

**ANALYZING YOUR PROPERTY CASE:
A PREQUEL TO CHARACTERIZATION, VALUATION AND
DIVISION OF THE MARITAL ESTATE**

Presented by:

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U. S. Enforcement of Mexican Decrees, San Antonio Family Lawyers Association, November 17, 1999, San Antonio, Texas.
Analysis of the Law and Key Issues: Procedures in Divorce Process, Texas Family Law Practice, January 27, 2000, San Antonio, TX.
Applying Procedural Tactics to Enhance Your Client's Case, Advanced Family Law Drafting Course, December 12-13, 2002, New Orleans, Louisiana.
Playing By the Rules – Using the Rules of Civil Procedure, The Rules of Evidence and the Family Code to Bolster Your Child Custody Case, San Antonio Bar Association Family Law Section Seminar, June 2003, San Antonio, TX
Advancing with the Basics – Rules of Procedure in the 21st Century, Tarrant County Family Law Bar Association, July 22, 2003, Fort Worth, TX
Extreme Billing Makeover - Successful Billing Practices and the Mutual Fairness Doctrine, San Antonio Bar Association Family Law Section Seminar, June 25, 2004, San Antonio, TX

Use of Discovery at Trial – Ultimate Trial Notebook, December 9-10, 2004, Dallas TX
New Year’s Resolutions for Successful Billing Practices! (40 Rules to Making More from your Practice),
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Discovery and Evidence: What I’ve Forgotten Since Law School!, San Antonio Bar Association Family
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I. INTRODUCTION

A. Analysis of Your Property Case

The analysis of your property case is the first and arguably the most important step in the handling of your clients divorce. Prior to characterization, valuation, and the division of the marital estate, it is absolutely essential that you have a thorough understanding of the property that exists that is to be divided. The purpose of this article is not to offer treatise on property characterization but rather to discuss those things that our clients need to understand in order to provide us information.

B. The importance of protocols.

Having protocols in your office is always important but never more so than when obtaining an understanding of your clients estate. Being able to look back on your cases and know that you have followed a series of protocols to obtain information from clients and third parties is essential for the proper handling of your client's case.

Most protocols will differ from office to office. Whatever they are, they should be in place and should be consistently followed.

The protocols followed by my office, which seem to have worked for us, include:

1. The pre-conference review of our website and downloading of a Client Divorce Information Sheet and the completion of (at the very least) a rough draft of the answers to same;
2. Mandatory viewing by all clients of a video explaining the Texas Divorce Process; and
3. The initial office conference with their particular attorney in our office.

While our clients are encouraged to download and complete their information sheet before their office conference, it is not absolutely mandatory in the process. (Many clients will ask for an information sheet once they are at the office.)

However, viewing our video is a mandatory protocol before seeing one of the attorneys in our office in order to provide an informational

“base line” for all clients going through the process.

The importance, again, of protocols in your office is that they allow you to know exactly what information has been provided to your client and what steps have been taken in your client's case.

II. RULES THE FAMILY CODE HAS TAUGHT US (AND THAT WE SHOULD TEACH OUR CLIENTS)

A. The Education of Our Clients

It is impossible to underestimate the need of educating our clients prior to asking them to teach us about their estates. A client will better understand property and claims to be identified if they understand the reasoning behind their providing that information.

The Family Code has taught us a lot and we need to share that with our clients so that they can gauge the importance of providing us information.

There is basic underlying information that we really need to share with our clients. My suggestion of that information is as follows:

B. The General Rules for Separate and Community Property

1. Separate Property

Clients need to understand that “separate property” is that property owned or claimed by the spouse before marriage; the property acquired by the spouse during marriage by gift, devise, or descent; and any recovery for personal injury that does not include recovery for loss of earning capacity.

Upon divorce, a spouse's separate property remains his/her separate property (in other words, what's mine remains mine).

Case law taught us that a court cannot divest a party of his/her separate real or personal property (in other words, what's mine is

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mine and will always be mine). *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 142 (Tex. 1977). *Cameron v. Cameron*, 641 S.W.2d 210, 219-20 (Tex. 1982).

Often times, our client will exclaim “but the separate property increased in value during the time we were married, and didn’t you tell me anything acquired during the marriage is community property?”

Your response, of course, is that in “In Texas a spouse does not have a claim for the increase in value of separate property during the marriage. However, the spouse may have a claim for reimbursement for time, toil, and effort of the community that went into making that increase. If payments are made for separate property during the marriage with community funds, the other spouse is entitled to reimbursement.” TFC 3.001

2. Community Property

Clients also need to understand that if property does not fall under the definition of separate, then it is community property. Community property is property acquired by either spouse during the marriage.

Some types of property require a special analysis. While a degree is not property that can be divided and courts cannot put a value on a degree, it is recognized that a spouse with a degree has a higher earning capacity than one without a degree. This is a factor the non-degreed spouse can use when making the request for a disproportionate division of the community estate.

A closely held corporation is divisible, though it is hard to find the fair market value. The buy-sell agreement can be a start for valuation, but this is not controlling in Texas (especially if the spouse was not involved in making the agreement).

Personal goodwill in a business is not divisible, while business goodwill is divisible. The difficulty arises in distinguishing the two. Clients need to understand that goodwill (especially business goodwill) is an important

asset to be considered in their estates.

3. Presumption of Community Property and Rebuttal of Same

Of course, clients need to understand that the presumption in Texas is that property possessed by either spouse during or on dissolution of marriage is community. And since there is no “legal separation” in Texas, all income earned during the separation prior to the rendering of the divorce, is community property. TFC 3.002

a. Tracing

We also need to be sure that clients understand that the most recognized method of rebutting the community presumption is through tracing. In *Chavez v. Chavez*, 269 S.W.3d 763, 767 (Tex. App. – Dallas 2008), the court noted that the process of tracing separate property “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.” “Mere testimony that property was purchased with separate property funds, without tracing of the funds, is generally insufficient to rebut the presumption. Any doubt as to the character of property should be resolved in favor of the community estate.” (citations omitted). However, the court held that the trial court did not abuse its discretion by not requiring the appellee to trace funds because undisputed evidence at trial proved that appellee purchased the separate property before the marriage. The appellee testified that he purchased the property before the marriage and appellant, on cross-examination, verified that she resided at the property prior to marriage and that the parties discussed refinancing the property and placing her name on the property's mortgage after marriage. The court held that “[t]his undisputed testimony is sufficient evidence to establish the separate character of the property.”

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b. Gifts

In *Wells v. Wells*, 251 S.W.3d 834, 839 (Tex. App. – Eastland 2008), the court pointed out the elements of establishing a gift for characterization as separate property. Those elements are “(1) intent to make a gift; (2) delivery of the property; and (3) acceptance of the property.” In the case at hand, the appellant argued that certain farm equipment was given to both him and his wife as a gift from his wife’s parents. However, the wife alleged that these pieces of equipment were actually gifts just to her. The court stated that in a mischaracterization challenge, appellant “must establish not only that the trial court erred but that this error caused sufficient harm to constitute an abuse of discretion.” The trial court had not provided valuation findings, so the appellate court could not determine what affect the characterization had on the total distribution. Further, the appellant did not show that the characterization was in error. Both appellee and her mother testified that the gift was to appellee alone. Appellant argued the general rule that mere testimony that separate property is separate is insufficient. However, the court held that “[t]he general rule is inapplicable because there was no need to trace assets. There was no dispute about what items of equipment were gifted, and there was no claim that any of this equipment had been sold, traded, or otherwise converted into any other asset.” 251 S.W.3d at 840. Therefore, the trial court had not abused its discretion in characterizing the equipment as separate. TFC 3.005

c. Stock

If a spouse gives a gift of property to the other spouse, it is presumed that the gift includes all the property and income that arises from that gift.

In *Legrand-Brock v. Brock*, 246 S.W.3d 318 (Tex. App. – Beaumont 2008), the court explained the law on the characterization of liquidated distributions. “Generally, when a spouse owns separate-property stock in a

dissolving corporation and receives distributions of liquidated assets, the distributions remain the stockholder's separate property. The character of property is not altered by the sale, substitution, or exchange of the property; separate property that merely undergoes mutations or changes in form remains separate property. Distributions received in exchange for the cancellation of stock upon the corporation's dissolution retain the character of the stock.” Appellant argued that because the company distributed the cash to appellee from its retained earnings, the distributions were dividends and therefore community property. The court clarified that “[c]ash dividends from stock are treated like income, and when distributed during marriage are community property. A distribution by a corporation to its shareholders may constitute a dividend in law even though not formally designated as a dividend by the board of directors. The corporation's earnings or surplus funds normally do not constitute a dividend while they are retained by the corporation, however.” Because there was no evidence that the company’s “board of directors declared or otherwise authorized the payments as cash dividends before the dissolution resolution, or that after liquidating and distributing its assets, [the company] somehow continued to operate as a business.” Here, “[t]he board resolution required [the company] to distribute its remaining assets to its shareholders in complete cancellation or redemption of all the shares of capital stock of the Company. It is immaterial to the characterization of the property in this case that the assets distributed on dissolution were the corporation's retained earnings. Upon the dissolution of the corporation, [appellee] received [a distribution] in exchange for his separate property stock. The cash distributions represented an exchange of [appellee’s] separate property stock for [the company’s] cash assets.” 246 S.W.3d, 321-23 (internal citations and quotations omitted).

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4. The 50/50 Myth

The Courts require a just and right division of the community estate and it is a common misconception that a 50/50 split is just and right. There is no such presumption. Although 50/50 can be a starting point, courts have wide discretion when it comes to defining a just and right division.

In the legendary case of Murff v. Murff, 615 S.W.2d. 696 (Tex. 1981), the Texas Supreme Court set out the most important factors for a court to consider in making a ‘just and right’ division of the community property. These 11 factors are as follows:

1. The disparity of incomes or earning capacities of the spouses
2. The spouses’ capacities and abilities
3. Benefits which the party not at fault would have derived from a continuation of the marriage
4. Business opportunities of the spouses
5. Education of the spouses
6. Relative physical conditions of the spouses
7. Relative financial conditions of the spouses
8. Differences in the size of each spouse’s separate estate
9. The nature of the property to be divided
10. Fault in the break up of the marriage
11. Attorneys fees of the parties

In Murff, the Texas Supreme Court explained: “The trial court in a divorce case has the opportunity to observe the parties on the witness stand, determine their credibility, evaluate their needs and potentials, both social and economic. As the trier of fact, the court is empowered to use its legal knowledge and its human understanding and experience. Although many divorce cases have similarities, no two of them are exactly alike. Mathematical precision in dividing property in a divorce is usually not possible. Wide latitude and discretion rests in these trial courts and that discretion should only

be disturbed in the case of clear abuse.” Murff, at 700.

5. Additional Factors

Texas has continued to developed additional factors that can be considered in determining if a spouse is entitled to more than 50% of the community estate. These factors include:

1. Fraud on the community;
2. Dissipation of a community asset;
3. Gifts by one spouse to others outside the marriage;
4. Tax implications of a proposed division;
5. Community debts and liabilities;
6. Reimbursement;
7. Credit for temporary spousal support paid;
8. Use of separate property to create community estate;
9. Increase of separate property due to other spouses efforts;
10. Waste of a community asset; and
11. Community debts/liabilities

There is no rule that a court should give one factor more weight than any other or that these factors are controlling – again, it is up to the court’s discretion. These lists are not exhaustive because the court has discretion and lawyers are a creative bunch; therefore, if you are presented with a new factor not listed above that you think makes a disproportionate division just and right, then present it to the judge as a possibility.

6. Reimbursement Claims

An important part of our clients’ case can be claims made for reimbursement for monies paid toward the mortgage of the separate property of their spouse or for improvements to that property. Any such amounts can give rise to reimbursement claims against that spouses separate estate.

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7. Recordation of Separate Property

Clients need to understand that a spouse can record their separate property in the deed records of a county where either spouse resides or the real property is located. If they have done so, they need to let us know as this is an important factor in our assessment of their estates.

8. Proportional Ownership of Property by Marital Estates

Clients need to understand that if they contributed separate funds as part of the purchase of community property, their separate estate may own a percentage interest in that property under the rule of inception of title. Our clients need to understand the importance of providing copies of their checks, closing statements and other proof of their separate property interest in these properties. TFC 3.006

9. Property Interest in Certain Employee Benefits

Our clients need to understand that retirement plans are often a largely overlooked portion of their estates.

a. Defined Contribution Plan

In a defined contribution plan, an employee has his/her own account with the employer. It may be a plan where the employee makes all the contributions or the employee and the employer make contributions. The value of the retirement benefit is the amount of money in the plan.

b. Defined Benefit Plan

A defined benefit plan is where upon retirement, an employee gets a sum certain for the rest of his/her life taking into account various factors, including length of employment. This is hard to value because the employee does not have his/her own account.

c. Vesting vs. Maturity

In order for a plan to be vested, the employee must stay at his/her job for a certain number of years. If unvested (employee has been at job for less than required number of years), then he/she loses a percentage value of the plan.

A plan is matured when the employee is old enough to draw retirement benefits from it.

A spouse who started earning retirement or any kind of employee benefit before marriage and had an interest in that before marriage has a separate property interest in that employee benefit. When the person gets married, the benefits that accrue during the marriage are community assets. If the parties divorce, and that spouse continues employment with the same employer, any benefits accumulated after divorce is separate. It is necessary to determine the percentage of the interest that was acquired during the marriage – as that is the community portion and the only portion the court has the authority to divide. TFC 3.007

10. Stock Options

Clients whose inventories include stock need to understand their characterization and the impact of the characterization on their property division.

Basically, cash dividends distributed during marriage are community property. Stock dividends, stock splits, appreciation in the value of the stock, proceeds from liquidate stock as well as mergers generally retain the character of the underlying stock.

But it is seldom that clear cut, such as in the case of stock options. When trying to decide whether a stock option is community or not, you must decide if this is an option/benefit that is given to the employee to encourage him/her to do good work while the marriage is occurring. If it is to compensate for services during the marriage, then a court will likely characterize it as community property. But if it is to encourage the employee to do good work in the future, i.e.

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post marriage, then it is separate. Sometimes stock options are awarded after separation, but are to reward for services that occurred during the marriage and to encourage employee to do good work in the future. These have a mixed character and are more difficult to characterize, so it may be time to call in an expert.

Of course there is no guarantee, and a court can listen to all the competing experts and turn around and give 100% to either spouse, such as *Hendershot v. Hendershot*, WL 4445648 (Tex. App. – Fort Worth 2008). “Texas courts have consistently held that stock options acquired during marriage are a contingent property interest and a community asset subject to division upon divorce. The family code sets out that, in a divorce decree, the trial court shall determine the rights of both spouses to stock options or other employer plans in the nature of compensation or savings. However, there is nothing in the code or case law with regard to the proper method of stock option valuation. The trial court has the discretion to award retirement benefits earned during marriage to the party who earned them.

11. Property Interest in Certain Insurance Proceeds

a. Casualty Loss

Insurance proceeds from a casualty loss to property during marriage are the same characterization as the property itself.

b. Disability Insurance

If a spouse receives disability insurance or workers’ compensation during the marriage, the portion of those payments that is for lost earnings is community. The portion that is for lost earnings while the spouse is no longer married is separate. TFC 3.008

C. The Management, Control, and Disposition of Marital Property

Our clients need to understand the dynamics of how, up to this point, their estates have been managed.

1. Managing Separate Property

Each spouse has the sole management, control, and disposition of the spouse’s separate property. TFC 3.101

2. Managing Community Property

During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single. This includes personal earnings, revenue from separate property, recoveries for personal injuries, and the increase and mutations of, and the revenue from, all property subject to the spouse’s sole management, control, and disposition.

Mixed or community property is subject to the joint management, control, and disposition of the spouses. Community property is subject to the joint management, control, and disposition of the spouses. In *City of Emory v. Lusk*, 278 S.W.3d 77 (Tex. App. – Tyler 2009), the court reviewed a case involving a spouse who, while in her role as a city councilwoman, consented to an easement for a sewer with the city along her and her husband’s property. The court held that, even if she was acting in her capacity as a city councilwoman, the property constituted community property and thus she could not encumber it acting alone. Her husband would also have to consent. 278 S.W.3d at 85. TFC 3.102

3. Protection of Third Persons

During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in that spouse’s name as shown by evidence of

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ownership or if it is in that spouse's possession and is not subject to such evidence of ownership. A third person dealing with a spouse is entitled to rely, as against the other spouse or anyone claiming from that spouse, on that spouse's authority to deal with the property if: (1) the property is presumed to be subject to the sole management, control, and disposition of the spouse; and (2) the person dealing with the spouse (a) is not a party to a fraud on the other spouse or another person; and (b) does not have actual or constructive notice of the spouse's lack of authority.

In *Wright v. Wright*, 280 S.W.3d 901 (Tex. App. – Eastland 2009), a divorce resulted in one spouse's claim that the other spouse committed fraud on the community because three days after she filed for divorce, he transferred 49% of the shares in one of the couple's companies and drained both of their bank accounts. The husband believed he had the authority to sell the stock because they were in his name, but the court determined that the wife was entitled to consultation before a transfer this large. The court stated the rule that a spouse who has the property in his/her name may make a moderate gift to a party outside the marriage so long as it is not capricious, excessive, or arbitrary. Because the trial court did not find the husband and third party credible witnesses, the appellate court affirmed the ruling that the third party was a part of the fraud on the community. Further, "[a] presumption of constructive fraud arises when one spouse disposes of the other spouse's one-half interest in community property without the other's knowledge or consent. [The husband] had the burden of proof to establish that the transfer of the stock to [the third party] was not unfair to the rights of [the wife]." The transfer deprived the wife of an additional \$637,000 in community assets, and thus was unfair to her rights. TFC 3.104

D. The Marital Property Liabilities

1. Spousal Liability

A spouse is only liable for the acts of his/her spouse if his/her spouse acts as an agent for the other spouse or the debt is incurred for a "necessary". Community property is not automatically subject to a liability that arises from an act of a spouse. The marriage relationship does not mean a spouse automatically acts as the other's agent. TFC 3.201 and TFC 2.501.

2. Rules of Marital Property Liability

A spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law.

Unless both spouses are personally liable as provided by this subchapter, the community property subject to a spouse's sole management, control, and disposition is not subject to: (1) any liabilities that the other spouse incurred before marriage; or (2) any non-tortious liabilities that the other spouse incurs during marriage.

The community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by the spouse before or during marriage. All community property is subject to tortious liability of either spouse incurred during marriage. TFC 3.202

3. Order in Which Property is Subject to Execution

Clients need to understand that a judge may determine, the order in which particular separate or community property is subject to execution and sale to satisfy a judgment, if the property subject to liability for a judgment includes any combination of: (1) a spouse's separate property; (2) community property subject to a spouse's sole management, control, and disposition; (3) community property subject to the other spouse's sole management, control, and disposition; and

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(4) community property subject to the spouses' joint management, control, and disposition.

In determining the order in which particular property is subject to execution and sale, the judge shall consider the facts surrounding the transaction or occurrence on which the suit is based and designate the order in which the property is subject to execution in a manner the Court deems is just and equitable . TFC 3.203

III. Marital Property Agreements

Oftentimes, clients will come to see us with signed pre-marital or post-marital agreements. Educating clients about those agreements is an important part of our process in analyzing their property case. There are two types of Marital Agreements, those entered into in contemplation of marriage (before marriage) and those entered into after marriage. The after marriage variety change the effect of the characterization laws, which also fall into two categories, the first being a Partition and Exchange Agreement which converts community property into separate property; and the second being a Conversion Agreement, which converts separate property into community property.

A. Premarital Agreements - Defined

A "Premarital agreement" is defined as an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage. "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings. TFC 4.001

1. Formalities

A premarital agreement must be in writing and signed by both parties. The agreement is enforceable without consideration. TFC 4.002

2. Content

The parties to a premarital agreement may contract with respect to: (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located; (2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property; (3) the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event; (4) the modification or elimination of spousal support; (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement; (6) the ownership rights in and disposition of the death benefit from a life insurance policy; (7) the choice of law governing the construction of the agreement; and (8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

Terms not allowed in a premarital agreement are those that (1) adversely effect the right of a child to support; (2) waiver of pension or other rights involving ERISA [which can be waived post marriage]; (3) waiver of inheritance rights unless such provision contains the necessary conveyance language; or (4) impose unlimited restraints on marriage; or (5) violate public policy or criminal statute.

The right of a child to support may not be adversely affected by a premarital agreement.

Waiver of a pension must comply with ERISA. Waiver of an inheritance must have the necessary conveyance language.

A contract imposing unlimited restraints on marriage is invalid.

The agreement may not violate public policy or a statute that imposes criminal liability. TFC 4.003

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3. Effect of Marriage

A premarital agreement becomes effective on marriage. TFC 4.004

4. Amendment or Revocation

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.

The courts may consider changed circumstances to find the agreement unconscionable (such as one spouse is left with not enough or no property or money). TFC 4.005

5. Enforcement

A premarital agreement is not enforceable if the party against whom enforcement is requested proves that:

(1) the party did not sign the agreement voluntarily; or

(2) the agreement was unconscionable when it was signed and, before signing the agreement, that party: (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

The burden of proof is on the party seeking to avoid enforcement of the premarital agreement.

In *Bufkin v. Bufkin*, 259 S.W. 3d 343 (Tex. App. – Dallas 2008), the court determined that where there was a valid premarital agreement on division of property, any evidence of fault in the divorce is irrelevant and does not apply to the

division. The division must be as the parties agreed in the premarital agreement. 259 S.W. 3d at 353. TFC 4.006

6. Enforcement: Void Marriage

If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. TFC 4.007

7. Limitation of Actions

A statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. TFC 4.008

B. The Marital Property Agreement

1. Partition or Exchange of Community Property

At any time, the spouses may partition or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouses may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. The partition or exchange of property may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse.

The court in *Ahmed v. Ahmed*, 261 S.W. 3d 190 (Tex. App. – Houston [14th Dist.] 2008) decided that a Mahr in a traditional Islamic wedding is not a valid premarital property agreement. A Mahr is “an Islamic religious custom whereby the husband contracts to give the wife a sum of money, either at the time of the marriage or deferred in the event of a divorce.” 261 S.W. 3d at 193. Here, the Mahr

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was not valid as a premarital property agreement because “the record is devoid of any evidence as to whether or not the parties intended the Mahr payment to come from Amir's separate property or from the community property,” and therefore there was no intent to convert community property into separate property. *Id.* at 195. TFC 4.102

2. Agreement between Spouses Concerning Income or Property from Separate Property

At any time, the spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner. TFC 4.103

3. Formalities

A partition or exchange agreement under Section 4.102 or an agreement under Section 4.103 must be in writing and signed by both parties. Either agreement is enforceable without consideration. TFC 4.104

4. Enforcement

A partition or exchange agreement is not enforceable if the party against whom enforcement is requested proves that:

(1) the party did not sign the agreement voluntarily; or

(2) the agreement was unconscionable when it was signed and, before execution of the agreement, that party: (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

An issue of unconscionability of a partition or exchange agreement shall be decided by the court as a matter of law.

The remedies pre September 9, 1993, included common law contract defenses, such as fraud, duress, mistake, ambiguity, overreaching and lack of consideration, however post September 9, 1993, ONLY involuntary execution and unconscionability apply. But as is true with most legal concepts, there is an exception. Although the TFC states involuntary execution and unconscionability are the exclusive remedies and defenses, courts have considered common law defenses such as fraud, duress and undue influence in determining the ultimate issue of involuntary execution. TFC 4.105

5. Rights of Creditors and Recordation under Partition or Exchange Agreement

Provision of a partition or exchange agreement made under this subchapter is void with respect to the rights of a preexisting creditor whose rights are intended to be defrauded by it.

A partition or exchange agreement made under this subchapter may be recorded in the deed records of the county in which a party resides and in the county in which the real property affected is located. An agreement made under this subchapter is constructive notice to a good faith purchaser for value or a creditor without actual notice only if the instrument is acknowledged and recorded in the county in which the real property is located. TFC 4.106

C. Agreement to Convert Separate Property to Community Property

1. Agreement to Convert to Community Property

At any time, spouses may agree that all or part of the separate property owned by either or both spouses is converted to community property. TFC 4.202

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a. Formalities of Agreement

An agreement to convert separate property to community property:

(a) Must be in writing and:

(i) be signed by the spouses;

(ii) identify the property being converted; and

(iii) specify that the property is being converted to the spouses' community property; and

(b) Is enforceable without consideration.

The mere transfer of a spouse's separate property to the name of the other spouse or to the name of both spouses is not sufficient to convert the property to community property under this subchapter. TFC 4.203

b. Management of Converted Property

Except as specified in the agreement to convert the property and as provided by Subchapter B, Chapter 3, and other law, property converted to community property under this subchapter is subject to: (1) the sole management, control, and disposition of the spouse in whose name the property is held; (2) the sole management, control, and disposition of the spouse who transferred the property if the property is not subject to evidence of ownership; (3) the joint management, control, and disposition of the spouses if the property is held in the name of both spouses; or (4) the joint management, control, and disposition of the spouses if the property is not subject to evidence of ownership and was owned by both spouses before the property was converted to community property. TFC 4.204

c. Enforcement

(a) An agreement to convert property to community property under this subchapter is not enforceable if the spouse against whom enforcement is sought proves that the spouse did

not: (1) execute the agreement voluntarily; or (2) receive a fair and reasonable disclosure of the

legal effect of converting the property to community property.

(b) An agreement that contains the following statement, or substantially similar words, prominently displayed in bold-faced type, capital letters, or underlined, is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting property to community property:

“THIS INSTRUMENT CHANGES SEPARATE PROPERTY TO COMMUNITY PROPERTY. THIS MAY HAVE ADVERSE CONSEQUENCES DURING MARRIAGE AND ON TERMINATION OF THE MARRIAGE BY DEATH OR DIVORCE. FOR EXAMPLE:

“EXPOSURE TO CREDITORS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO THE LIABILITIES OF YOUR SPOUSE. IF YOU DO NOT SIGN THIS AGREEMENT, YOUR SEPARATE PROPERTY IS GENERALLY NOT SUBJECT TO THE LIABILITIES OF YOUR SPOUSE UNLESS YOU ARE PERSONALLY LIABLE UNDER ANOTHER RULE OF LAW.

“LOSS OF MANAGEMENT RIGHTS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO EITHER THE JOINT MANAGEMENT, CONTROL, AND DISPOSITION OF YOU AND YOUR SPOUSE OR THE SOLE MANAGEMENT, CONTROL, AND DISPOSITION OF YOUR SPOUSE ALONE. IN THAT EVENT, YOU WILL LOSE YOUR MANAGEMENT RIGHTS OVER THE PROPERTY. IF YOU DO NOT SIGN THIS AGREEMENT, YOU WILL GENERALLY RETAIN THOSE RIGHTS.”

“LOSS OF PROPERTY OWNERSHIP. IF YOU SIGN THIS AGREEMENT AND YOUR MARRIAGE IS SUBSEQUENTLY TERMINATED BY THE DEATH OF EITHER

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SPOUSE OR BY DIVORCE, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME THE SOLE PROPERTY OF YOUR SPOUSE OR YOUR SPOUSE'S HEIRS. IF YOU DO NOT SIGN THIS AGREEMENT, YOU GENERALLY CANNOT BE DEPRIVED OF OWNERSHIP OF YOUR SEPARATE PROPERTY ON TERMINATION OF YOUR MARRIAGE, WHETHER BY DEATH OR DIVORCE.”

(c) If a proceeding regarding enforcement of an agreement under this subchapter occurs after the death of the spouse against whom enforcement is sought, the proof required by Subsection (a) may be made by an heir of the spouse or the personal representative of the estate of that spouse. TFC 4.205

d. Rights of Creditors; Recording

A conversion of separate property to community property does not affect the rights of a preexisting creditor of the spouse whose separate property is being converted.

A conversion of separate property to community property may be recorded in the deed records of the county in which a spouse resides and of the county in which any real property is located.

A conversion of real property from separate property to community property is constructive notice to a good faith purchaser for value or a creditor without actual notice only if the agreement to convert the property is acknowledged and recorded in the deed records of the county in which the real property is located. TFC 4.206

IV. GATHERING THE INFORMATION

Having educated your client on the law and, hopefully, created reasonable expectations, it is time to gather as much information as possible to assist you in your assessment of the estate. Remember there are several difference sources

available to obtain the information on your clients' estate.

A. Your Client

Obviously, your primary source of information will be from your client. Once our clients have a better understanding of the reasons that we need their information, hopefully they will offer a more complete description of their estates.

Obviously, having the most complete information sheet available for clients to complete, naming every type of asset and debt that can be contemplated is a “plus” in the process. Attached as an exhibit to this article is our firm's Client Information Form that will offer you a start in the process. (The best compliment a client can give us is their comment that they are completing a “book” of their lives through the completion of our information form.)

B. Third Party Independently Retained Financial Experts

If your case has significant property issues, a third party financial expert can be worth their weight in gold.

1. Uses of the Expert

Tracing separate property claims, identifying reimbursement claims, valuation and even roughly identifying your client's estate are only some of the many ways a financial expert can assist you and your client in assessing your case. In a large estate with multiple types of assets, I ask my pert to determine the tax implications of various versions of the property division.

2. Choosing Your Expert

You need to choose a financial expert with whom both you and your client are comfortable. I resist clients' election of their current CPA or

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bookkeeper as their financial experts. Oftentimes, individuals with whom they have a long standing relationship are family friends and very trustworthy. However, those benefits must be offset by the fact that most of these individuals do not know or understand the rules of family law (and your time and your clients' money must be used to educate them.). I basically explain that their customary CPA does

not have forensic experience and, accordingly, will not be an effective witness.

C. Websites for Third Party Information Gathering

1. Property Valuation

- Can call/visit retailers as if you are selling to get a value
- Cars
 - www.kbb.com
 - www.edmunds.com
 - www.nadaguides.com (boats, recreational vehicles, motorcycles, manufactured homes, classic cars) (with a small fee for the report - \$20)
- Boats
 - www.nadaguides.com
 - <http://www.usedboats.com/search/boat-values>
 - <http://www.bucvalu.com/>
- RVs/Trailers
 - www.nadaguides.com
 - www.pplmotorhomes.com (to order pricing guides; can call to get value)
- Real Property
 - Appraisal Districts – most are now online
- Stocks
 - <http://finance.yahoo.com/> (to get current value of the stock)
- Antiques
 - <http://collectibles.about.com/od/priceguidesonline/tp/priceguideindex.htm>

- <http://www.instappraisal.com>
- Furniture (and for other personal items)
 - To see what other people are selling similar items for in your area:
 - www.craigslist.com for your city)
 - <http://shop.ebay.com/items/Furniture>
- Art pieces/collections
 - <http://www.askart.com/AskART/index.aspx>
 - <http://www.findartinfo.com/>
- Jewelry
 - <http://www.online-jewelry-appraisals.com/>
 - <http://www.gemval.com/>

V. CONCLUSION

Analyzing a property case is important in the proper handling of your client's divorce covering the bases by first educating your client and then checking with third party experts and sources is the best way to ensure that you are properly analyzing their case.

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EXHIBIT "A"

CHECKLIST OF ISSUES FOR CLIENT REVIEW

- **SEPARATE PROPERTY**

Owned Prior to Marriage

Acquired by Gift, Devise or Descent

Personal Injury Claim(s)

- **COMMUNITY PROPERTY**

Acquired by spouse

Acquired by party

- **PRESUMPTION OF COMMUNITY PROPERTY**

TRACING REQUIREMENT

ELEMENT FOR ESTABLISHING GIFT

Intent

Delivery

Acceptance

- **PRESUMPTION**

- **RECORDATION OF SEPARATE PROPERTY**

- **GIFTS BETWEEN SPOUSES**

Presumed to include property and income arising from gift

- **PROPORTIONAL OWNERSHIP OF PROPERTY BY MARITAL ESTATES**

Inception issues

- **PROPERTY INTEREST IN CERTAIN EMPLOYEE BENEFITS**

DEFINED CONTRIBUTION PLAN

DEFINED BENEFIT PLAN

STOCK OPTIONS

- **DISABILITY INSURANCE/WORKMAN'S COMPENSATION**

Received During Marriage

Received After Marriage

- **MANAGEMENT AND CONTROL OF PROPERTY**

Managing Separate Property

Managing Community Property

- **PROTECTIVE OF THIRD PERSONS & MARITAL PROPERTY LIABILITIES**

Spousal Liability

Necessaries

Other liabilities

Rules of Marital Property Liability

EXHIBIT "B"

Law Offices of
HIGDON, HARDY & ZUFLACHT, L.L.P.
12000 HUEBNER, SUITE 200
SAN ANTONIO, TEXAS 78230-1204
(210) 349-9933
(210) 349-9988

CLIENT INTERVIEW FORM

CLIENT NAME: _____

DATE: _____

INSTRUCTIONS: Please complete this questionnaire. If you will spend the time to complete all items, you will give us the background information necessary to begin to understand the complexity of the personal aspects of your family law problem. All information will be held in strict confidence.

NOTICE: Pursuant to Texas Rule of Civil Procedure 192.5 along with all corresponding Rules of Evidence associated therewith, the information contained within this document comprises the work product of the attorney whose client name is referenced above. All information herein has been prepared in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

REFERRAL

Who referred you to this office?

_____: My friend whose name is _____.

_____: An Attorney whose name is _____.

_____: The Yellow Pages of the _____ directory.

_____: The San Antonio Bar Association.

_____: A Judge by the name of _____.

_____: Other _____.

FOR OFFICE USE ONLY:

REFERRING ATTORNEY: _____.

1. Please give your full name, date and place of birth, Social Security number, and drivers license number:

a. Name : _____

Maiden Name : _____

b. Date of Birth : _____

c. Place of Birth : _____

d. Social Security : _____

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e. Driver's License # : _____

2. Where are you living now?

a. Street Address : _____

b. City : _____

c. State & Zip Code : _____

How long in State : _____

d. County of Residence : _____

e. How long in County : _____

f. Residence telephone : _____

g. Mobile telephone : _____

h. Email Address : _____

3. Please complete the following concerning your employment:

a. Employer : _____

b. Job title : _____

c. Full address : _____

d. Telephone number : _____

e. Gross salary/monthly : _____

f. Annual gross (including bonuses, Stock options, etc.)

: _____

g. Length of employment : _____

h. Education/Training : _____

4. Please give your spouse's full name, date and place of birth, Social Security number, drivers license number:

a. Name : _____

Maiden Name : _____

b. Date of Birth : _____

c. Place of Birth : _____

d. Social Security : _____

e. Driver's License # : _____

5. Where is your spouse living and what is your spouse's telephone number?

a. Street Address : _____

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- b. City : _____
- c. State & Zip Code : _____
- How long in State : _____
- d. County of Residence : _____
- How long in County : _____
- e. Residence telephone : _____

6. Please complete the following concerning your spouse's employment:

- a. Employer : _____
- b. Job title : _____
- c. Full address : _____
- d. Telephone number : _____
- e. Gross salary/monthly : _____
- f. Annual gross (including bonuses, Stock options, etc.) : _____
- g. Length of employment: _____
- h. Education/Training : _____

7. Please give the date and place of your marriage:

- a. Date : _____
- b. City, State : _____
- 8. Date of separation : _____

9. Enter name of Marriage Counselor, if applicable.

: _____

10. If there are any children of this marriage, thoroughly answer all questions.

Child #1

- a. Name of Child : _____
- b. Sex of Child : _____
- c. Date of Birth : _____
- d. Place of Birth : _____
- e. Social Security : _____
- f. Disability, if any : _____
- g. Child's Address : _____
- h. Driver's License # : _____

Child #2

- a. Name of Child : _____

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- b. Sex of Child : _____
- c. Date of Birth : _____
- d. Place of Birth : _____
- e. Social Security : _____
- f. Disability, if any : _____
- g. Child's Address : _____
- h. Driver's License # : _____

Child #3

- a. Name of Child : _____
- b. Sex of Child : _____
- c. Date of Birth : _____
- d. Place of Birth : _____
- e. Social Security : _____
- f. Disability, if any : _____
- g. Child's Address : _____
- h. Driver's License # : _____

Child #4

- a. Name of Child : _____
- b. Sex of Child : _____
- c. Date of Birth : _____
- d. Place of Birth : _____
- e. Social Security : _____
- f. Disability, if any : _____
- g. Child's Address : _____
- h. Driver's License # : _____

11. Will there be a dispute over custody of the children? _____

If not, who will have custody? _____

12. List all property (other than furniture and clothing) owned by the children.

13. Religious Preference:
a. your preference: _____
b. your spouse's: _____

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14. Check as appropriate if your marital difficulties involve any of the following:

- _____ Drugs/alcohol
- _____ Sexual disappointment
- _____ Sexual infidelity
- _____ Financial dispute
- _____ Physical violence
- _____ Religion
- _____ Incompatibility
- _____ Other _____

15. Have you or your spouse ever filed for a divorce? _____
If so, when and where? _____

16. Does your spouse now have an attorney? _____
If so, whom? _____

17. If a divorce is granted, should the wife's maiden or prior name be restored? _____
If so, what name will be used? _____

18. Have you been married before? _____
If so, how many times? _____
Any children? _____

If there are children from a previous marriage, please give full name, sex, date and place of birth.

Child #1

- a. Name of Child : _____
- b. Sex of Child : _____
- c. Date of Birth : _____
- d. Place of Birth : _____

Child #2

- a. Name of Child : _____
- b. Sex of Child : _____
- c. Date of Birth : _____
- d. Place of Birth : _____

Child #3

- a. Name of Child : _____
- b. Sex of Child : _____
- c. Date of Birth : _____
- d. Place of Birth : _____

Child #4

- a. Name of Child : _____
- b. Sex of Child : _____
- c. Date of Birth : _____
- d. Place of Birth : _____

With whom do these children reside? _____

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19. Do you pay or receive child support? Describe Child Support payments.

20. Has your spouse been married before? If so, how many times? Any children

If there are children from the previous marriage of your spouse, please give full name, sex, date and place of birth.

Child #1

- a. Name of Child
b. Sex of Child
c. Date of Birth
d. Place of Birth

Child #2

- a. Name of Child
b. Sex of Child
c. Date of Birth
d. Place of Birth

Child #3

- a. Name of Child
b. Sex of Child
c. Date of Birth
d. Place of Birth

Child #4

- a. Name of Child
b. Sex of Child
c. Date of Birth
d. Place of Birth

With whom do these children reside?

21. Does your Spouse pay or receive child support? Describe Child Support payments.

22. Please list all Real Estate Property:

[1.1] Real Estate Property #1

- a. Address
b. Legal Description
c. Mortgage Company
Amount of original note
Note executed by
Date of original note
d. Year bought
e. Estimate Current Mkt. value
f. Monthly payments
g. General Comments

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[1.2] Real Estate Property #2

a. Address : _____

b. Legal Description : _____
: _____
: _____

c. Mortgage Company : _____
Amount of original note : _____
Note executed by : _____
Date of original note : _____

d. Year bought : _____

e. Estimate Current Mkt. value : _____

f. Monthly payments : _____

g. General Comments : _____

[1.3] Real Estate Property #3

a. Address : _____

b. Legal Description : _____
: _____
: _____

c. Mortgage Company : _____
Amount of original note : _____
Note executed by : _____
Date of original note : _____

d. Year bought : _____

e. Estimate Current Mkt. value : _____

f. Monthly payments : _____

g. General Comments : _____

[1.4] Real Estate Property #4

a. Address : _____

b. Legal Description : _____
: _____
: _____

c. Mortgage Company : _____
Amount of original note : _____
Note executed by : _____
Date of original note : _____

d. Year bought : _____

e. Estimate Current Mkt. value : _____

f. Monthly payments : _____

g. General Comments : _____

24. List all Bank Accounts, Savings Accounts, C.D.'s, Credit Union, Savings bonds:

[2.1] Account #1

a. Name of Bank : _____
Address : _____

b. Account type & # : _____
(checking, savings, IRA, etc.) : _____

c. Amount on deposit : _____

d. Authorized users : _____

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[2.2] Account #2
a. Name of Bank : _____
Address : _____
b. Account type & # : _____
(checking, savings, IRA, etc.) : _____
c. Amount on deposit : _____
d. Authorized users : _____

[2.3] Account #3
a. Name of Bank : _____
Address : _____
b. Account type & # : _____
(checking, savings, IRA, etc.) : _____
c. Amount on deposit : _____
d. Authorized users : _____

[2.4] Account #4
a. Name of Bank : _____
Address : _____
b. Account type & # : _____
(checking, savings, IRA, etc.) : _____
c. Amount on deposit : _____
d. Authorized users : _____

[2.5] Account #5
a. Name of Bank : _____
Address : _____
b. Account type & # : _____
(checking, savings, IRA, etc.) : _____
c. Amount on deposit : _____
d. Authorized users : _____

[2.6] Account #6
a. Name of Bank : _____
Address : _____
b. Account type & # : _____
(checking, savings, IRA, etc.) : _____
c. Amount on deposit : _____
d. Authorized users : _____

[2.7] Account #7
a. Name of Bank : _____
Address : _____
b. Account type & # : _____
(checking, savings, IRA, etc.) : _____
c. Amount on deposit : _____
d. Authorized users : _____

[2.8] Account #8
a. Name of Bank : _____
Address : _____
b. Account type & # : _____
(checking, savings, IRA, etc.) : _____

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- c. Amount on deposit : _____
- d. Authorized users : _____

23. List all Motor vehicles, Boats, Airplanes, Cycles, Trailers:

[3.1] Vehicle #1

- a. Year and Model : _____
- b. Vehicle ID Number : _____
- c. Who drives the vehicle : _____
- d. Mortgage with : _____
Address : _____
Loan Balance : _____

[3.2] Vehicle #2

- a. Year and Model : _____
- b. Vehicle ID Number : _____
- c. Who drives the vehicle : _____
- d. Mortgage with : _____
Address : _____
Loan Balance : _____

[3.3] Vehicle #3

- a. Year and Model : _____
- b. Vehicle ID Number : _____
- c. Who drives the vehicle : _____
- d. Mortgage with : _____
Address : _____
Loan Balance : _____

[3.4] Vehicle #4

- a. Year and Model : _____
- b. Vehicle ID Number : _____
- c. Who drives the vehicle : _____
- d. Mortgage with : _____
Address : _____
Loan Balance : _____

25. List all Retirement, Pensions, and Savings Plans.

a. Do you participate in any retirement plan? _____

[4.1] If so, describe the plan: _____

b. Does your Spouse participate in any retirement plan? _____

[4.2] If so, describe the plan: _____

c. Do you participate in any company savings plan? _____

[4.3] How much is in the plan: \$ _____

d. Does your Spouse participate in any company savings plan? _____

[4.4] How much is in the plan: \$ _____

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26. List any other Deferred Compensation Benefits (e.g., workers' compensation, disability benefits, bonuses and other "special payments," employee stock options, and other forms of compensation)

a. [5.1] Name or Type of Your Benefit: _____
Please describe the benefit: _____

b. [5.2] Name or Type of your Spouse's Benefit: _____
Please describe the benefit: _____

26. List all Life Insurance or Annuities:

[6.1] Insurance #1

a. Insurance Company : _____
Policy # : _____
b. Insuring Life of : _____
c. Beneficiary : _____
d. Type of Policy (Whole Life) (Term) (Universal)
e. Cash Value : _____
f. Loans against policy : _____

[6.2] Insurance #2

a. Insurance Company : _____
Policy # : _____
b. Insuring Life of : _____
c. Beneficiary : _____
d. Type of Policy (Whole Life) (Term) (Universal)
e. Cash Value : _____
f. Loans against policy : _____

[6.3] Insurance #3

a. Insurance Company : _____
Policy # : _____
b. Insuring Life of : _____
c. Beneficiary : _____
d. Type of Policy (Whole Life) (Term) (Universal)
e. Cash Value : _____
f. Loans against policy : _____

27. List any Brokerage or Mutual Fund Accounts:

[7.1] Account #1

a. Name of Account : _____
b. Estimate amount invested : _____

[7.2] Account #2

a. Name of Account : _____
b. Estimate amount invested : _____

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[7.3] Account #3
a. Name of Account : _____
b. Estimate amount invested : _____

[7.4] Account #4
a. Name of Account : _____
b. Estimate amount invested : _____

28. List all Stocks, Bonds, and Other Securities (include securities not previously disclosed in this interview):

[8.1] Investment #1
a. Name of Stock : _____
b. Estimate amount invested : _____

[8.2] Investment #2
a. Name of Stock : _____
b. Estimate amount invested : _____

[8.3] Investment #3
a. Name of Stock : _____
b. Estimate amount invested : _____

[8.4] Investment #4
a. Name of Stock : _____
b. Estimate amount invested : _____

29. Does anyone owe you or your spouse money? _____
How much is owed \$ _____
Owed by whom : _____

30. Are you involved in any lawsuits? _____
If so, please explain : _____

31. Do you own any livestock or mineral interest? _____

32. Do you belong to any clubs with an equity interest? _____
If so, where : _____

33. List any and all Other Assets name any other assets or property not named above:

34. Debts: (Other than house and/or automobiles; e.g., Charge Cards, Personal Loans, etc....)
a. _____ \$ _____
b. _____ \$ _____
c. _____ \$ _____
d. _____ \$ _____
e. _____ \$ _____
f. _____ \$ _____
g. _____ \$ _____
h. _____ \$ _____

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- i. _____ \$ _____
- j. _____ \$ _____
- k. _____ \$ _____
- l. _____ \$ _____
- m. _____ \$ _____
- n. _____ \$ _____

35. Income Tax

- a. Have you filed for all previous years? _____
Prepared by whom : _____
- b. Refund received? : _____
If so, how much: \$ _____

36. Last Will and Testament

- a. Do you have a will? : _____
Prepared by whom : _____
- b. Does your spouse have a will? _____
Prepared by whom : _____

37. Separate Property

- a. Do you own any separate property (property owned before marriage or property received during marriage as a gift or inheritance)? _____
If so, detail property : _____

- 38. Does your spouse own separate property? _____
If so, detail property : _____

EXHIBIT “C”

**ANALYZING YOUR PROPERTY CASE
(A Summary for Clients)**

**LAW OFFICES OF
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August 3, 2009

VIA HAND DELIVERY

Mr. _____

San Antonio, TX 78230

RE: Style of Case

Dear Mr. _____:

The analysis of your property case is the first and arguably the most important step in the handling of your divorce. Prior to characterization, valuation, and the division of the marital estate, it is absolutely essential that you have a thorough understanding of the property that exists that is to be divided. The purpose of this letter is to discuss those things that you need to understand in order to provide us with information.

I. RULES THE FAMILY CODE HAS TAUGHT US (AND THAT I WANT TO TEACH YOU)

A. The General Rules for Separate and Community Property

1. What is Separate Property?

“Separate property” is that property owned or claimed by the spouse before marriage; the property acquired by the spouse during marriage by gift, devise, or descent; and any recovery for personal injury that does not include recovery for loss of earning capacity.

Upon divorce, a spouse’s separate property remains his/her separate property (in other words, what’s mine remains mine).

Case law taught us that a court cannot divest a party of his/her separate real or personal property (in other words, what’s mine remains mine and will always be mine). *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 142 (Tex. 1977). *Cameron v. Cameron*, 641 S.W.2d 210, 219-20 (Tex. 1982).

Often times, our client will exclaim “but the separate property increased in value during the time we were married, and didn’t you tell me anything acquired during the marriage is community property?”

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Your response, of course, is that in “In Texas a spouse does not have a claim for the increase in value of separate property during the marriage. However, the spouse may have a claim for reimbursement for time, toil, and effort of the community that went into making that increase. If payments are made for separate property during the marriage with community funds, the other spouse is entitled to reimbursement.” TFC 3.001

2. What is Community Property?

If property does not fall under the definition of separate, then it is community property. Community property is property acquired by either spouse during the marriage.

Some types of property require a special analysis. While a degree is not property that can be divided and courts cannot put a value on a degree, it is recognized that a spouse with a degree has a higher earning capacity than one without a degree. This is a factor the non-degreed spouse can use when making the request for a disproportionate division of the community estate.

A closely held corporation is divisible, though it is hard to find the fair market value. The buy-sell agreement can be a start for valuation, but this is not controlling in Texas (especially in the spouse was not involved in making the agreement).

Personal goodwill in a business is not divisible, while business goodwill is divisible. The difficulty arises in distinguishing the two. Goodwill (especially business goodwill) is an important asset to be considered in your estate.

3. Presumption of Community Property and Rebuttal of Same

Of course, you need to understand that the presumption in Texas is that property possessed by either spouse during or on dissolution of marriage is community. And since there is no “legal separation” in Texas, all income earned during the separation prior to the rendering of the divorce, is community property. TFC 3.002

a. Tracing

We also need to be sure that clients understand that the most recognized method of rebutting the community presumption is through tracing. In *Chavez v. Chavez*, 269 S.W.3d 763, 767 (Tex. App. – Dallas 2008), the court noted that the process of tracing separate property “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.” “Mere testimony that property was purchased with separate property funds, without tracing of the funds, is generally insufficient to rebut the presumption. Any doubt as to the character of property should be resolved in favor of the community estate.” (citations omitted). However, the court held that the trial court did not abuse its discretion by not requiring the appellee to trace funds because undisputed evidence at trial proved that appellee purchased the separate property before the marriage. The appellee testified that he purchased the property before the marriage and appellant, on cross-examination, verified that she resided at the property prior to marriage and that the parties discussed refinancing the property and placing her name on the property's mortgage after marriage. The court held that “[t]his undisputed testimony is sufficient evidence to establish the separate character of the property.”

b. Gifts

In *Wells v. Wells*, 251 S.W.3d 834, 839 (Tex. App. – Eastland 2008), the court pointed out the elements of establishing a gift for characterization as separate property. Those elements are “(1) intent to make a gift; (2) delivery of the property; and (3) acceptance of the property.” In the case at hand, the appellant argued that certain farm equipment was given to both him and his wife as a gift from his wife’s parents. However, the wife alleged that these pieces of equipment were actually gifts just to her. The court stated that in a mischaracterization challenge, appellant must “must establish not only that the trial court erred but that this error caused sufficient harm to constitute an abuse of discretion.” The trial court had not provided valuation findings, so the appellate court could not determine what affect the characterization had on the total distribution. Further, the appellant did not show that the characterization was in error.

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Both appellee and her mother testified that the gift was to appellee alone. Appellant argued the general rule that mere testimony that separate property is separate is insufficient. However, the court held that “[t]he general rule is inapplicable because there was no need to trace assets. There was no dispute about what items of equipment were gifted, and there was no claim that any of this equipment had been sold, traded, or otherwise converted into any other asset.” 251 S.W.3d at 840. Therefore, the trial court had not abused its discretion in characterizing the equipment as separate. TFC 3.005

d. Stock

If a spouse gives a gift of property to the other spouse, it is presumed that the gift includes all the property and income that arises from that gift.

In *Legrand-Brock v. Brock*, 246 S.W.3d 318 (Tex. App. – Beaumont 2008), the court explained the law on the characterization of liquidation distributions. “Generally, when a spouse owns separate-property stock in a dissolving corporation and receives distributions of liquidated assets, the distributions remain the stockholder's separate property. The character of property is not altered by the sale, substitution, or exchange of the property; separate property that merely undergoes mutations or changes in form remains separate property. Distributions received in exchange for the cancellation of stock upon the corporation's dissolution retain the character of the stock.” Appellant argued that because the company distributed the cash to appellee from its retained earnings, the distributions were dividends and therefore community property. The court clarified that “[c]ash dividends from stock are treated like income, and when distributed during marriage are community property. A distribution by a corporation to its shareholders may constitute a dividend in law even though not formally designated as a dividend by the board of directors. The corporation's earnings or surplus funds normally do not constitute a dividend while they are retained by the corporation, however.” Because there was no evidence that the company’s “board of directors declared or otherwise authorized the payments as cash dividends before the dissolution resolution, or that after liquidating and distributing its assets, [the company] somehow continued to operate as a business.” Here, “[t]he board resolution required [the company] to distribute its remaining assets to its shareholders in complete cancellation or redemption of all the shares of capital stock of the Company. It is immaterial to the characterization of the property in this case that the assets distributed on dissolution were the corporation's retained earnings. Upon the dissolution of the corporation, [appellee] received [a distribution] in exchange for his separate property stock. The cash distributions represented an exchange of [appellee's] separate property stock for [the company's] cash assets.” 246 S.W.3d, 321-23 (internal citations and quotations omitted).

4. The 50/50 Myth

The Courts require a just and right division of the community estate, and it is a common misconception that a 50/50 split is just and right. There is no such presumption. Although 50/50 can be a starting point, courts have wide discretion when it comes to defining a just and right division.

In the legendary case of *Murff v. Murff*, 615 S.W.2d. 696 (Tex. 1981), the Texas Supreme Court set out the most important factors for a court to consider in making a ‘just and right’ division of the community property. These 11 factors are as follows:

1. The disparity of incomes or earning capacities of the spouses
2. The spouses’ capacities and abilities
3. Benefits which the party not at fault would have derived from a continuation of the marriage
4. Business opportunities of the spouses
5. Education of the spouses
6. Relative physical conditions of the spouses
7. Relative financial conditions of the spouses
8. Differences in the size of each spouse’s separate estate
9. The nature of the property to be divided
10. Fault in the break up of the marriage
11. Attorneys fees of the parties

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In *Murff*, the Texas Supreme Court explained: “The trial court in a divorce case has the opportunity to observe the parties on the witness stand, determine their credibility, evaluate their needs and potentials, both social and economic. As the trier of fact, the court is empowered to use its legal knowledge and its human understanding and experience. Although many divorce cases have similarities, no two of them are exactly alike. Mathematical precision in dividing property in a divorce is usually not possible. Wide latitude and discretion rests in these trial courts and that discretion should only be disturbed in the case of clear abuse.” *Murff*, at 700.

5. Additional Factors

Texas has continued to developed additional factors that can be considered in determining if a spouse is entitled to more than 50% of the community estate. These factors include:

4. Fraud on the community;
5. Dissipation of a community asset;
6. Gifts by one spouse to others outside the marriage;
4. Tax implications of a proposed division;
5. Community debts and liabilities;
6. Reimbursement;
7. Credit for temporary spousal support paid;
8. Use of separate property to create community estate;
9. Increase of separate property due to other spouses efforts;
10. Waste of a community asset; and
11. Community debts/liabilities

There is no rule that a court should give one factor more weight than any other or that these factors are controlling – again, it is up to the court’s discretion. These lists are not exhaustive because the court has discretion and lawyers are a creative bunch; therefore, if you are presented with a new factor not listed above that you think makes a disproportionate division just and right, then present it to the judge as a possibility.

6. Reimbursement Claims

An important part of your case can be claims made for reimbursement for monies paid toward the mortgage of the separate property of their spouse or for improvements to that property. Any such amounts can give rise to reimbursement claims against that spouses separate estate.

7. Recordation of Separate Property

You need to understand that a spouse can record their separate property in the deed records of a county where either spouse resides or the real property is located. If you have done so, you need to inform us of same as this is an important factor in our assessment of their estates.

8. Proportional Ownership of Property by Marital Estates

You need to understand that if you contributed separate funds as part of the purchase of community property, their separate estate may own a percentage interest in that property under the rule of inception of title. You also need to understand the importance of providing copies of their checks, closing statements and other proof of their separate property interest in these properties. TFC 3.006

9. Property Interest in Certain Employee Benefits

Retirement plans are often overlooked portion of your estate.

b. Defined Contribution Plan

In a defined contribution plan, an employee has his/her own account with the employer. It may be a plan where the employee makes all the contributions or the employee and the employer make contributions. The value of the retirement benefit is the amount of money in the plan.

b. Defined Benefit Plan

A defined benefit plan is where upon retirement, an employee gets a sum certain for the rest of his/her life taking into account various factors, including length of employment. This is hard to value because the employee does not have his/her own account.

c. Vesting vs. Maturity

In order for a plan to be vested, the employee must stay at his/her job for a certain number of years. If unvested (employee has been at job for less than that number of years), then he/she loses a percentage value of the plan.

A plan is matured when the employee is old enough to draw retirement benefits from it.

A spouse who started earning retirement or any kind of employee benefit before marriage and had an interest in that before marriage has a separate property interest in that employee benefit. When the person gets married, the benefits that accrue during the marriage are community assets. If the parties divorce, and that spouse continues employment with the same employer, any benefits accumulated after divorce is separate. It is necessary to determine the percentage of the interest that was acquired during the marriage - that is the percentage that is community and which is the only portion the court has the authority to divide. TFC 3.007

10. Stock Options

If your estate includes stock options, you need to understand their characterization and the impact of the characterization on your property division.

Basically, cash dividends distributed during marriage are generally considered to be community property. Stock dividends, stock splits, appreciation in the value of the stock, proceeds from liquidate stock as well as mergers generally retain the character of the underlying stock.

But it is seldom that clear cut, such as in the case of stock options. When trying to decide whether a stock option is community or not, you must decide if this is an option/benefit that is given to the employee to encourage him/her to do good work while the marriage is occurring. If it is to compensate for services during the marriage, then a court will likely characterize it as community property. But if it is to encourage the employee to do good work in the future, i.e. post marriage, then it is separate. Sometimes stock options are awarded after separation, but are to reward for services that occurred during the marriage and to encourage employee to do good work in the future. These have a mixed character and are more difficult to characterize, so it may be time to call in an expert.

Of course there is no guarantee, and a court can listen to all the competing experts and turn around and give 100% to either spouse, such as *Hendershot v. Hendershot*, WL 4445648 (Tex. App. – Fort Worth 2008). “Texas courts have consistently held that stock options acquired during marriage are a contingent property interest and a community asset subject to division upon divorce. The family code sets out that, in a divorce decree, the trial court shall determine the rights of both spouses to stock options or other employer plans in the nature of compensation or savings. However, there is nothing in the code or case law with regard to the proper method of stock option valuation. The trial court has the discretion to award retirement benefits earned during marriage to the party who earned them.

11. Property Interest in Certain Insurance Proceeds

a. Casualty Loss

Insurance proceeds from a casualty loss to property during marriage are the same characterization as the property itself.

b. Disability Insurance

If a spouse receives disability insurance or workers' compensation during the marriage, the portion of those payments that is for lost earnings is community. The portion that is for lost earnings while the spouse is no longer married is separate. TFC 3.008

C. The Management, Control, and Disposition of Marital Property

You need to understand the dynamics of how, up to this point, their estates have been managed.

1. Managing Separate Property

Each spouse has the sole management, control, and disposition of the spouse's separate property. TFC 3.101

2. Managing Community Property

During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single. This includes personal earnings, revenue from separate property, recoveries for personal injuries, and the increase and mutations of, and the revenue from, all property subject to the spouse's sole management, control, and disposition.

Mixed or community property is subject to the joint management, control, and disposition of the spouses. Community property is subject to the joint management, control, and disposition of the spouses. In *City of Emory v. Lusk*, 278 S.W.3d 77 (Tex. App. – Tyler 2009), the court reviewed a case involving a spouse who, while in her role as a city councilwoman, consented to an easement for a sewer with the city along her and her husband's property. The court held that, even if she was acting in her capacity as a city councilwoman, the property constituted community property and thus she could not encumber it acting alone. Her husband would also have to consent. 278 S.W.3d at 85. TFC 3.102

3. Protection of Third Persons

During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in that spouse's name as shown by evidence of ownership or if it is in that spouse's possession and is not subject to such evidence of ownership.

A third person dealing with a spouse is entitled to rely, as against the other spouse or anyone claiming from that spouse, on that spouse's authority to deal with the property if: (1) the property is presumed to be subject to the sole management, control, and disposition of the spouse; and (2) the person dealing with the spouse (a) is not a party to a fraud on the other spouse or another person; and (b) does not have actual or constructive notice of the spouse's lack of authority.

In *Wright v. Wright*, 280 S.W.3d 901 (Tex. App. – Eastland 2009), a divorce resulted in one spouse's claim that the other spouse committed fraud on the community because three days after she filed for divorce, he transferred 49% of the shares in one of the couple's companies and drained both of their bank accounts. The husband believed he had the authority to sell the stock because they were in his name, but the court determined that the wife was entitled to consultation before a transfer this large. The court stated the rule that a spouse who has the property in his/her name may make a moderate gift to a party outside the marriage so long as it is not capricious, excessive, or arbitrary. Because the trial court did not find the husband and third party credible witnesses, the appellate court affirmed the ruling that the third party was a part of the fraud on the community. Further, "[a] presumption of constructive fraud arises when one spouse disposes of the other spouse's one-half interest in community property without the other's knowledge or consent. [The husband] had the burden of proof to establish that the transfer of the stock to [the third party] was not unfair

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to the rights of [the wife].” The transfer deprived the wife of an additional \$637,000 in community assets, and thus was unfair to her rights. TFC 3.104

D. The Marital Property Liabilities

1. Spousal Liability

A spouse is only liable for the acts of his/her spouse if his/her spouse acts as an agent for the other spouse or the debt is incurred for a “necessary”. Community property is not automatically subject to a liability that arises from an act of a spouse. The marriage relationship does not mean a spouse automatically acts as the other’s agent. TFC 3.201 and TFC 2.501.

2. Rules of Marital Property Liability

A spouse’s separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law.

Unless both spouses are personally liable as provided by this subchapter, the community property subject to a spouse’s sole management, control, and disposition is not subject to: (1) any liabilities that the other spouse incurred before marriage; or (2) any non-tortious liabilities that the other spouse incurs during marriage.

The community property subject to a spouse’s sole or joint management, control, and disposition is subject to the liabilities incurred by the spouse before or during marriage. All community property is subject to tortious liability of either spouse incurred during marriage. TFC 3.202

3. Order in Which Property is Subject to Execution

Clients need to understand that a judge may determine, as deemed just and equitable, the order in which particular separate or community property is subject to execution and sale to satisfy a judgment, if the property subject to liability for a judgment includes any combination of: (1) a spouse's separate property; (2) community property subject to a spouse's sole management, control, and disposition; (3) community property subject to the other spouse's sole management, control, and disposition; and (4) community property subject to the spouses' joint management, control, and disposition.

In determining the order in which particular property is subject to execution and sale, the judge shall consider the facts surrounding the transaction or occurrence on which the suit is based. TFC 3.203

II. Marital Property Agreements

Oftentimes, clients will come to see us with signed pre-marital or post-marital agreements. Educating clients about those agreements is an important part of our process in analyzing their property case. There are two types of Marital Agreements, those entered into in contemplation of marriage (before marriage) and those entered into after marriage. The after marriage variety are to change the effect of the characterization laws, which also fall into two categories, the first being a Partition and Exchange Agreement which converts community property into separate property; and the second being a Conversion Agreement, which converts separate property into community property.

A. Premarital Agreements - Defined

A “Premarital agreement” is defined as an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage. “Property” means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings. TFC 4.001

1. Formalities

A premarital agreement must be in writing and signed by both parties. The agreement is enforceable without consideration. TFC 4.002

2. Content

The parties to a premarital agreement may contract with respect to: (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located; (2) the right to

buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property; (3) the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event; (4) the modification or elimination of spousal support; (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement; (6) the ownership rights in and disposition of the death benefit from a life insurance policy; (7) the choice of law governing the construction of the agreement; and (8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

The right of a child to support may not be adversely affected by a premarital agreement.

Waiver of a pension must comply with ERISA. Waiver of an inheritance must have the necessary conveyance language.

A contract imposing unlimited restraints on marriage is invalid.

The agreement may not violate public policy or a statute that imposes criminal liability. TFC 4.003

3. Effect of Marriage

A premarital agreement becomes effective on marriage. TFC 4.004

4. Amendment or Revocation

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.

The courts may consider changed circumstances to find the agreement unconscionable (such as one spouse is left with not enough or no property or money). TFC 4.005

5. Enforcement

A premarital agreement is not enforceable if the party against whom enforcement is requested proves that:

(1) the party did not sign the agreement voluntarily; or

(2) the agreement was unconscionable when it was signed and, before signing the agreement, that party: (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

The burden of proof is on the party seeking to avoid enforcement of the premarital agreement.

In *Bufkin v. Bufkin*, 259 S.W. 3d 343 (Tex. App. – Dallas 2008), the court determined that where there was a valid premarital agreement on division of property, any evidence of fault in the divorce is irrelevant and does not apply to the division. The division must be as the parties agreed in the premarital agreement. 259 S.W. 3d at 353. TFC 4.006

6. Enforcement: Void Marriage

If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. TFC 4.007

7. Limitation of Actions

A statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. TFC 4.008

B. The Marital Property Agreement

1. Partition or Exchange of Community Property

At any time, the spouses may partition or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouses may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. The partition or exchange of property may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse.

The court in *Ahmed v. Ahmed*, 261 S.W. 3d 190 (Tex. App. – Houston [14th Dist.] 2008) decided that a Mahr in a traditional Islamic wedding is not a valid premarital property agreement. A Mahr is “an Islamic religious custom whereby the husband contracts to give the wife a sum of money, either at the time of the marriage or deferred in the event of a divorce.” 261 S.W. 3d at 193. Here, the Mahr was not valid as a premarital property agreement because “the record is devoid of any evidence as to whether or not the parties intended the Mahr payment to come from Amir's separate property or from the community property,” and therefore there was no intent to convert community property into separate property. *Id.* at 195. TFC 4.102

2. Agreement between Spouses Concerning Income or Property from Separate Property

At any time, the spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner. TFC 4.103

3. Formalities

A partition or exchange agreement under Section 4.102 or an agreement under Section

4.103 must be in writing and signed by both parties. Either agreement is enforceable without consideration. TFC 4.104

4. Enforcement

A partition or exchange agreement is not enforceable if the party against whom enforcement is requested proves that:

(1) the party did not sign the agreement voluntarily; or

(2) the agreement was unconscionable when it was signed and, before execution of the agreement, that party: (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

An issue of unconscionability of a partition or exchange agreement shall be decided by the court as a matter of law.

The remedies pre September 9, 1993, included common law contract defenses, such as fraud, duress, mistake, ambiguity, overreaching and lack of consideration, however post September 9, 1993, ONLY involuntary execution and unconscionability apply. TFC 4.105

5. Rights of Creditors and Recordation under Partition or Exchange Agreement

Provision of a partition or exchange agreement made under this subchapter is void with respect to the rights of a preexisting creditor whose rights are intended to be defrauded by it.

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A partition or exchange agreement made under this subchapter may be recorded in the deed records of the county in which a party resides and in the county in which the real property affected is located. An agreement made under this subchapter is constructive notice to a good faith purchaser for value or a creditor without actual notice only if the instrument is acknowledged and recorded in the county in which the real property is located. TFC 4.106

C. Agreement to Convert Separate Property to Community Property

1. Agreement to Convert to Community Property

At any time, spouses may agree that all or part of the separate property owned by either or both spouses is converted to community property. TFC 4.202

a. Formalities of Agreement

An agreement to convert separate property to community property:

- (1) must be in writing and:
 - (a) be signed by the spouses;
 - (b) identify the property being converted; and
 - (c) specify that the property is being converted to the spouses' community property; and
- (2) is enforceable without consideration.

The mere transfer of a spouse's separate property to the name of the other spouse or to the name of both spouses is not sufficient to convert the property to community property under this subchapter. TFC 4.203

b. Management of Converted Property

Except as specified in the agreement to convert the property and as provided by Subchapter B, Chapter 3, and other law, property converted to community property under this subchapter is subject to: (1) the sole management, control, and disposition of the spouse in whose name the property is held; (2) the sole management, control, and disposition of the spouse who transferred the property if the property is not subject to evidence of ownership; (3) the joint management, control, and disposition of the spouses if the property is held in the name of both spouses; or (4) the joint management, control, and disposition of the spouses if the property is not subject to evidence of ownership and was owned by both spouses before the property was converted to community property. TFC 4.204

c. Enforcement

(a) An agreement to convert property to community property under this subchapter is not enforceable if the spouse against whom enforcement is sought proves that the spouse did not: (1) execute the agreement voluntarily; or (2) receive a fair and reasonable disclosure of the legal effect of converting the property to community property.

(b) An agreement that contains the following statement, or substantially similar words, prominently displayed in bold-faced type, capital letters, or underlined, is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting property to community property:

“THIS INSTRUMENT CHANGES SEPARATE PROPERTY TO COMMUNITY PROPERTY. THIS MAY HAVE ADVERSE CONSEQUENCES DURING MARRIAGE AND ON TERMINATION OF THE MARRIAGE BY DEATH OR DIVORCE. FOR EXAMPLE:

“EXPOSURE TO CREDITORS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO THE LIABILITIES OF YOUR SPOUSE. IF YOU DO NOT SIGN THIS AGREEMENT, YOUR SEPARATE PROPERTY IS GENERALLY NOT SUBJECT TO THE LIABILITIES OF YOUR SPOUSE UNLESS YOU ARE PERSONALLY LIABLE UNDER ANOTHER RULE OF LAW.

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“LOSS OF MANAGEMENT RIGHTS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO EITHER THE JOINT MANAGEMENT, CONTROL, AND DISPOSITION OF YOU AND YOUR SPOUSE OR THE SOLE MANAGEMENT, CONTROL, AND DISPOSITION OF YOUR SPOUSE ALONE. IN THAT EVENT, YOU WILL LOSE YOUR MANAGEMENT RIGHTS OVER THE PROPERTY. IF YOU DO NOT SIGN THIS AGREEMENT, YOU WILL GENERALLY RETAIN THOSE RIGHTS.”

“LOSS OF PROPERTY OWNERSHIP. IF YOU SIGN THIS AGREEMENT AND YOUR MARRIAGE IS SUBSEQUENTLY TERMINATED BY THE DEATH OF EITHER SPOUSE OR BY DIVORCE, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME THE SOLE PROPERTY OF YOUR SPOUSE OR YOUR SPOUSE'S HEIRS. IF YOU DO NOT SIGN THIS AGREEMENT, YOU GENERALLY CANNOT BE DEPRIVED OF OWNERSHIP OF YOUR SEPARATE PROPERTY ON TERMINATION OF YOUR MARRIAGE, WHETHER BY DEATH OR DIVORCE.”

(c) If a proceeding regarding enforcement of an agreement under this subchapter occurs after the death of the spouse against whom enforcement is sought, the proof required by Subsection (a) may be made by an heir of the spouse or the personal representative of the estate of that spouse. TFC 4.205

d. Rights of Creditors; Recording

A conversion of separate property to community property does not affect the rights of a preexisting creditor of the spouse whose separate property is being converted.

A conversion of separate property to community property may be recorded in the deed records of the county in which a spouse resides and of the county in which any real property is located.

A conversion of real property from separate property to community property is constructive notice to a good faith purchaser for value or a creditor without actual notice only if the agreement to convert the property is acknowledged and recorded in the deed records of the county in which the real property is located. TFC 4.206

III. GATHERING THE INFORMATION

Having been educated on the law and, hopefully, created reasonable expectations, it is time to gather as much information as possible to assist us in our assessment of your estate. Remember there are several difference sources available to obtain the information on your estate.

A. You

Obviously, our primary source of information will be from you. Once you have a better understanding of the reasons that we need your information, hopefully you will offer a more complete description of their estates.

Obviously, having the most complete information sheet available for clients to complete, naming every type of asset and debt that can be contemplated is a “plus” in the process.

C. Third Party Independently Retained Financial Experts

If your case has significant property issues, a third party financial expert can be worth their weight in gold.

1. Uses of the Expert

Tracing separate property claims, identifying reimbursement claims, valuation and even roughly identifying your estate are only some of the many ways a financial expert can assist me and you in assessing your case. In a large estate with multiple types of assets, I ask my expert to determine the tax implications of various versions of the property division.

2. Choosing Your Expert

You need to choose a financial expert with whom both of us are comfortable. I tend to resist the election of current CPA's or bookkeepers as financial experts. Oftentimes, individuals with whom you have a long standing relationship are family friends and very trustworthy. Those benefits must be off-set by the fact that most of these individuals do not know or understand the rules of family law (and my time and your money must be used to educate them.). Generally, my experience is that a customary CPA does not have forensic experience and, accordingly, will not be an effective witness.

C. Websites for Third Party Information Gathering

1. Property Valuation

- Can call/visit retailers as if you are selling to get a value
- Cars
 - www.kbb.com
 - www.edmunds.com
 - www.nadaguides.com (boats, recreational vehicles, motorcycles, manufactured homes, classic cars) (with a small fee for the report - \$20)
- Boats
 - www.nadaguides.com
 - <http://www.usedboats.com/search/boat-values>
 - <http://www.bucvalu.com/>
- RVs/Trailers
 - www.nadaguides.com
 - www.pplmotorhomes.com (to order pricing guides; can call to get value)
- Real Property
 - Appraisal Districts – most are now online
- Stocks
 - <http://finance.yahoo.com/> (to get current value of the stock)
- Antiques
 - <http://collectibles.about.com/od/priceguidesonline/tp/priceguideindex.htm>
 - <http://www.instappraisal.com/>
- Furniture (and for other personal items)
 - To see what other people are selling similar items for in your area:
 - www.craigslist.com for your city)
 - <http://shop.ebay.com/items/Furniture>
- Art pieces/collections
 - <http://www.askart.com/AskART/index.aspx>
 - <http://www.findartinfo.com/>
- Jewelry
 - <http://www.online-jewelry-appraisals.com/>
 - <http://www.gemval.com/>

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V. CONCLUSION

Analyzing a property case is important in the proper handling of your divorce covering the bases by first educating you and then checking with third party experts and sources is the best way to ensure that your case is properly analyzed.

Very truly yours,

CHARLES E. HARDY
CEH/sb

Read on _____ day of _____, 200__.

Signature

Printed Name

