions made by either the employee or the employer into an individual account and the investment gains of those funds.

A spouse's SP interest in a defined-contribution plan can be determined using characterization rules that apply to non-retirement assets (**tracing method**). *TFC 3.007(c)*. The amount in the account on the date of marriage can also be used to obtain the SP interest, and the community interest is determined by subtracting the value of the account on the date of marriage from the value of the account on the date of divorce (**subtraction method**). NOTE that the subtraction method is not applicable to IRAs as these accounts must be traced.

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

C. Military Retirement Benefits – Calculation of Community Interest

The community's interest in military retirement benefits is based on the amount of retirement pay that correspond to the rank held by the service member on the date of divorce so that the community's interest in military retirement benefits is valued as of the date of divorce. *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987). The percentage of the benefits subject to division is calculated by dividing the service member spouse's retirement points accrued during the parties' marriage by the total retirement points accrued. *Bloomer v. Bloomer*, 927 S.W.2d 118 (Tex. App. – Houston [1st Dist.] 1996, writ denied).

The *Taggart* formula does not apply in a situation where a former spouse has not yet retired, and instead the court should use the *Berry* formula which changes the denominator to the number of months employed under the plan at the time of divorce. *Hicks v. Hicks*, 348 S.W.3d 281 (Tex. App.– Houston 2011, no pet.).

When faced with military retirement benefits in your cases, make sure that you understand it or get an expert involved. *See Torres v. Torres*, 2013 WL 776278 (Tex. App. – Houston [14th Dist.] 2013)(not reported)(W and her attorney didn't understand the retirement which was disclosed by H, and H had no obligation to explain it; therefore W received 40% of nothing).

XII. Stock Options/Restricted Stock – The separate or community interest in stock option plans or restricted stock plans is determined using a formula set forth in TFC 3.007(d)-(e) as follows:

- (d) A spouse who is a participant in an employer-provided stock option plan or an employer-provided restricted stock plan has a SP 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 SP 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 SP 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.

XIII. Miscellaneous Assets

- A. Pets** – The characterization of a pet as SP or CP 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).
- B. Prejudgment and Postjudgment Interest** – Prejudgment and postjudgment interest is characterized when the interest accrued. *Smith v. Smith*, 22 S.W.3d 140 (Tex. App.– Houston [14th Dist.] 2000, no pet.)(prejudgment and postjudgment interest earned during marriage was CP even though the actual damages recovered by spouse were SP).
- C. 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.).
- D. Lottery Winnings** – Winnings from a lottery ticket purchased with SP funds during the marriage are CP. *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 CP).
- E. Patents** – A patent in the name of one spouse that was acquired during marriage is CP. *Shestawy v. Shestawy*, 150 S.W.3d 772 (Tex. App.– San Antonio 2004, pet. denied). Income from patents and income from all separately owned intellectual property is CP. *Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App.– Houston [1st Dist.] 2003, no pet.).
- F. Children**
- 1. Earnings of a Child** – The earnings of an unemancipated child and any property purchased from these earnings are the CP 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 CP 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). 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 SP. *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

- G. Disability Benefits or Worker's Compensation Benefits** – If a person becomes disabled or is injured, any **disability insurance payment** or **workers' compensation payment** is CP 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 SP of the disabled or injured spouse. *TFC 3.008(b)*.

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

- H. Social Security Benefits** – Social Security benefits, including disability benefits, are the SP of the recipient spouse. *Richard v. Richard*, 659 S.W.2d 746 (Tex. App.– Tyler 1983, no writ). A divorced spouse may 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: (a) applies for such benefits; (b) is at least 62 years old; (c) is not currently married; and (d) 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),(c)*. In addition, the spouse receiving the secondary benefit must have been married to the other spouse for at least ten years, and the divorce must be final. *42 U.S.C.A. §§ 416(d)*.

Social Security Disability Benefits – Section 407(a) of the Federal Social Security Act preempts Texas law and provides that **social security disability benefits** are the SP of the receiving spouse, however, foreign social security-type benefits are presumed CP absent some binding authority to the contrary. *In the Matter of the Marriage of Everse*, No. 07-11-00220-CV (Tex. App.– Amarillo 2013)(trial court erred in treating foreign benefits in the same manner as US benefits and the CP presumption prevails).

I. Stock

- 1. Cash Dividends** – Dividends paid in cash on either SP or CP stock or mutual fund shares are CP. *Amarillo Nat'l Bank v. Liston*, 464 S.W.2d 395 (Tex. Civ. App.– Amarillo 1970, writ ref'd n.r.e.); *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 SP are SP. *Wohlenberg v. Wohlenberg*, 485 S.W.2d 342 (Tex. Civ. App.– El Paso 1972, no writ).
- 3. Stock Splits** – Stock splits on SP stock are SP. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.– Houston [14th Dist.] 1975, writ dismissed w.o.j.).

XIV. TRUSTS

- A. **Trust Definitions** – A trust is 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. *Rest 3d Trusts, Sec. 2*.

Settlor/Grantor – person who creates a trust.

Trust property – property held in trust (original corpus/undistributed income).

Trustee – person who holds property in trust – legal title, not equitable title.

Beneficiary – person for whose benefit property is held in trust. *Restatement 3d Trusts, Section 3*.

- B. **Interests in a Trust** – A spouse's interest in a trust can be characterized as SP or CP. A trust generally involves two interests that can be characterized – ownership of the corpus of the trust and ownership of the income from the trust.

If a spouse is the beneficiary of a trust, he or she holds equitable title, not legal title, to the trust property; the spouse has not "acquired" the property, and it is therefore not CP, 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).

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

- C. **Trust Corpus** – If the corpus is funded by SP, the corpus will be SP; if the corpus is funded with CP, the corpus will be CP. *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 SP was SP); *Cleaver v. Cleaver*, 935 S.W.2d 491 (Tex. App. – Tyler 1996, no writ)(corpus of trust established before marriage was SP, and income was also SP); *Hardin v. Hardin*, 681 S.W.2d 241 (Tex. App.–San Antonio 1984, no writ)(corpus of trust created by gift was SP); *Dickinson v. Dickinson*, 324 S.W.3d 653 (Tex. App.–Fort Worth 2010, no pet. h.)(H's remainder interest in the trust corpus was obtained by devise and is his SP).

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).

D. 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:

1. Was the income distributed or undistributed during the marriage;
2. Who created the trust – a third party of a spouse for his or her own benefit (self-settled trust);
3. Does the spouse have any interest in the corpus of the trust; and
4. 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).

1. Distributed Income from Trust

Distributed Income from 3rd Party Trust – Income distributed during marriage from a third-party trust in which a spouse has a beneficial interest in the corpus is CP. *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App.–Corpus Christi 1997, no writ).

Even if the corpus of the trust is the spouse’s SP, any income generated from the corpus during marriage is CP. *See Sharma v. Routh*, 302 S.W.3d 355 (Tex. App.–Houston [14th Dist] 2009, no pet.)(court held that when a spouse receives distributions of trust income under an irrevocable trust during marriage, the income distributions are CP only if the recipient has a present possessory right to part of the corpus); *see also Benavides v. Mathis*, 2014 WL 547904 (Tex. App.–San Antonio)(not released for publication).

It has also been held that income distributed from trusts created by third parties, and the property purchased with that income, is the SP 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 SP 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 SP.

Distributed Income from Self-settled Trust – 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 CP.

2. **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 SP. *Cleaver v. Cleaver*, 935 S.W.2d 491 (Tex. App. – Tyler 1996, no writ).

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 trustee has absolute discretion as to distribution of income), the undistributed income in the trust is SP. *In Re Marriage of Burns*, 573 S.W.2d 555 (Tex. Civ. App.-- Texarkana 1978, writ dismissed)(undistributed income earned during marriage was SP as beneficiary did not have past or present right to compel distribution); *Buckler v. Buckler*, 424 S.W.2d 514 (Tex. App.–Fort Worth 1967, writ dismissed)(undistributed trust income not CP if trustee has right to withhold it from 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 undistributed trust income during marriage, such income remained part of trust and was not subject to division as it was not CP); *Currie v. Currie*, 518 S.W.2d 386 (Tex. Civ. App.–San Antonio 1974, writ dismissed)(undistributed trust income not CP where there is no obligation to make a distribution).

Mandatory Pay Trust – Undistributed income on trust corpus that accrues during the marriage is CP 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 half of the trust corpus during marriage and chose to leave vested portion in control of trustee; held that income from that vested portion was CP); *Cleaver v. Cleaver*, 935 S.W.2d 491 (Tex. App. – Tyler 1996, no writ)(if spouse has right to distribution of income from trust, income is CP).

3. **Undistributed Income Retained in Self-Settled Trust** – If undistributed income earned during marriage is required to be distributed under the terms of the trust agreement (mandatory trust), the undistributed income should be CP. 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 H was sole beneficiary of SP corpus; undistributed income

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

E. Alter Ego – Trusts

The alter ego doctrine can be applied to trusts where “constructive control” over the assets of the trust is held by the beneficiary by virtue of his/her relationship with the trustees. *In re Marriage of Long*, 542 S.W.2d 712 (Tex. Civ. App.–Texarkana 1976, no writ)(the court will apply the alter ego doctrine to classify trust assets as marital property, even the trust has legal title when a spouse has sufficient ownership of the assets); *In re Marriage of Burns*, 573 S.W.2d 555 9Tex. Civ. App.–Texarkana 1978, writ dism’d)(court held that the income from trusts was not marital property because the income was not “acquired” by the spouse, and since the income had not been distributed, it was the property of the trust).

Conduct that may indicate alter ego status may consist of moving assets in and out of a trust for the convenience of a beneficiary and distributions to a beneficiary that are not justified under terms of trust.

F. Jurisdiction – A suit against a trust must be brought against its legal representative, the trustee. The trust must be joined as a party. *Ray Malooly Trust v. Juhl*, 186 S.W.3d 68 (Tex. 2006).

XV. Reimbursement

A. Reimbursement Generally

1. Equitable Remedy – Reimbursement is an equitable remedy and a court of equity is bound to look at all facts and circumstances and determine what is fair, just and equitable. *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988).
2. Discretion with Court – Reimbursement is not available as a matter of law but lies within the discretion of the court. *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App.–Houston [14th Dist.] 1996, no writ).
3. Reimbursement Arises – An equitable right of reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit. *TFC 3.402*.
4. Offsets – A trial court resolves a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset if the court determines it to be appropriate. *TFC 3.402(b)*.

Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate, except that the separate estate of a spouse may not claim an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by the separate estate against contributions made by the community estate to the separate estate. *TFC 3.402(c)*.

The party seeking an offset to a claim for reimbursement has the burden of proof with respect to the offset. *TFC 3.402(e)*.

5. Improvements – Reimbursement for funds expended by a marital estate for improvements to another marital estate shall be measured by the enhancement in value to the benefitted marital estate. *TFC 3.402(d)*.

B. Claim for Reimbursement – A claim for reimbursement includes:

1. Payment by one marital estate of the unsecured liabilities of another marital estate;
2. **Inadequate compensation** for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse;
3. The reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage;
4. The reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received.
5. The reduction of the principal amount of that part of a debt, including a home equity loan:
 - a. incurred during a marriage;
 - b. secured by a lien on property;
 - c. incurred for the acquisition of, or for capital improvements to, property;
6. The reduction of the principal amount of that part of a debt:
 - a. incurred during a marriage;
 - b. secured by a lien on property owned by a spouse;
 - c. for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached; and
 - d. incurred for the acquisition of, or for capital improvements to, property;
7. The refinancing of the principal amount described by 3-6 above to the extent the refinancing reduces that principal amount in a manner described by the applicable subdivision;
8. Capital improvements to property other than incurring debt; and
9. The reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses. *TFC 3.402(a)*.

- C. **Proving a Claim for Reimbursement** – To prove a claim for reimbursement, the spouse seeking reimbursement must establish the following: (1) a contribution was made by one marital estate to another; (2) the contribution was reimbursable; and (3) the value of the contribution. See *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982); *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. App.–San Antonio 1990, no writ)(element 3).

A spouse seeking reimbursement from the community estate for contributions made by his separate estate must prove by clear and convincing that the funds expended were SP. *Henry v. Henry*, 48 S.W.3d 468 (Tex. App.–Houston [15th Dist.] 2001, no pet.); *Williams v. Williams*, No. 2-04-230-CV (Tex. App.–Fort Worth 2005, no pet.)(memo op.); *Beard v. Beard*, 49 S.W.3d 40 (Tex. App.–Waco 2001, pet. denied).

Contributions made during marriage are presumed to be made with community property. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. App.–Houston [14th Dist.] 1975, writ dismissed); *TFC 3.003*.

- D. **Jensen Reimbursement Claim** – There is a common law reimbursement claim (*Jensen* claim) and a statutory claim. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984); *TFC 3.402(a)(2)*.

Common Law Claim – The common law claim is difficult to prove since the following must be shown: reasonable value of the time and effort expended to enhance the SP estate, other than that reasonably necessary to manage and preserve the estate, less the compensation received for that time and effort in the form of salary, bonus, dividends. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984).

Statutory Claim – The statutory *Jensen* reimbursement claim is easier to prove than the common law claim in that it is only necessary to prove **inadequate compensation** for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse. *TFC 3.402(a)(2)*. A salary expert can be hired in these situations, and also CPAs have tables for reasonable compensation.

- E. **Nonreimbursable Claims** – The court may not recognize a marital estate's claim for reimbursement for the following:

1. Child support, alimony or spousal maintenance;
2. Living expenses of a spouse or child;
3. Contributions of property of a nominal value;
4. Payment of a liability of a nominal amount; or
5. Student loans.

- F. **Equitable Lien** – the court may impose an equitable lien on the property of a benefitted marital estate to secure a claim for reimbursement against that property by a contributing marital estate. *TFC 3.406(a)*.
- G. **Pleadings** – Claims for reimbursement must be pled. *Raymond v. Raymond*, 190 S.W.3d 77 (Tex. App.– Houston [1st Dist.] 2005, no pet.).
- H. **Disposition of Claim for Reimbursement** – The court must determine the rights of the spouses in a claim for reimbursement and apply equitable principles to:
 - 1. determine whether to recognize the claim after taking into account all the relative circumstances of the spouses; and
 - 2. order a division of the claim for reimbursement, if appropriate, in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage. *TFC 7.007*.

XVI. Fraud on the Community/Reconstituted Estate

- A. **Reconstituted Estate Defined** – Reconstituted estate means the total value of the community estate that would exist if an actual or constructive fraud on the community had not occurred. *TFC 7.009(a)*.
- B. **Remedy for Fraud** – If it is determined that a spouse has committed actual or constructive fraud on the community, the court shall:
 - 1. calculate the value by which the community estate was depleted as a result of the fraud on the community and calculate the amount of the reconstituted estate; and
 - 2. divide the value of the reconstituted estate between the parties in a manner the court deems just and right. *TFC 7.009(b)*.
- C. **Just and Right Division of Reconstituted Estate** – In making a just and right division of the reconstituted estate under TFC 7.001, the court may grant any legal or equitable relief necessary to accomplish a just and right division, including:
 - 1. awarding to the wronged spouse an appropriate share of the community estate remaining after the actual or constructive fraud on the community;
 - 2. awarding a money judgment in favor of the wronged spouse against the spouse who committed the actual or constructive fraud on the community; or
 - 3. awarding to the wronged spouse both a money judgement and an appropriate share of the community estate. *TFC 7.009(c)*.