

## Myth-busting divorce in Texas

By Trey Yates

Many myths surround divorce and the divorce process in Texas. Firstly, divorce in real life looks nothing like divorce on reality TV, or on *Judge Judy*.



One of the most common myths surrounding divorce is that by law, the couple's assets will be divided 50/50. The Texas Family Code requires that, at the time of divorce, the court divide *the community property* of the spouses "in a manner that the court deems just and right." This does not mean that a court is required to divide the marital property equally in half.

In fact, the court can look to a variety of factors in deciding what percentage each spouse is awarded to arrive at a "just and right" division. The factors that can influence the court's division of the couple's property include, fault in the breakup of marriage, conduct of the spouses during the marriage, fraud, waste, earning power of the spouses, who will be the primary caregiver of the children, the nature of the property to be divided, whether a specific asset will be subject to taxation, attorney's fees and more.

Another misconception is what constitutes "community property" and what constitutes "separate property" in a divorce. Here are the definitions:

**Separate property** consists of property owned or claimed by a spouse before marriage; property acquired by a spouse during marriage by gift, devise, or descent; and, recovery for personal injuries sustained by a spouse during marriage, except any recovery for loss of earning capacity during marriage.

**Community property** consists of the property, other than separate property, acquired by either spouse during marriage. This is true regardless of which spouse has possession of the property. The fact that one spouse is named on the title, deed, or account, or that one spouse receives the asset as payment for personal services (e.g. salary), or the asset will not be paid until a later date (e.g. retirement benefits), will not change the character of the property.

## **Presumption of Community Property**

In Texas, there is a legal presumption that property possessed by either spouse during or on dissolution of marriage is presumed to be community property. This legal presumption can only be overcome by “clear and convincing evidence” that the property in question is indeed separate property. The most common way of proving separate property is by tracing the asset from the date of acquisition to the present date.

## **Right to Reimbursement**

The increase in value of a spouse’s separate property during marriage is generally considered separate property. However, a spouse may have a claim for reimbursement when the community estate in some way improves the separate estate of one of the spouses, or vice versa. The right of reimbursement is not an interest in property or an enforceable debt; rather, it is an equitable right that arises upon dissolution of the marriage through death, divorce, or annulment.

For example, the court can determine the rights of spouses in any pension or retirement plan or their rights under any life insurance policy.

Valuation of a particular asset of the parties can sometimes be difficult. Family businesses, stock options, unique collections such as wine, antiques or interests in retirement plans can all pose questions as to their real worth.

Much of the time, determining the value of complex marital assets requires expert appraisal or testimony. In all cases, individuals going through divorce should evaluate all property and assets currently owned by each spouse and discuss them with their attorneys.

An individual's best asset in divorce is the advice and counsel of a board certified family law attorney, experienced in divorce, who can help sort through the applicable divorce laws in your case. It is also a good idea to make sure he or she is well acquainted with the courts and judges in your community since that information may also factor into a couple's unique settlement outcome.

## Divorce and debt

**By Patricia Barrett, CFP, CDFIA**

When couples seek divorce, a primary focus of the process will involve reviewing, evaluating and making decisions regarding finances. Your lawyer and/or divorce financial analyst will advise you to collect a variety of financial documents and records, and outline your family's current household expenses. It's a daunting task, but a necessary one in order to determine an equitable divorce settlement.



The financial side of divorce involves multiple, interrelated components. Many questions will have to be carefully analyzed before a settlement is reached. One area of a couple's finances that warrants consideration during divorce is debt.

Both parties should strive to protect individual credit ratings during divorce. Typically, a credit report for each spouse will be generated as part of the process. This report reveals most outstanding community debts associated with each party. Either attorney can generate *Temporary Orders* for the divorcing couple that outline who pays for what until the divorce is final. Both spouses should maintain good records for all the payments made during this time.

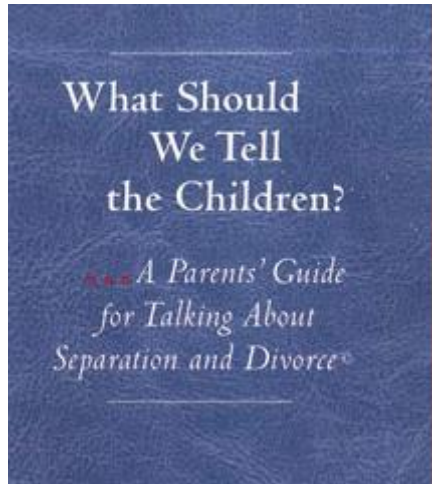
Each spouse also should agree not to run up credit card or other debt during this time, with the exception of possibly putting divorce financial analyst's or attorney's fees on a credit card. On the same note, don't use cash reserves at this time to pay off credit cards or the fees of your divorce team.

Many married couples carry a mortgage in both names on the family home. I usually recommend that if one spouse keeps the home, the mortgage should be refinanced to remove the other party's name. An attorney can draft legal documents to handle a mortgage that isn't refinanced. It's called a "deed of trust to secure assumption."

Unfortunately, creditors and mortgage companies don't recognize divorce decrees, so until a joint mortgage is refinanced or paid off, both names will continue to appear on the loan documents, and both parties will be responsible for it. That means creditors can come after one or both spouses if the mortgage or community debt goes into default.

One unique approach to crafting a divorce settlement involves how the community debt and assets are divided between the two parties. Typically, the higher earning spouse retains most of debt, but is rewarded with more of assets.

Crafting an equitable divorce settlement often requires creative thinking. I've found that how couples approach the community debt in a divorce can offer them a practical, win-win solution.



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### ***What should we tell the children?***

***A Parents' guide for talking about separation and divorce  
from the American Academy of Matrimonial Lawyers***

When parents are about to separate, the best thing they can do is prepare their children for what is about to happen. This booklet was developed to help parents think about, plan for and make this discussion more meaningful and helpful.