

CHARACTERIZATION OF MARITAL PROPERTY

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I. INTRODUCTION

The characterization of property in a Texas marriage can have a material impact on a probate case and estate planning. It is therefore important for the practitioner to have a firm understanding of basic property characterization. This paper will discuss the estates in a Texas divorce (separate and community), how certain property is characterized, what property can be characterized as separate property, the community presumption and how to overcome it through tracing, and reimbursement claims.

The paper will then discuss the intersection of probate and characterization and provide examples of the potential impact of characterization on certain estate and business planning.

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III. CHARACTERIZATION AND DIVISION

At the time of divorce, Texas courts must divide the community estate in a manner that is just and right. Establishing the character of property as either community or separate (or a mixture of community and separate) is a necessary first step in identifying the community property that is subject to division.

IV. Separate Property

A spouse's separate property consists of (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage. Tex. Const. art. 16, § 15; Tex. Fam. Code § 3.001; *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) ("The nature of property is fixed by the Texas Constitution, and not by what is 'just and right.'"). The trial court lacks authority to divest a spouse of separate property. *Pearson v. Fillingim*, 332 S.W.3d 361, 364 (Tex. 2011) (per curiam); *Viera v. Viera*, 331 S.W.3d 195, 204 (Tex. App.-El Paso 2011, no pet.). "If the trial court mischaracterizes a spouse's separate property as community property and awards some of the property to the other spouse, then the trial court abuses its discretion and reversibly errs." *Sharma v. Routh*, 302 S.W.3d 355, 360 (Tex. App.-Houston [14th Dist.] 2009, no pet.).

A. Property Owned or Claimed Before Marriage

Any property owned or claimed by a spouse before marriage remains the separate property of that spouse after marriage. Tex. Const. Art. XVI, § 15; TEX. FAM. CODE § 3.001. See *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984) (property held by either a husband or wife before marriage remains the separate property of such spouse and the status of the property is to be determined by the origin of the title to the property, and not by the acquisition of final title); *Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1954) (evidence showed husband received

conveyance of specific land before marriage, land was his separate property); *Norris*, 260 S.W.2d at 676 (husband's interest in partnership acquired before marriage is separate property, although salary and profits from partnership during marriage were community property); see also *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App. - Dallas 1987, writ ref'd n.r.e.); *Beeler v. Beeler*, 363 S.W.2d 305 (Tex. Civ. App. - Beaumont 1962, writ dismissed) (note for balance due on sale of ranch and cattle owned prior to marriage and sold thereafter was separate property).

B. Property Acquired by Devise or Decent

Whether acquired by devise or decent, legal title vests in beneficiaries upon the death of the decedent — not when the property is actually transferred to the beneficiary by the estate. Texas Probate Code § 37. *Johnson v. McLanglin*, 840 S.W.2d 668 (Tex. Civ. App. - Austin 1992, no writ). For this reason, during the time the property is held by the estate until it is actually conveyed to the beneficiary, any income earned on such property would presumptively be community property. The practitioner should be careful when dealing with this particular type of inheritance. It is often necessary to trace the income on separate property during the period in which the estate holds the property. Any interest devised to a spouse, whether a fee or a lesser interest, will belong to that spouse as separate property. See *Sullivan v. Skinner*, 66 S.W. 680 (Tex. Civ. App. 1902, writ ref'd). In *Sullivan*, the wife was willed property “for the term of her natural life, with full power to receive for her sole and separate use, and no other, the rents and profits of the same, and on her death the same to

belong to any child or children of the wife.” The rents and profits were held to be her separate property because they were specifically made a part of the devised interest under the terms of the will. Had they not been specifically mentioned in the will, the “rents and profits” would likely have been community property. *Id.* (emphasis added). Property received in consideration of the assignment and release of the heir's expectancy is in the nature of property acquired by descent and is therefore the separate property of the spouse receiving it. In *Barre*, 153 S.W. 120, the court stated:

“The status of the expectancy, as a separate or community right and interest, would be determined, we think, by the character of the right in which it had its origin. Without question the expectancy here, if and when it shall fall into possession, would follow, under the laws of descent and distribution, from the fact that Mrs. Barre was in the relation of child. So, in measuring the legal rights of Mrs. Barre, the expectancy, or contingent interest, in controversy, should be, it is not doubted, treated and regarded as a separate, and not community, right and interest of Mrs. Barre, and controlled as to ownership and sale, by the laws governing in such respects.”

C. Property Acquired by Gift and Related Presumptions

1. Gift by a Third Party

Property acquired by a spouse by gift from a third party is separate property. Tex. Const. Art. XVI, § 15; TEX. FAM. CODE § 3.001. A “gift” is a voluntary transfer of property to another made gratuitously and without consideration. *Zoller v. Zoller*, 01-09-00992-CV, 2011 WL 1587358 (Tex. App. Apr. 21,

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