

## ***SEPARATE AND COMMUNITY PROPERTY***

***Texas is a community property state. Community property includes all property acquired and owned by you and your spouse during your marriage unless it is proven to be separate property.***

### ***What is Separate Property?***

Separate property includes:

- \* property which you owned prior to your marriage,
- \* property which you received during the marriage as a gift,
- \* “pain and suffering” proceeds from personal injury lawsuits, and
- \* property which you inherited before or after the marriage.

Property acquired after marriage is community property unless it falls into one of these categories regardless of whose name is on the title.

The court is prohibited from awarding the separate property of one spouse to the other, so it is important to determine which property is separate and which is community.

Income earned from separate property is community property. For example: Rent proceeds from a separate property residence, or interest earned on a separate property account are community property.

### ***How Does the Court Determine if it's Community or Separate?***

The courts in Texas presume that all property owned at the time of the dissolution of the marriage is community property. The person claiming that any asset is separate property has the burden of proving this through evidence presented to the court. Sometimes this is as simple as showing the court the original deed to a piece of property owned before marriage, and other times it requires tracing through receipts and bank records. The court then decides if the property is community or separate by weighing this evidence.

### ***How Does the Court Divide Community Property?***

The Court has the right to divide community property in a “just and right manner”. Many believe that because Texas is a community property state that this means each party in a divorce is entitled to fifty percent of the property. **This is not necessarily true.** The Court may find it appropriate to award one party more than the other party. We have had the court award 60/40 splits, 45/55 splits, and even 80/20 splits. The most common factors the courts have looked at in our experience are the length of the marriage, and the future earning capacity of each spouse.



For example, a stay-at-home mother and wife who has never worked during a 20 year marriage is likely to get a larger portion of the community estate. The reason for this is the court knows that she will have to find a job and re-enter the workplace after having not done so for more than 20 years. The likelihood of her ever making as much income, or accruing as much retirement as her spouse is improbable.

Other factors considered by the Court in how to divide the community property are as follows:

- \* age
- \* education
- \* work experience
- \* job opportunities
- \* ability to create income in the future
- \* the amount of separate property of each party
- \* whether there are children and who has custody of the children
- \* the needs of the children
- \* the size and nature of the property owned by the parties

### ***Who is Responsible for Payment of Debts***

We know you are concerned with how to relieve your community debt obligations. Many of our clients come to us heavily in debt and we often hear the client say, "I do not want to be responsible for the debt. My spouse incurred most of it and should pay for it." The Courts consider the same factors as set out in #3 when determining who should be responsible for community debts.

Even so, each of you are responsible for the debt regardless. The Court cannot order the credit card companies or banks to look to that spouse only for payment. VISA is not a party to your lawsuit. The only thing the Court can order, is that one spouse has responsibility, and if that spouse fails to pay the debt then the other spouse has the right to sue his or her ex for any payments made.

Similarly, the Court cannot order a mortgage company to take a party off of the note. If the home is awarded to one spouse, the other spouse is still secondarily liable for the note unless the mortgage company releases them. We have found that the best way to handle this is to contact the mortgage company after the divorce by certified mail giving them your new address and noting that you want to be notified of any default in the terms of the note. The good news is, that most of our clients who are "secondarily" liable on the note as a result of divorce are still able to obtain new housing.