

## Marital Property Agreements and Divorce Settlements

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## Texas Constitution Article 16, § 15 Separate & Community Property

All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relations to separate and community property....

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## Texas Family Code § 3.001 Separate Property

A spouse's separate property consists of:

- (1) the property owned or claimed by the spouse before marriage;
- (2) the property acquired by the spouse during marriage by gift, devise, or descent; and
- (3) The recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

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**Texas Family Code § 3.002  
Community Property**

Community property consists of the property, other than separate property, acquired by either spouse during marriage.

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**Texas Family Code § 3.003  
Community Property Presumption**

- (a) Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.
- (b) The degree of proof necessary to establish that property is separate property is clear and convincing evidence.

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**Clear & Convincing Evidence  
Texas Family Code §101.007**

■ “Clear and convincing evidence” means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

- *In re J.F.C.*, 96 S.W.3d 256 (Tex.2002)
- *In re G.M.*, 596 S.W.2d 846 (Tex.1980)

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## Overcoming the Community Property Presumption

- *Bahr v. Kobr*, 980 S.W.2d 723, 728 (Tex.App.-- San Antonio 1998, no pet.):

“Mere testimony that property was purchased with separate property funds, without any tracing of the funds, is generally insufficient to rebut the community property presumption.”

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## Inception of Title Rule

- The character of marital property is determined at the time of “inception of title.”
- “Inceptions of title” occurs when a party first has a right or claim to the property which results in title becoming vested.

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## Texas Constitution Article 16, § 15 Separate & Community Property

Spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse;

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**Texas Constitution Article 16, § 15  
Separate & Community Property**

- Spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse;
- and spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses' community property.

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**Texas Family Code § 4.001  
Definition of Premarital Agreement**

“Premarital Agreement” means an agreement between prospective spouse made in contemplation of marriage and to be effective on marriage.”

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**Texas Family Code § 4.002  
Premarital Agreement Formalities**

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

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## Texas Family Code § 4.003 Premarital Agreement 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 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;

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## Premarital Agreement Content Cont....

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 criminal penalty.

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## Premarital Agreement Content- Limitations

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

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# Moving on to: Post-Marital Agreements

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## Marital Property Agreements

Texas Family Code § 4.102:

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 spouse 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.

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## Agreement Between Spouses Concerning Income or Property from Separate Property

■ Texas Family Code § 4.103

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.

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## Texas Family Code § 4.104 Partition Agreement 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.

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## Enforceability of Premarital Agreements & Postmarital Agreements Texas Family Code §4.005 and §4.105

- A partition agreement is not enforceable if the party against whom enforcement is requested proves that:
  1. The party did not sign the agreement voluntarily;  
or

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## Enforceability Continued...

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 party.

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## Texas Family Code § 4.202 Agreement to Convert 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.

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## Texas Family Code § 4.203 Formalities

- An agreement to convert separate property to community property:
  - Must be in writing and;
  - Be signed by the spouses;
  - Identify the property being converted; and
  - Specify that the property is being converted to the spouses' community property and
  - 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.

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## Records and the Presumption

Texas Family Code § 3.003

- Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.
- The degree of proof necessary to establish that property is separate property is clear and convincing evidence.
- It is difficult to show a clear and convincing proof without records.
- Records including: financial records, stock records, shareholder minutes, deeds, etc.

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## Retaining Records

- It is extremely important to retain records.
- Never tell a client that they can destroy their records after 5-7 years.

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## Retaining Records

- Loss of records destroys the ability to trace and characterize assets.
- Many times the premarital and postmarital agreements still requires that records be maintained to prove what the parties agreed to do is actually done.

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**Thank You!**

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