

**PRESENTED AT**

16th Annual Conference on Consumer Bankruptcy Practice

Jul 27-28, 2020

Live Webcast

## **Property that Never Becomes Property of the Estate**

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## Property that Never Becomes Property of the Estate

The filing of a bankruptcy case creates an estate. With exceptions, property of the estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” 541(a)(1). Texas is a community property state and there is a common misconception about what marital property comes into a bankruptcy estate. Just because property is “community property” does not mean that it comes into the estate and/or that community property of a non-filing spouse is subject to claims against a filing spouse. *Property which does not come into the estate is not required to be exempted, thereby allowing a debtor (and non-filing spouse) to effectively increase or avoid the exemption limits.*

Since enactment of the federal Equal Credit Opportunity Act in 1974, there has been a significant change in how couples obtain credit. Prior to 1974, it was common (and perfectly legal) for a creditor extending credit to a woman to require her husband to join in the credit application even if she was employed and had her own income. The 1974 Act was intended to allow women - who were working in ever increasing numbers - to obtain greater access to credit by providing that a creditor extending credit could not decline to extend credit based upon marital status. If a woman would otherwise qualify for credit (i.e., based on her income and credit score), granting her credit cannot be conditioned on her husband also being liable for the debt. One of the results of this is that many couples have very little joint debt and their joint debt tends to be limited to secured major purchases like houses and cars. These are typically assets the clients will desire to retain, so the debt will be paid. Most couples do not have a large amount of joint *unsecured* debt. They may each *individually* have a large amount of unsecured debt so they may both need to file, but it will not be because of *joint* unsecured debt. There is a great deal of confusion on this issue. I routinely see potential clients who are convinced that they both need to file because they are married and Texas is a community property state or because they went to see another lawyer who told them they both have to file. My firm files a large percentage of what we call “non-filing spouse” cases because we review their debts to determine whether both spouses actually need to file. I wrote a paper on this several years ago and have re-written it since.

## Property of the Estate: 541(a)(2) and 541(a)(5)

541(a)(2) provides that property of the estate includes “all interests of the debtor and the debtor’s spouse in community property as of the commencement of the case that is -

- (A) under the sole, equal, or joint management and control of the **debtor**; or
- (B) liable for an allowable claim against the **debtor**, or for both an allowable claim against the debtor **and** an allowable claim against the **debtor’s spouse**, to the extent that such interest is so liable.” [Emphasis added.]

The issues of (1) what interest in community property is under the sole or joint management of the debtor or (2) is liable for a claim against the debtor or the debtor and the debtor’s spouse is an issue of *state law*. There are no Bankruptcy Code provisions which purport to address this issue except (maybe/possibly) 101(7) which defines “community claim” as:

...a claim that arose before the commencement of the case concerning the debtor for which

property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case.

Remember that 541 has an “after acquired property” provision which brings specified assets into the estate if they are acquired within 180 days of filing of the bankruptcy case. 541(a)(5) provides that property of the estate includes:

Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A)...

(B) as a result of a property settlement agreement with the debtor’s spouse, or of an interlocutory or final divorce decree; or

(C) ....

Finally, if only one spouse files and elects to use the federal exemptions, the non-debtor spouse is not entitled to claim *any* exemptions. *In re Kim*, 748 F.3d 647 (5<sup>th</sup> Cir.2014). 522(b)(1) provides:

...an individual debtor may exempt from property of the estate the property listed in either paragraph (2), or in the alternative, paragraph (3) of this subsection.

Remember – if the non-filing has assets which are not property of the estate they do not have to be exempted.

The rule for using Texas exemptions is different as the Texas exemptions allow one set of amounts for a “single adult” - \$50,000 worth of personal property - and a higher set of amounts for “a member of a family” - \$100,000 worth of personal property.

### **Texas Marital Property Law:**

In olden times Texas common law generally provided that a husband was not only empowered to manage his separate property and community property, but the income generated by his wife’s separate property, as well. It was not until Texas passed the Matrimonial Property Act of 1967 that spouses (women in particular) were granted the right to manage the income from their separate property and sole management community property. These changes were codified in the first version of the Texas Family Code enacted in 1969. The “current” version of the Texas Family Code enacted in 2000 expanded these rights. (It has since been amended, but primarily with respect to other issues.)

The relevant Texas Family Code sections are:  
3.002; 3.102; 3.104; 3.201; 2.501; 3.202

All of the foregoing sections are contained in Texas Family Code, Title 1. The Marriage

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First appeared as part of the conference materials for the  
16<sup>th</sup> Annual Conference on Consumer Bankruptcy Practice session  
"Non-Exemptions and Weird Exemptions"