# Marital Property Law by corbin b.p. dodge More outlines available at [www.corbin-dodge.com](http://www.corbin-dodge.com) Spring 2013 Professor George South Texas College of Law

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# TeXas Marital Property System

* **Marital Property System**
* **Definition** - Governs ownership, mgmt, liability, & disposition of property possessed during & upon dissolution of marriage
* Primarily based on CL vs. Family Law which is code & procedures
* **Maintenance** - Post-marriage payments to a spouse. Expanded length & amount in 2011 (like alimony)
* **Characterize** - Determine whether marital property was acquired at a time, or in a manner, which deems it SP of a spouse
* **CP vs. CL Property States**
* **Community Property** *(Minority)*
* **Foundational Principle:** Whatever’s acquired by jt efforts of H&W *see* **Doctrine of Onerous Title !!!**
  + - Roots in Spanish & Mexican law. Recognizes women’s rights to hold property
    - TX has a “just & right division” of marital property upon divorce. Only trial judge can rule.
* **Common Law Property** *(Majority)*
* **~~Historical~~**~~: Property became H’s after marriage~~
* **Analysis: Characterization of Property**
* **CP Presumption**: All property possessed at the dissolution of marriage is presumed to be CP unless rebutted by C&C evidence (Claim property is SP → Must rebut w/ C&C evidence) **ALWAYS START HERE !!!**
* **Characterize the Property:** CP or H’s SP or W’s SP?
* **Management of Property**
  + - H’s SP he manages
    - W’s SP she manages
    - CP H manages solely
    - CP W manages solely
    - CP managed jointly

|  |  |
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| **Scenario** | **Answer** |
| H claims that a $300K house & Corvette that was acquired during his marriage are his SP. **Can H claim them as his SP?** | All property possessed at the dissolution of marriage is presumed to be CP. For H to claim them as his SP, he must overcome the CP presumption by showing clearing & convincing evidence that the house & Corvette were purchased out of his SP. // Characterize the property |
| *Same as above,* **but what if he owned the house before marriage?** | He must bring the deed to prove that it was his SP before marriage |

Core Statutes

* **Separate Property § 3.001**
* Property owned or claimed by spouse before marriage **or**
* Property acquired by spouse during marriage by gift, devise, or descent **or**
* PI recovery sustained by spouse during marriage, except for lost earning capacity during marriage
* **Community Property:** Property, other than SP, acquired by either spouse during marriage  **§ 3.002**
* **Community Property Presumption § 3.003**
* Property possessed by either spouse during or on dissolution of marriage is presumed CP
* Can only rebut by C&C proof the property in question is SP

History of Separate Property

* **1876 TX Const § 15 Separate Property**
* *All property, both real & personal of W, owned or claimed by her before marriage & acquired after by gift, devise or descent, shall be her SP (applies to both H&W); and laws shall be passed to clearly define W’s rights in relation to her SP as that held in common with her H. Laws shall also be passed providing for the registration of the W’s SP*
* Expanded to include gifts during marriage “Claimed” by K, etc
* Same core definition bc constitution is supreme
* Legislature & parties can’t expand it (even by K)
* **Most Limiting Aspect:** Gender. Doesn’t define H’s SP. H manages property, but W owns it
* **1911:** Married woman could obtain a DistCt order to remove her coverture disability
* **1913:** W could manage her SP & Special CP (W’s earnings, rents, & interests) They became exempt from H’s liability
* **1915:** Property or money received as compensation for PI sustained by W are her SP, ~~except medical bills & expenses H paid~~
* **1917:** Rents & revenues derived from SP of either spouse are SP of that spouse
* **1948-80 TX Const § 15 Separate Property**
* *All property, both real & personal of W, owned or claimed by her before marriage & acquired after by gift, devise or descent, shall be her SP (applies to both H&W); and laws shall be passed to clearly define W’s rights in relation to her SP as that held in common with her H; provided that H & W, w/out prejudices to preexisting creditor may from time to time, by written instrument as if the W were a feme sole partition bw themselves in severalty or into equal undivided interests all or any part of their existing CP,* ***OR*** *exchange bw themselves he community interest of one spouse in any property for the community interest of the other spouse in other CP, whereupon the portion or interest set aside to each spouse shall be & constitute a part of the SP of such spouse.*
* **2 new ways to create SP:** Partition or exchange
  + - **Requirements**
      * Must be married (can’t do in pre-nup)
      * Must be done on existing CP [modern allows future property]
    - **Partition**
      * **Applies**
        + Most things
        + Bank account (but not future interest earned on it. Must partition interest again bc it’s CP)
      * **Doesn’t Apply:** Future property
      * **EX:** H & W hold Whiteacre as CP. They decide to split it. 1/2 becomes H’s SP & 1/2 becomes W’s SP.
    - **Exchange**
      * **EX:** H & W hold Greenacre & Blackacre as SP. H exchanges his CP interest in Blackacre for W’s CP interest in Greenacre. So all of Greenacre is H’s SP. All of Blackacre is W’s SP

**1980, 1987, 1999 TX Const § 15 Separate Property**

* *(1) All property, both real & personal, of a spouse owned or claimed before marriage, & that acquired afterward by gift, devise, or descent, shall be the SP of that spouse, (2) & laws shall be passed more clearly defining the rights of the spouses, in relation to separate & CP, provided that* ***persons about to marry*** *& spouses, without the intention to defraud preexisting creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any other CP then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be & constitute a part of the SP & estate of such spouse or future spouse; (3) &* ***the spouses*** *may from time to time, by written instrument,* ***agree*** *between themselves that the income of property from all or part of the SP then owned by one of them, or which thereafter might be acquired, shall be the SP of that spouse, (4) & if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property, (5) & spouses may agree in writing that all or part of their CP becomes the property of the surviving spouse on death of a spouse, (6) & spouses may agree in writing that all or part of the SP owned by either or both of them shall be the spouses’ CP.*
* **Major Changes**
  + - 1972 Equal Rights Amendment made it genderless
    - Almost eliminated alienation of affection (right of H to sue W’s lover for DAS)
    - **New Clause**

*(1) All property, both real & personal, of a spouse owned or claimed before marriage, & that acquired afterward by gift, devise, or descent, shall be the SP of that spouse,*

* **Clause 1 ‘80:** Same basic definition of SP is the same. Genderless

*(2) & laws shall be passed more clearly defining the rights of the spouses, in relation to separate & CP, provided that* ***persons about to marry*** *& spouses, without the intention to defraud preexisting creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any other CP then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be & constitute a part of the SP & estate of such spouse or future spouse;*

* **Clause 2 ‘80**
* Genderless. Now includes future spouses *“persons about to marry”*
* **Preexisting creditors**: Changed from “*w/out prejudice to*” to “*intent to defraud*”
* **Partition & Exchange**
  + - Now includes future property & future spouses
    - Spouses or future spouses can partition or exchange existing or future CP
    - Exchanges don’t have to be equal *Chiles v. Chiles*
    - Legislature can’t change character

*(3) &* ***the spouses*** *may from time to time, by written instrument,* ***agree*** *between themselves that the income of property from all or part of the SP then owned by one of them, or which thereafter might be acquired, shall be the SP of that spouse,*

* **Clause 3 ‘80**
* **Requirements:** Spouses **&** in writing (no partition or exchange req’d) Extra perk for spouses **!!!**
* **Applies:** Can agree that income or property from SP remains SP of that spouse
* **Doesn’t Apply**
  + - Can’t agree one spouse’s salary will be his SP & the others property will be their SP
    - May only agree to income from SP being SP (bc earnings are CP)
    - Can only agree (Must partition or exchange to do this)

Can’t do it as future spouses

But future spouses can accomplish it w/ a *partition* or *exchange*

Strict Interpretation

Spouses can agree that income from property left to W by her grandmother be SP

*(4) & if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property*

*(5) & spouses may agree in writing that all or part of their CP becomes the property of the surviving spouse on death of a spouse*

*(6) & spouses may agree in writing that all or part of the SP owned by either or both of them shall be the spouses’ CP.*

**Clause 4 ’80** *Wyly v. Commissioner*

* + - * **Rule:** Income follows a gift bw spouses
      * ***Wyly* Issue w/ gifts**
        + **EX:** Spouse gifts rental house to W *“to hold as her SP forever.”* W puts rent in her private bank account. It’s income & income is CP. House is SP.
        + In *Wyly,* the IRS comm’r said all interest retained must be reported. Thus, interest from rental property gifted to a spouse, which is CP, effectively makes the gift not a gift. The *Wyly Amendment* was included in the 1980 Constitution: *“If one spouse makes a gift of property to the other that gift of property is presumed to include all the income or property which might arise from that gift”*
    - **Clause 5 ’87** *McKnight v. McKnight; Hilley v. Hilley*
      * **Rule:** Can set up JTWROS w/ CP
      * EX: CP will become property of my SS on my death
      * **Requirements:** Spouses **&** in writing
    - **Clause 6 ’99** *Kellate v. Trice*
      * **Rule:** Can change character of SP into CP
      * **Requirements:** Spouses **&** in writing
    - **1987:** BoP shifted to opponent

Increase in Value of SP

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| **Scenario** | **Answer** |
| **Example of Increase in SP land value**  Land worth $100, worth $1,000 at divorce | $900 is SP except for crops or rent |
| W owns race horse before marriage. H trained & horse wins KY Derby. **What is H entitled to?** | **Historical:** No reimbursement for his time, toil & effort *(Stringfellow)*  **Modern:** Consider time, toil, & effort |

* **Rule:** Crops grown on SP land → CP **!!!**  *De Blane v. Hugh Lynch*, *6*
* **Rule:** An increase in land value that’s SP → SP same today, *De Blane*
* *Note:* Crops character doesn’t change, but eventually it changed about whether they can satisfy H’s debt
* **Livestock** *Stringfellow v. Sorrells, 8*
* Offspring of W’s SP livestock → CP
* Livestock remains SP (even if weight/value increases)
* **Doctrine of Onerous Title !!!**
* **Definition:** Whatever is acquired by joint effort of the spouses is CP
* **Test:** Was it acquired by the labor of the spouses? Yes → CP | No → SP
* **General:** This principle is at the foundation of the CP system
* **TX:** Dividends, interests, rent, & other income derived from SP of a spouse are CP (strict)
* ***But see:* §3.005 Gifts Between Spouses**: Gift presumed to include all income & property that may arise from it
* **Doctrine of Implied Exclusion** **!!!**
* **Rule:** SP excluded if not acquired by gift, devise, or descent  *Arnold v. Leonard, 13*
* **Effect:** Anything not specifically listed in the Constitution is impliedly excluded
* **Test:** Was it acquired by gift, devise, or descent? Yes → SP | No → CP
  + - Can’t change it by prenup or postnup *Gorman v. Gause, 22*
* **CP & Joint Tenancy w/ Right of Survivorship**
* **Historical:** ~~CP can’t be used to create a JTWROS bc not an interspousal gift~~ *Hilley v. Hilley*, 24
* **Modern:** CP can be used to create a JTWROS

Character of Personal Injury Recovery

* **§3.001(3)** PI recovery sustained by the spouse during marriage → SP (except lost earning capacity)
* **Historical (Pre 1980 Amendment to TX Const)**
  + - *Northern TX Traction v. Hill*, 18 - All property or moneys received as compensation for PI sustained by W is her SP, ~~except actual & necessary expenses against H for hospital fees, medical bills, & incident. [Under the §, everything was SP except med expenses]~~ *see Graham v. Franco*
    - W can have a separate claim for her injuries (even if H contributorily negligent) *SW Bell Tele v. Thomas, 34*
    - PI recovery by a spouse is SP except recovery for lost earning capacity during marriage.
      * H’s negligence not imputed to W so as to bar her recovery  *Graham v. Franco*, 28
      * Personal -> DAS are SP EX: P&S, dismemberment

**Modern**

* + - Recovery for injuries to the person → SP
    - Wages/Earning Capacity → CP
    - Medical Expenses → Reimburse based on how they were paid before recovery EX: Paid by CP → CP
    - Malicious prosecution →
    - Slander →
    - Disability or Workers comp during marriage → CP bc meant to replace earnings **§ 3.008**
    - Disability or Workers comp when not married → SP **§ 3.008**
* **Joining Spouses + When local rules conflict w/ civil §’s** *Few v. Charter Oak Fire Ins*, 25
* **Rule:** Ct conflicts w/ legislation → Civil rule yields (not local rule). W can sue w/out H. W not req’d to join H in a recovery suit for worker’s comp arising out of her own injuries. Workers comp is jt owned CP but H doesn’t have to be a party to recover
* *Bradley v. Bradley* (50) -
* *Dewey v. Dewey* (52) -
* *Beck v. Beck* (62) -
* *Fanning v. Fanning* (67) -
* *Fanning v. Fanning* *Motion for Rehearing* (75) -
* *Sheshunoff v. Shesunoff* (76) -
* *Izzo v. Izzo* (83) -
* *Holmes v. Beatty* (92) -
* **Modern Rules of CP and SP**
* Can make a gift of SP to spouse
* Can’t make a gift of SP to the community (bc the gift must be separate)
  + - But can sell it to the community
* Can’t divest a spouse of their SP in divorce
* **2 Ways to Change Character of Property:** Purchase (FMV) **or** Gift
* Can’t alter the character of property by mere agreement
* Donative intent makes it SP EX: H gives W watch, paid by community → Watch is SP
* Easier to go from CP → SP (bc increases ownership rights)
* Increase in SP land value → SP

Premarital Agreement (Uniform Premarital Agreement Act)

* **Definition:** Agreement bw spouses in contemplation of marriage  **§4.001**
* **Requirements:** Writing **&** signed by both parties (no consideration req’d)  **§4.002**
* Applies  **§4.003**
* K for
* Rights & obligations of both parties in all of their property
* Right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose, etc
* Disposition on separation, divorce, death, etc
* Modify or eliminate spousal support
* Make a will, trust, etc (to carry out)
* Life insurance ownership rights
* Choice of law **&**
* Any other matter, including personal rights & obligations
* **Doesn’t Apply:** Can’t agree to eliminate possible child support
* **Becomes effective:** Upon marriage **§ 4.004**
* **Req’ts to Amend or Revoke:** *Same as creation*  **§ 4.005**
* **Enforcement** **§ 4.006**
* Not enforceable if proves:
  + - Not signed voluntarily **OR**
    - Unconscionable when signed **&** before signing: **!!!**
      * No fair & reasonable disclosure of property or $ obligations
      * Didn’t voluntarily & expressly waive (in writing) disclosure or $ obligations **&**
      * No knowledge or reasonably couldn’t have adequate knowledge of disclosure or $ obligations
        + EX: Never saw bills
        + Doesn’t matter how unconscionable > Must show no/lack of knowledge **!!!**
        + **INVOLUNTARY or**
        + **UNCONSCIONABLE + NO/LACK OF KNOWLEDGE + NO DISCLOSURE + NO WAIVER**
    - Ct decides unconscionability
    - These are the exclusive remedies or defenses (including CL ones)
* **Enforcement: Void Marriage:** If void → Only enforce agreement parts if necessary in for equi **§ 4.007**
* **Tips to make enforceable:** Like wills. Video, copies to all parties & attys, initial pages, ask questions (voluntary, no drugs, etc)
* **Homestead Right**
* **Definition:** SS right to a homestead & other exempt property cxs(to continue to occupy SP home of a dead spouse)
* **Rule:** Can waive your homestead right in a premarital agreement *Williams v. Williams*, 35
* **Rule:** Can’t violate const defs of CP & SP
* **Examples**
* Big church wedding → H says she must sign or he’ll leave her at the alter → Still Voluntary
* 40, unmarried, & pregnant -> Still voluntary

Post-Marital Agreement

* **Partition or Exchange of CP** **§ 4.102**
* At any time, spouses may partition or exchange bw themselves all or part of their CP, then existing or to be acquired, as the spouses may desire. It becomes that spouse's SP. May also provide that future earnings & income arising from the transferred property shall be SP of the owning spouse. *[Same as TX Const]*
* **Spousal Agreement Income or Property from SP § 4.103**
* Spouses may agree that income or property from future or existing SP, shall be O’s SP *[Same as TX Const]*
* **Requirements:** *Same as Premarital Agreement* **§ 4.104**
* **Enforcement:** *Same as Premarital Agreement* **§ 4.105**
* Rights of Creditors & Recordation Under Partition or Exchange Agreement **§ 4.106**
* Void if intent to defraud preexisting creditor
* May record in the deed records of a residing parties’ county & county of the property. Constructive notice to a good faith purchaser for value or a creditor w/out actual notice only if acknowledged & recorded in the county it’s located
* **SP to CP**
* **Agreement to Convert to CP** **§ 4.202**
  + - At any time, spouses may agree that all or part of the SP owned by either or both spouses is converted to C
* **Requirements** Writing **&** signed by both **&** specify property to convert **§ 4.203**
* **Applies**
  + - No consideration req’d
    - Even if one party didn’t believe it would ever be utilized (ie we’ll never divorce) *Sheshunoff v Shesh.,82*
* **Doesn’t Apply:** Transfer of SP
* **Undue Influence**  *Izzo v. Izzo, 83*
* **Factors !!!** *Daniel v. Daniel,* 57
  + - 1. Existence & exertion of an influence **&**
    - 2. Influence operated to subvert or overpower the person’s mind when executing the document **&**
    - 3. Would have executed the document but for the influence
* **Presumption of UI**
  + - Fiduciary relationship (= fiduciary duty) EX: atty-client
      * *Sheshunoff:* Claimed post-marital agreement involuntary -> Voluntary
      * *Izzo:* Claims voluntary -> Involuntary bc fiduciary relationship
* **Voluntary**: An action taken intentionally **or** by the exercise of free will
  + - H atty has a fiduciary duty to…
* **JTWROS**
* **History:** ~~CP can’t be used to create a JTWROS bc not an interspousal gift~~  *Hilley v. Hilley, 24*
* **Rule:** 1987 Amendment to the TX Constitution allowed CP to be used to establish JTWROS
* **Effect:** Broadly enforced, even if the agreements are very inexplicit *Holmes v. Beatty, 92*
* JTWROS are CP until spouse dies
* If it only says “JT” → Still Establishes ROS **!!!**

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|  | **Separate Property** | **Community Property** |
| **Family Code** | **§3.001 SP**   * Owned or claimed by spouse before marriage **or** * Acquired by spouse during marriage by gift, devise, or descent **or** * PI recovery sustained by spouse during marriage, except recovery for lost earning capacity during marriage   *See* **Doctrine of Implied Exclusion** | **§3.002 CP**  **-** Property, other than SP, acquired by either spouse during marriage  **§3.003 CP Presumption**   * Property possessed by either spouse during or on dissolution of marriage → Presumed CP * Can only rebut by C&C proof it’s SP * *See* **Doctrine of Onerous Title !!!** |
| **History (Not anymore)** | **Alienation of Affection:** H could sue W’s lover for DAS from her affair  **Tender Years Doctrine:** Child under 3 should be w/ mom | Indispensable parties had to be joined as a party (if they had an interest in the property)  CP couldn’t be used to create JTWROS |
| **What’s allowed** | Can gift to spouse (look to donative intent)  Can’t gift to community (but can sell to community)  Can’t take from spouse in divorce  **§3.001(3)** PI recovery by spouse → SP (except lost earning capacity)  Can waive your homestead right in a premarital agreement | CP can be used to create JTWROS  If 3rd party sues spouse, they can only get a judgment against the other spouse if they’re named in the suit  Can gift interest in SP  **PI Recovery**   * Recovery for injuries to the person → SP * Wages/Earning Capacity → CP * Medical Expenses → Reimburse based on how they were paid before recovery |
| **Not Allowed** |  | **Gifts to the Community** not allowed today bc gifts are SP |
| **Applies** | Increase in land value  Livestock increases in value/weight  Income & property that arise from gift to spouse | Crops grown on SP land  Rents from SP land  Offspring of W’s SP livestock  Dividends, interests, rent, & other income derived from SP of a spouse |

* **Doctrine of Inception of Title**
* **General:** Usually concerned w/ whether the title was incepted before or after marriage
* Title doesn’t incept w/ a down payment → It’s a tenancy in common
* **Homestead Inception of Title** 
  + - Homestead → Right against the world from day you settle the property. It’s superior to everyone else
* **Adverse Possession Inception of Title**
  + - Move from the land → No right. The rightful O can displace you until the §oL runs (right arises when the § runs)

# Characterization of Marital Property

Overview of the CP System & its Rebuttal

* **Analysis:** Begin with CP presumption in every case

CP Presumption

* **Rule:** All property possessed at the dissolution of marriage is presumed CP  **§3.003**
* **Applies** *“possessed”*
* Property acquired before marriage
* Property acquired during marriage
* **To claim SP in divorce:** Must rebut the CP presumption w/ C&C evidence

Establishing the type of property

* **Timeframe:** Established at acquisition EX: When purchased, signed note
* **How to establish character**
* **Tracing**
  + - Most common
    - **Test:** Where did the $ come from?
    - **Purpose:** Characterize property or est. reimbursement
* **Conveyance:** Can establish a SP presumption by conveyance **!!!** EX: Gift → Presumption of SP gift
* Gift bw spouses → Income follows the gift **§3.005**
* Income from SP → Income is CP (unless a gift b/w spouses)
* Sign mortgage during marriage → It’s CP credit
  + - But there are ways to get SP credit during marriage
* **Rule:** Spouse has absolute right to establish a SP interest (Can rebut CP presumption) *Foster v. Christensen*, 103
* **Rule:** Acquisition date may indicate SP *but* must look at evolution, bc might really be CP *Naples v. Nimitz*, 107
* *Pearson v. Fillingim* (109)
* **Creditors**
* **Homestead Protection:** It can’t be used to pay off creditors

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| **What’s the Character?** | **Answer** |
| **Bought house w/ your earnings before marriage, but no bank records** | House = Presumed CP |
| **Bought house w/ your earnings before marriage, but no bank records, but have deed w/ date** | Deed with date rebuts CP Presumption |
| **SP used to pay all/some installments on a note for house acquired during marriage** | Reimbursement, not rebuttal.  Payments create a right to reimbursement, not a SP interest |
| **Deposit $60K in wedding gifts** | Divide 50/50 as SP |
| **You buy $100K condo outright w/ 20K inheritance & 80K bonus** | It’s mixed |
| **What if you put 20K inheritance down & both sign 80K note?** | 20K inheritance = SP  80K note = mixed (bc look at acquisition) Thus, it’s a SP foothold & both sign CP, so the character is mixed |
| **What if you inherit 100K 6 months after marriage & buy condo?** | SP |
| **What if you buy 200K condo (100K inheritance &100K note)?** | $100K inheritance = SP  $100K mortgage = CP  Thus, the character is mixed. |

Doctrine of Inception of Title

* **Rule:** Look to time title was incepted to determine the character of property When the obligation was signed
* **Applies:** Buy real estate, K to buy car, life insurance, etc
* **Test:** When did the right arise?
* **Homestead Inception of Title** *Welder v. Lambert, 112*
* Homestead creates a right against the world on the day you settle the property EX: Sign K to colonize
* **Conditions**
  + - When condition met → Relates back to the time of K
    - Condition not met → Considered never made
* **Adverse Possession Inception of Title**
* **Timeline:** Move onto property, title acquired when §oL’s is filled O can kick you out before §oL’s
* **Rule:** Once an earnest money K is signed & SP character attaches, it’s immaterial that a community debt may exist or that part of the unpaid purchase price is thereafter paid by community funds. Community estate is only entitled to reimbursement from the separate estate **!!!** *Carter v. Carter*, 117
  + - Right of reimbursement is based on community $ going into ones SP
* **Doesn’t Apply:** If stay w/ permission *Strong v. Garrett, 122* H & W live together → H can’t claim AP

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| **There are 3 Scenarios !!!** | **Character?** | **What gets reimbursed?** |
| *$1,000 paid before marriage* | Title incepts before marriage → SP | If $99,000 left over, can get **reimbursement** to the community **if community pays**  $ + K before marriage = SP  **Separate reimburses Community** |
| *$1,000 down payment (earnest money) paid by H during marriage. Both sign mortgage for $99,000* | Tenancy in common bw SP ($1,000) & CP (credit) | **Test: to determine character:** Look to the time the mortgage was signed (time of acquisition). Mixed property characterization. Not really inception issue but more when was the $ was paid.  **What if it was paid off by their CP?** Reimburse the down payment to H’s SP → 1% SP interest | 99% CP interest  **What if it was paid off with inheritance?** Same. Reimburse SP |
| *$1,000 down payment paid by CP during marriage + $1,000 note signed by both* | CP | **Whatf it was paid for out of inheritance?**  Get reimbursement to SP  **Community reimburses Separate** |

* **Views** *McCurdy v. McCurdy*, 126
* **Pro rata proportions to CP law** **(CA):** Uses apportionment to determine title’s character
* **Doctrine of inception of title to CP (TX):** Uses time of inception to determine title’s character
* **14 Policies in *Parsons***
* Arkansas was a CL state, so characterized as SP
* As SP, benefits of insurance policy would:
  + - If CP → *McCurdy* have gone into the estate & W got ½ of whatever community had paid
      * If 60% paid by SEstate, then 30% would be sep
    - If CL → *Parsons*, proceeds of H’s SP would be in proportion to premiums paid by separate estate
      * If 60% paid for by SEstate, then 60 would be sep
      * Community gets back all the premiums paid by community, ½ of it will then go to W & ½ to H
      * So $54K in proceeds, all of it was SP. Subtract 20K paid by community // so 34K goes to H’s Estates SP
        + 10 of the premium paid goes to W’s SP estate
      * EX: Insurance policy paid before marriage. Couple divorces.
        + How do you divide the reimbursement to the community?

Just & right division

|  |  |
| --- | --- |
| **Problems: Inception of Title** | **Answer** |
| H & W lived together. H moves out but let’s W stay there for a long time. **Can W claim AP inception of title?** | No. It’s not allowed if someone is staying there w/ permission |

* + - * + What id it was a death case? → ½ goes to decedents estate. ½ to SS
* On death → Characterize at acquisition

**General Rule of Property Division in Divorce or Annulment § 7.001**

* Ct shall divide as Ct deems **just & right**, having due regard for their rights of each party & children
* **Division of Property Under Special Circs § 7.002**
* In addition to § 7.001, in a decree of divorce or annulment the Ct shall order a divide this real & personal property **in a manner the Ct deems just & right,** having due regard for the rights of each party & any children:
  + - Either spouse acquires property while domiciled in another state & that would have been CP if the spouse who acquired the property had been domiciled in this state at the time of the acquisition **or**
      * **EX:** A couple living in NY (CL state) used H’s earnings & H’s name. If use SP proceeds from another state to buy house in community state → CP
    - Property that was acquired by either spouse in exchange for real or personal property & that would have been CP if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition
* **Treat as SP**
  + - A spouse acquires property while domiciled in another state & it would have been their SP if they’d been domiciled in TX at the time of acquisition **or**
    - A spouse acquires property in exchange for real or personal property & that would have been their SP if they’d been domiciled in TX at the time of acquisition
* **SP of a spouse if partitioned or exchanged by written agreement of the spouses:**
  + - Income & earnings from the spouses' property, wages, salaries, & other compensation received
      * On or after 1/1 of the year divorce filed; **or**
      * In another year when they were married for any part of the year

Tracing

* **Definition:** Used to discover SP character. Use documentary evidence to establish the source of the funds.
* **BOP:** Clear & convincing evidence (unless not rebutted by the other party)
* **Rule:** Property must be properly traced *Hardee v. Vincent, pg 135*
* **BOP:** Must have tracing w/ **clear & convincing** evidence it was SP
  + - Conjecture is not sufficient evidence
    - *“When tracing SP, it’s not enough to show that separate funds could have been the source of a subsequent deposit of funds. Such* ***conjecture*** *doesn’t constitute sufficient evidence to sustain appellant’s burden of tracing to overcome the CP presumption”*
* EX: Purchased out of business owned by both → CP
* **Tracing in O&G properties** *Norris v. Vaughan*
* Oil royalties from a separate well → Will be and remain SP **!!! aka piecemail of land**
* Bonuses from a separate well → Will be and remain SP **!!!** Selling minerals is like selling land
* Delay rentals → CP **!!!** Treat like rentals
* Partnership owns oil well
  + - **Entity Theory of Partnership (TX)**
      * Anything held by partnership is partnership property.
      * But if you start taking benefits (?) then it’s CP
    - **Aggregate Theory of Partnership (not TX)**  *Norris*, not TX
      * *Norris* said you could spend a reasonable amount of your time to manage your SP

Tracing Methods

* **Clearinghouse Method**  *McKinley v. McKinley, 145*
* Looks to intent. Most liberal tracing case bc mixes 2 diff methods & utilizes intent
* A tracing aid. Not a bright line rule
* **Community Consumption Rule** *Gibson v. Gibson*
* Whatever’s left over that you consume is SP bc you consumed community + some of your community living
* I don’t understand this rule !!!
* **Lowest Intermediate Balance Rule** *Snider v. Snider*
* **Look for:** *“it never dropped below that amount”*
* **Mutual Funds:** SP shares in mutual fund → Profit or GR from selling capital assets of the mutual funds is also SP
* **Mutated Stock**: If there’s nothing that was added in it remains SP *Carter v. Carter, 153*

|  |  |
| --- | --- |
| **Scenario** | **Rule? Character?** |
| You have 5K. Grandma gives you 40K to buy a car. You buy a 45K car from your account. | **Rule?** Clearinghouse Method. **Character?** Don’t apply community out first. In this case, apply intent. |
| You consume 4K + another 1K | **Rule?** Community Consumption Rule.  **Character?** You can show the community consumed 5K of the 9K. |
| **An Account starts w/ 25K before marriage and….**  …Increases to 50K during marriage | **Rule:** Lowest Intermediate Balance Rule  **Character?** $50K = CP |
| …Drops to 0 during marriage | **Rule:** Lowest Intermediate Balance Rule **Character?** Presumed CP unless rebutted |
| ….Drops to 22K after marriage | **Rule:** Lowest Intermediate Balance Rule **Character?** $22K = SP |
| If stock increases from 10 to 100 per share | **Mutual Funds.** Increase is SP |
| Have 1000 shares and throws out cash dividends of 1000. | **Mutual Funds.** Dividends are CP |
| You sell 1000 shares of SP IBM stock to get 1000 shares of Apple stock | **Mutated Stock.** Remains SP |

* **Purchase-Money Resulting Trusts § 9 RST of Trusts**
* **Rule:** Where property transferred to one person & the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid
* **Exceptions**
  + - Gift w/ intent no resulting trust should arise **or**
    - Illegal transfer EX: Unjust enrichment
* **Applies:** Y is holding it for A
* **Transfer to spouse, descendant, et or child**
  + - No trust unless they manifest intent the transferee shouldn’t have a beneficial interest in the property EX: to hold for me
* **Presumption of Gift** 
  + - **Applies:** When Parent pays & child receives (to the natural object of one’s bounty)
    - **To Rebut:** Can rebut w/ parole evidence
* **Presumption of Trust**
  + - **Applies: ???**
    - **To Rebut:** Can rebut w/ parole evidence

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| **Examples** | **Character?** |
| *A pays X 500 and signs a note for 500. Y pays off the note. What % is A’s interest?* | Usually you’d have a trust result to A. A’s interest is 100%.. Y has no interest |
| Total purchase price is $1000. A pays $500 & Y pays $500 but title passes to Y. What are their respective interests? | 50/50 |
| **Illustration for (2) above**  *A, father to A Jr. pays total purchase price of $1,000 and title passes to son, A Jr at time of payment. What is A’s interest?* | Presumed a gift b/c we presume that A is making a gift to the *natural object of his bounty* |
| **Illustration for (2) above**  *What if A, father to A Jr, provides his son with a letter before title passes asking son to simply hold the property which will be passed to him?* | It will rebut the presumption that a gift was made. |

Presumptions Arising from Conveyance Through which Title is Acquired

Resulting Trusts

* *See above*

Conveyance Containing a Significant Recital

* **General Rule:** When there’s a conveyance w/out a significant recital → Can rebut w/ Parole Evidence **!!!**
* Deed from 3P as grantor to both or either spouses → CP Presumption. Irrelevant how it’s titled, still CP but can rebut
* **Difficult Presumptions of Gift to Overcome**
  + - Deed from H to W → Presume a gift
    - Can’t rebut if there’s a significant recital EX: *“Paid w/ SP funds”*
      * **Rule:** Can’t rebut a significant recital
      * **Exception:** Unless Fraud or Mistake *Messer v. Johnson, 170*
* **Standard of Proof to Rebut a Presumption of Gift:** C&C*Johnson v. Johnson, 162*

* **3 General Presumptions** These conflict in *Johnson*
* Property acquired during marriage → CP presumption
* Property acquired during marriage, paid for w/ separate funds → Presumption it’s SP
* Deed names H & W → Gift presumption
* **Acceptingthe Benefits** *Johnson v. Johnson, 162*
* **Rule:** Can’t voluntarily accept the benefits of a judgment & later appeal it
* **Reimbursement Checks**
  + - **Rule:** Can’t accept a reimbursement then later demand more
    - **Alternatives:**
      * Reject it, but they may not have it later
      * Give to Ct
      * Accept it and hold it
* **Can’t divest SP**
* **Rule:** TX Ct can’t divest a person of their SP **!!!** EX: Can’t award a spouses SP to the other
* **Tip:** Make a small SP down payment on a house when married. The minute you put down SP, it can’t be divested.
* When spouse is in privity of K & they’re fully aware of what’s going on → They can’t (bury?) the deed

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| --- | --- |
| **Examples** | **Character?** |
| ***Whorrall* EX:** H put down $500 SP on a house. The couple signed a note for $35K (clearly CP). W put down $21K SP. **What result?** | This creates a SP foothold. Ct can’t divest H of his $500 foothold (.9%). It can’t be granted wholly to W. H is a co-tenant in the house to the extent of his .9% interest. [W can get the entire 61% deemed hers b/c she paid the notes]  If H paid off the note, he’d have no SP foothold b/c character’s determined at acquisition |

* **Exceptions Where Parole Evidence is Admissible**
  + - When offered by a party to the transaction or by one in privity w/ a party to the transaction, parole evidence isn’t admissible to rebut a significant recital in the absence of allegations entitling the party to equitable relief
      * EX: Fraud or Mistake
* **Privity**
  + - **Non-grantee spouse is a party to the transaction if:**
      * He’s the grantor **&**
      * Signs the executor K of sale w/out joining in the deed **&**
      * Signs the promissory note & deed of trust executed **&**
      * Merely present when the deed recitals are drafted **!!!**
    - **Non-grantee spouse is NOT a party to the transaction**: Parole evidence admissible to contradict the recital
* In TX, if property is omitted from the divorce decree, you can come back in & prove it’s CP & get your share

Credit Transactions

* **Rule:** Can use separate credit to acquire SP during marriage if not received by gift, devise, descent, **or** doesn’t have SP or funds to purchase it *Gleich v. Bongio, 177*
* EX: If H owes $, creditors can’t reach W’s SP
* **Omitted Asset Division****§ 9.203**
* **Applies:** Ct fails to dispose of property subject to division in a divorce, even though it had jsd
* **If TX Ct didn’t do it:** Do a just & right division w/ due regard for the rights of the parties & children **!!!**
* **If another state’s Ct didn’t do it & under their law:** TX Ct applies that states law re: undivided property as req’d by § 1, Art. IV, US Constitution (the full faith & credit clause), & enabling federal statutes**!!!**

PI Recoveries

* **Rule:** Recovery for PI to the body of a spouse → SP  **MISSED CLASS**
* **Includes**
* Disfigurement
* Physical P&S (past & future)
* Mental pain & anguish
* **Doesn’t Include**
* Lost earning capacity during marriage
* Medical expenses during marriage
* Other expenses associated w/ injury to the community estate

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| --- | --- |
| **Scenario** | **Character?** |
| *“to W in receipt of consideration for her SP”* | Deed controls. It establishes it’s her SP. Will be & remain her SP. |
| *“From H to W as her sole & SP”* **or**  *“From W’s parents to her as her sole & SP”* | Deed in gift clearly states it’s W’s gift → SP |
| H had a SP house. W planted the gardens & improved it for $5,800. Should she be reimbursed to her SP? | Probably not, it was presumed CP & she put $ into it, thus improving property that was partly hers. |
| **H puts W’s name on deed that was paid with his SP** | Presumption of gift |

# Claims for Reimbursement & Economic Contribution

History

* **Pre-2001: No reimbursement for**
* Expenditures for maintenance & repair **or** taxes on property, interest, or insurance **or**
* Spouses time, toil, & effort during marriage
* **1999-2001: Equitable Interests:** Wasn’t used
* **~~2001-9/1/2009~~**
* **~~Economic Contribution (EC):~~** ~~Not well received.~~ Not on exam. pg 206
* **Could receive for**: *See #’s 1-6 below*

Modern

* **Reimbursement Allowed for § 3.402**
* 1. Reduction of principal debt secured by a lien on property owned before marriage
* 2. Reduction of principal debt secured by a lien on property received by gift, devise, or descent during marriage
* 3. Reduction of principal debt…including a home equity loan
  + - Incurred during marriage **&**
    - Secured by a lien **&**
    - Incurred for capital improvements
* 4. Reduction of principal debt…
  + - Incurred during marriage &
    - Secured by a lien on property owned by spouse **&**
    - Creditor agreed to look for repayment solely to their separate marital estate that the lien is attached **&**
    - Incurred for capital improvements
* 5. #’s 1-4, to the extent it’s lowered by financing
* 6. Capital improvements w/out incurring debt **&**
* 7. One marital estate pays unsecured liabilities of another marital estate **& New in 2009**
* 8. Inadequate compensation for time, toil, talent, & effort of a spouse by a business entity (under their control & direction) **&**
* 9. Reduction by community estate of an unsecured debt incurred by the separate estate
* **Reimbursement NOT Allowed for !!! § 3.409**
* Child support, alimony, or spousal maintenance payments
* Living expenses of a spouse or child of a spouse
* Contributions of property of a nominal value
* Payment of a liability of a nominal amount **or**
* Student loan owed by a spouse
* **Measured by:** Enhancement in value to the benefitted marital estate
* **BOP for Reimbursement:** Person seeking reimbursement
* **BOP for offset:** Person seeking offset
* **Consider:** Equity & Offset
* **Improvements**
* **Rule:** Can be reimbursed for improvements paid by CP or SP
* **Measured by:** How much improvements enhanced the home value
* **Effect:** Doesn’t create an ownership interest. Only creates a claim against the estate

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| --- | --- |
| **Can they be reimbursed? If so, how?** | **Answer** |
| Owned home before marriage, improvements paid by community | Yes. Separate must reimburse the community |
| CP house. H uses SP $ from inheritance to add pool. | CP must reimburse the SP. The pool became CP under the *law of fixtures* |
| W owned SP house. Spouse inherits $, pays for pool w/ CP | Yes. W’s SP must reimburse the community b/c the SP benefitted from the new pool. Use the just & right division to divide the CP |
| H owned SP house. W uses SP to add pool. | SP of home owner (H) must reimburse SP of enhancer (W).  **How much would W owe if the pool cost $50,000 to add?** $50,000 |
| Student loan before marriage. Community pays it off. | No. Community can’t get reimbursed **!!!** |
| Student loan before marriage. Spouse pays it w/ their SP | No. They’re SP can’t get reimbursed **!!!** |
| **Offset**  Married, live in home. H paid $1,000/month mortgage for 60 months w/ his SP. If rented it would be $2,500/month. Upon divorce, H wants reimbursement for mortgage paid. | W can argue H enjoyed the benefits of a lower mortgage. It would have been 2,500/month which offsets the costs of what it would have cost the community |

* **Marital Estate § 3.401**
* CP owned by the spouses together & referred to as the community marital estate **or**
* SP owned individually by H & referred to as a separate marital estate **or**
* SP owned individually by W, also referred to as a separate marital estate
* **Offset § 3.402**
* **Rule:** Benefits for use & enjoyment of property may be offset against a reimbursement claim for expenditures that benefitted a marital estate
* **Doesn’t Apply:** Can’t claim an offset for use & enjoyment of a SP primary or secondary residence (even if only part SP)

**General**

* **Spouse:** An H who is a man, or W who is a woman (TX won’t recognize it for same-sex unions in other states) **§ 3.401**
* Doesn’t affect *inception of title* (where characterized at the time the right to own or claim arises) **§ 3.404**
* *Doesn’t create an ownership interest* in property, but **§ 3.404**
* Does create a claim against the property of the benefited estate by the contributing estate **§ 3.404**
* Claim matures on divorce or spouse’s death
* Doesn’t affect the right to manage, control, or dispose of marital property as provided by this chapter **§ 3.405**
* **Equitable Lien § 3.406**
* **Divorce:** May impose an equitable lien on the community estate to secure a reimbursement claim against it when the community contributed to & paid for the benefit
* **Spouse Dies:** *Same as above* if the reimbursement claim is brought bya surviving spouse / representative of the deceased / person interested in the estate (probate)
* **Disposition of Claim for Reimbursement § 7.007**
* In a decree of divorce, Ct determines the rights of both spouses in a reimbursement claim & apply equitable principles to:
* Determine whether to recognize the claim considering all circs **&**
* Order a division of the reimbursement claim, if appropriate, in a manner the Ct considers just & right, w/ due regard for the rights of each party & any children of the marriage **!!!**

Reimbursement for Time, Toil, & Talent

* **Rule:** Right to reimbursement for TTT is limited *Vallone alluded to it*
* **Use:** When a spouse uses their TTT to increase value of SP owned by one or both of them *Jensen adopted it b/c equitable*
* **Formula:** [Value of the TTT] - [Actual remuneration (compensation to community)] **!!!**
* **Established by:** Expert W’s who testify how much it would cost to hire someone to do what spouse gave w/ their TTT
* **Applies:** Salary, Club bonuses, Member benefits
* **BOP:** *Same as reimbursement*
* **~~Community Ownership Theory:~~** Community should receive whatever renumeration is paid to a spouse for their TTT b/c the TTT belongs to the community EX: Stock value increases b/c of O spouses TTT → CP
* **Reimbursement Theory** *Jensen v. Jensen, 219*
* Community reimbursed for value of TTT expended by either or both spouses to enhance the SP of either, other than what’s reasonably necessary to manage & preserve the SP, less the remuneration received for that time & effort in salary, bonus, dividends & other fringe benefits, those items being CP when received
* Alluded to in *Vallone.* *Jenson* court adopts bc more equitable
* EX: Stock remains SP as it appreciates
* **Trawick**
  + - Founded 68, incorporated 76, owns (1 mil shares=750K/75%), married 11/76, died 11/80 (4 yrs 48 months). Value of corp increased $500K, so his stock increased by 375K. Of that, jury says 55% of the increase was the result of his TTE, so 208K (this was good for the H trying to keep the $ bc the lower the increase from TTE, then the less they had to reimburse the community. The rest of the increase could have been the market, new marketing person, etc.
    - **Threshold Issue:** Did the time, toil, & talent increase his separate shares?
    - **Then figure out how much he was actually compensated:** 
      * Club membership not just for business expenses, life insurance, a car from the company -> increased his compensation but was just a wash. He was compensated 96K.
    - **Then take the TTE - Actual Remuneration (compensation):** =144K-304K (usually it’s a range)
* EX: H opens failing business before marriage & it doesn’t improve. Can W have a claim for the value of his TTE? Probably not. H didn’t gain anything/no benefit from his TTE

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| --- | --- |
| **Problems: Reimbursement for TTT** | **Answer** |
| H works at a restaurant as maitre’d. **How do you evaluate the H’s TTT for that work?** | Value is the cost of a replacement maitre’d |

Beginning Balance Reimbursement

* **History:** In *Schmidt*, the Ct reimbursed the value of the business merchandise bc it was built on SP & couldn’t trace it. This theory carried over into *Horlock*
* In, *Horlock,* H had someone else sign gift tax returns unbeknownst to W, who claimed fraud. Not fraud bc no intent to deceive, for the benefit of the estate. W may have claim for constructive fraud
* **Actual Fraud Factors !!!**  *Horlock, 227*
* Primary purpose to deprive of the use & enjoyment of the assets comprising the gifts
* Dishonesty or **intent to deceive**
* **Constructive Fraud Factors !!!**  *Horlock, 227*
* 1. Size of the gift in relation to the total size of the community estate
* 2. Adequacy of the estate remaining to support spouse in spite of the gift (Amount of comm estate left to care for spouse)
* 3. Relationship of donor to done
* **Unequal division of property**
* Offset
* Equitable division **or**

Reimbursement for Improvements

* **Historical measures of improvements**
* Enhancement of value to the receiving estate or the cost of improvements, whichever is less **or**
* Enhancement alone, regardless of cost
* Cost, regardless of enhancement
* *Anderson v. Gilliland, 236*
* **Test:** How much did improvements enhance the property value?
* Divorce = just and right division of property. Death case = forced half share

Purchase Money Reimbursement (equitable offsets)

Availability of Reimbursement for Retained Earnings & Reimbursement

* X

Economic Contribution Calculator

* X

# Management & Liability of Property During Marriage

Management Rights

* **Managing SP:** Each spouse has the sole management, control, and disposition of their SP **§ 3.101**
* Can devise SP however you want
* **Managing CP !!! § 3.102**
* **Rule:** During marriage, each spouse has sole management, control, & disposition of the CP they would have owned if single
* **What it means:** Spouse has right to manage properties they would have owned if they were single/SP *Jamail v. Thomas, 276*
* **Rule:** If that CP is mixed w/ the same type of CP that belongs to the other spouse, then it’s subject to both spouses joint management, control, & disposition, unless by another written agreement or power of attorney
  + - **What it means:** SP holder has mgmt. & control over communal income based off their SP. It’s considered **MIXED PROPERTY** when that SP-communal revenue is mixed with their CP
    - **Thus, if H & W both have paychecks deposited into 1 account, then it’s subject to the JOINT MGMT & CONTROL of BOTH spouses**
    - **Includes**
      * Personal earnings
      * Revenue from SP
      * PI Recoveries
      * Increase & revenue from that property
* Employer owes no duty to non employee to disclose CP assets their spouse accrued *Medenco v. Myklebust, 280*
* *Cooper v. TX Gulf Industries, 283*

Marital Property Liability

* Marital property liability is linked to the management of property. Liability depends on how it’s managed & its character
* **You’re personally liable for the acts of your spouse only if: § 3.201**
* Spouse acts as an agent for the person (must not be bc of the marriage) **or**
* Incurs a debt for necessaries
* **Usually doesn’t apply to:** CP
* **Rules § 3.202**
* **SP** not subject to liabilities of other spouse unless both are liable by other rules of law
* **CP**
  + - **That’s subject to a spouse’s SOLE management, control, & disposition ISN’T subject to:**
      * Liabilities a spouse incurred before marriage **or**
      * Nontortious liabilities other spouse incurs during marriage
    - **Exceptions**
      * Unless both are personally liable
      * CP subject to a spouse’s sole or **JOINT** mgmt, control, & disposition **IS** subject to liabilities incurred by spouse before or during marriage.
      * All CP is subject to tortious liability of either spouse incurred during marriage **!!!**
* **Claims of a Criminal Restitution Judgment Against a Non-Participant Spouse**
* **Can’t make a claim for:** Retirement allowances, annuities, accumulated contributions, optional benefits, & $ in state public retirement system accounts that are **CP** subject to the participating spouse's sole mgmt, control, & disposition
* **Can make a claim for:** Their interest in a domestic relations order
* *Pope Photo Records v. Malone, 305*
* *Cocherham* analysis is overruled. Now look to *Agency*
* Spouse which receives property that would be subject to claims
* Can’t impose joint liability on a person who’s not a party to the suit (spouse must be named) *Stewart Title v. Huddleston, 308*
* **~~Doctrine of Virtual Representation~~:** Abolished
* **Deed of Trust to Secure an Assumption:** You can assume the debt to get the deed EX: Assume payments

…know rules on top of pg 309

* **Order of Property Liability § 3.203**
* Judge makes a just & equitable about property liability judgments, if the property subject to liability includes any combo of:
* **Spouse’s SP**
* CP subject to **either** spouse’s sole mgmt, control, & disposition
* CP subject to **the other** spouse’s sole mgmt, control, & disposition
* CP subject to the spouses’ **joint mgmt**, control, & disposition
* **Consider:** The facts & circs

Ratification of Debt

* **Definition:** Can infer from conduct. High awareness isn’t sufficient. Paying outrageous credit card debt of spouse isn’t sufficient. Must participate in creating the debt. Not liable for spouses actions unless you acted as an agent or it was for necessaries
* **Requirements** *Providian Nat’l Bank v. Ebarb, 267*
* Approval by act word, or conduct **&**
* Full knowledge of those facts **&**
* Intent of giving validity to the earlier act
* **Look for:**
* **Necessaries Includes:** Atty fees acquired for divorce or child custody *Aldrich v. Tedder, 269*

Fraudulent Conveyances & Death

Death

* **Rule:** Purchase of life insurance w/ community funds to benefit an unrelated person is (presumed?) constructive fraud *Givens v. Girard Life Ins., 286*
* **Factors to determine if gift of community funds to 3P was proper** *Murphy v. Metropolitan Life Ins., 291*
* Relationship of parties
* Special circs to justify the gift EX: Gift to indigent mom still unfair to W
* Reasonable proportion to remaining community assets
* **Interspousal Immunity Doctrine**
* **History:** *Bounds* abrogated the community spouse…doctrine for intentional torts. H shot W & kids brought suit. *Price* expanded to all torts
* **Modern:** Abolished. Spouses can sue each other for torts. Spouse can sue for IIED (*Twiman)*

Remedy for Fraud on the Community

* **Fraud on the Community; Division & Disposition of Reconstituted Estate** (*see Horlock factors* ***!!!****)* **§ 7.009**
* **Reconstituted estate:** Value community estate if an actual or constructive fraud on the community hadn’t occurred
* **Calculating DAS for actual or constructive fraud !!!**
  + - Calculate value by which the community estate was depleted as a result of the fraud on the community **&**
    - Calculate amount of the reconstituted estate **&**
    - **Equitable DAS**
      * Divide the value of the reconstituted estate bw parties in a manner the Ct deems just & right
        + **Awards allowed to wrong spouse in just & right division**

Share of the remaining community estate after the fraud on the community

$ judgment against spouse who committed fraud on the community **or**

$ judgment & share of the community estate

* No separate & independent tort action for actual fraud against a spouse for depriving community assets *Schleuter v. Schleuter, 295*
* But can consider it in property division EX: Higher culpability like actual fraud
* Can order spouse to return property, or use just & right division EX: Return emus
* No punitive DAS
* Here you’re recovering CP (vs. Interspousal torts where your recovering SP) **!!!**
* **Exception: Liability by Other Rules of Law** *Brody v. US, 301*
* **Applies:** When property is subject to liability when otherwise not under TX law
* **Look for:** Usually IRS
* **$ obtained from a loan during marriage**
* If her SP stock collateralized the loan →

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| --- | --- | --- | --- | --- | --- |
| *Pg 255* | **H’s SP** | **H’s Sole Mgmt, CP** | **Jt Mgmt CP** | **W’s Sole Mgmt CP** | **W’s SP** |
| **H’s SP Debt** |  |  |  |  |  |
| **H’s Pre-marital liabilities** |  |  |  |  |  |
| **H’s Non-tortious liabilities during marriage** |  |  |  |  |  |
| **H’s tortious liabilities during marriage** |  |  |  |  |  |
| **W’s tortious liabilities during marriage** |  |  |  |  |  |
| **W’s non-tortious liabilities during marriage** |  |  |  |  |  |
| **W’s pre-marital liabilities** |  |  |  |  |  |
| **W’s SP Debt** |  |  |  |  |  |
| **Jt liabilities of spouses** |  |  |  |  |  |

Divorce

Protection of 3P’s

* **Rule:** If conveyed as CP, in fact or presumptively, purchaser must ascertain the deceased heir to it; but it’s clearly apparent he must ascertain who inherits *Sanburn v. Schuler, 313*
* Can depend upon how property appears in the deed records. Inquire based upon that
* **Secret Title & Innocent Purchaser Doctrine**
* An innocent purchaser can depend upon apparent or legal title *Moran v. Adler, 316*
* Aka Bona Fide purchasers can depend upon apparent title
  + - *Apparent Title:* Apparently CP bc transferred during marriage
    - *Legal Title:* Deed records
* **Equitably Adopted Children**
  + - **Rule:** Equitably adopted kids who want to make a claim to property, must put innocent purchasers on inquiry by filing in the deed records
    - **Purpose:** No way for innocent purchaser to discover them (unlike natural kids)
    - Equitably adopted children are generally treated the same as legally adopted kids/natural kids
      * **Effect:** Equal inheritance unless justified by other circs EX: Will divides unevenly
* **Protection of 3P’s § 3.104**
* During marriage, property presumed to be subject to under a spouses sole management, control, & disposition if it’s evident they own it
* **Evidence of Ownership:**
  + - Held in their name, as shown by muniment, K, deposits, or other evidence of ownership **or**
    - In their possession & is not subject to such evidence
* 3P dealing w/ a spouse can rely on the spouse’s authority to deal w/ the property (against the other spouse or their claimant)
* **Requirements**
  + - Presumed to be subject to the spouses sole management, control, & disposition **&**
    - 3P isn’t acting fraudulently **&**
    - No actual or constructive notice that the spouse lacks authority

# Dissolution of Marriage by Divorce

The Just & Right Division

* **What is a Just & Right Division?**  *Murph v. Murph, 324*
* **General Rule of Property Division in Divorce or Annulment §7.001**
  + - Ct shall divide as Ct deems **just & right**, having due regard for their rights of each party & children
    - *Young, Red* said you could consider adult children EX: Adult child w/ MS
* **MOST IMPORTANT LIST !!!**
* **Use any time on her exam or The bar Where you Must consider a just & right division**
* **Factors that can be Considered in a Just & Right Division**
* **1. Spouses capacity & ability**
* **2. Benefits the party not at fault would have derived from continuing the marriage** *Aka innocent spouse rule*
* **3. Business Opportunities**
* **4. Education of the Parties**
* **5. Physical conditions of the parties**
* **6. Financial condition & obligations** EX: Business obligations
* **7. Age disparity**
* **8. Size of separate estates**
* **9. Nature of the property**

Atty’s fees are considered in a just & right division. They are not part of divorce **TX Civ Pract & Rem § 38**

|  |  |
| --- | --- |
| **Can the Ct consider this in a just & right division?** | **If so, what factor?** |
| One spouse is around 60 and will soon be retiring from a prestigious firm. The other spouse is 30 and a lawyer at the same firm, in the same position as their spouse. | Yes, age disparity. The young lawyer is in a better position |
| A divorcing couples CP is worth $1 million. W has an addition SP trust fund that’s worth $20 million, giving her $60,000 monthly. Might give H more than ½ bc she has trust | Yes. Size of separate estates. The Ct may award H a disproportionately higher percentage of the CP estate since W has the benefit of a large trust fund that pays out to her monthly. |
| The Ct is considering dividing a divorcing couples property. The property includes a $1 million bank account and a $1 million retirement account. One spouse is old and one spouse is young. | Yes. Nature of the property. The young spouse would incur a large tax penalty to withdraw funds if they were awarded the retirement account. The older spouse would not be penalized if they are over 55 (?) |

* **Agreement Incident to Divorce or Annulment**  **§7.006**
* **Rule:** Spouses may make a property division, liabilities, & maintenance agreements in *writing* to amicably resolve a divorce dispute.
  + - Can revise or repudiate before divorce granted (unless it’s binding under another rule of law)
* **Test:** Is it a just & right division of property?
* **If Ct finds the terms are just & right:** Ct must accept it
  + - Then, the Ct may set forth the agreement in full or incorporate it by reference in the divorce decree.
* **If Ct finds the terms are not just & right:** Ct may request the spouses revise it **or** do a contested hearing
* **Policy:** Parties can amicably settle divorce & divide their property
* No just & right division in probate matters
* Only a TrCt can make a just & right division
* Jury, AppCt → can’t make a just & right division
* Can repudiate up until rendition
  + - **Rendition:** When divorce orally pronounce & division of property is made **or** via letter (judge will set for entry, which means signing, once sign judge “renders” the decree
      * Divorce must also include a division of property
      * Can repudiate up until the time of rendition
      * Ct can review an agreement, even if signed & initialed by both parties
    - **If found Just & Right ->** Take settlement to Ct, which can approve, & incorporate it into the final divorce
    - **If not found Just & Right ->** Ct can request a revised agreement **or** set a contested hearing
* Maintenance (TX) - Post-divorce support

Divesture of SP Not Just & Right

* Missed class 1/1

Quasi-CP & the Just & Right Division

* **Rule:** *See tracing. To establish SP must use proper tracing by showing C&C evidence Hardy v. Vincent*

Valuation for Division

Goodwill

* **Review Guis-brea, goodwill’s a big deal on the exam !!!**
* **Rule:** Goodwill can be valued in the property division
* **Types of Goodwill**
* **Personal Goodwill:** SupCt says can’t divide personal goodwill, but there’s been a trend that says it should be considered
* **Guis-brae Goodwill:** Commercial goodwill that’s attributable to the business. No tangible-reputation. Professional goodwill is attributable to the person themselves.
* **Consider:** Talent & Reputation
* **TX: 2-Prong test to determine whether Goodwill is Subject to Division !!!**  *Finn v. Finn, 362*
* Did the goodwill exist separate & apart from their personal ability?
* If so, does the goodwill have commercial value (guis-brae) the community is entitled to share?
* **Requirement:** Documents to prove its commercial value
* Other CP states say you can include goodwill in the property division
* **Bill of Review:** Can review a decision w/in 4 years if there’s been extrinsic fraud (even if it was an agreed decision)

Use of Partnership Agreement for Basis of Valuation

* **Operative event:** Death, divorce
* Enterprise value & market value are inappropriate
* FMV

Partnership Distributions

* Partnership property → Not divided can’t come into the estate **!!!** *Marshall v. Marshall, 382*
* Partnership distributions → Always CP **!!!**
  + - **Rare exception:** Liquidation. Partnership dissolves & $ goes back to partners SP stock
* Gift to the couple → SP that each have a ½ interest in
* **Useofructory Rights:** Right to the profits of an asset (that gives off profit)
* Spouse may be liable for debts they incur during the pendency of the trial → Still married so it’s community debt
* Since partnership property doesn’t retain a separate character, distributions from the partnership are considered CP, regardless of whether the distribution is of income or of an asset
* If you retain earnings & they’re not distributed → Not partnership property *Thomas v. Thomas*

|  |  |
| --- | --- |
| **Scenario** |  |
| 1,000,000 estate w/ community debt of 200K. | 1,000,000 - [200K] = 800,000 / 2 = 400K each |
| What type of property is best to hold as an individual, rather than to put into a corporate structure? | Oil. Oil royalties are SP.  If you put them in a partnership, the royalties paid will be CP  Be very careful with oil **!!!** |

* *Livshutz v. Lifshutz, 391*

Retirement and Other Employee Benefits Including Stock Options

Retirement Benefit §’s

* **Defined Benefit Plan vs. Defined Contribution Plan**
* **Defined Benefit Plan**
  + - Typically seen in the *military*. At a certain level of service for so many years.
    - They come up w/ a formula based on rank & years of service to finds your benefits
    - Uncertain how much is in it at a given time. EX: Don’t know value at time of divorce
    - Difficult to deal w/
    - **Might add:** *“If, as, & when you receive this, the spouse will get X amount”*
    - **Addressed under CL !!!**
      * *Taggert* is still good law if retired before divorce
      * *Berry* controls otherwise.Use *Berry* case to establish amount in a defined benefit plan
* **Defined Contribution Plan**
  + - AA plan where your employer puts in $ monthly, or you put in $ & employer matches it, or you just put in $
    - Can trace. You’ll know how much is in it & what it’s invested in on the day of marriage
    - EX: 401K
    - EX: If you have a Defined Contribution Plan & you get married tomorrow, all the shares you had prior to marriage are SP. Stock & increases acquired during marriage are CP
    - If it’s in a savings account that just gets interest → Interest is CP (bc apply tracing rules)
* Retirement became divisible upon divorce in the 1970’s
* Retirement plans are considered a community asset
* Look at day-to-day
* Whatever you’ve earned during the marriage is CP
* **Ways to Deal with Retirement Benefits upon Divorce**
* Can decide not to divide them **or**
* Can buy them out of your retirement **or**
* Can give them other assets, etc
* **Disposition of Retirement & Employment Benefits & Other Plans § 7.003**
* In a divorce or annulment, Ct shall determine the rights of both spouses in a pension, retirement plan, annuity, individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant. Irrelevant whether they’re self-employed.

Other Employee Benefits & Stock Options

* Military pensions earned during marriage are CP, even if not mature & aren’t yet in possession (not a mere expectancy) *Cearley, 398*
  + - This is where the saying *“If as and when…”*
    - **Community Interest in Defined Benefit Plan**
    - **Formula: [ Years married employed ÷ by years employed ] × Value**
* *Taggert* allowed for retroactive division of military retirement pensions, even years after divorce *Taggert v. Taggert*
* To some extent, *Berry* overruled *Taggert.*
* Use *Berry* unless you’re retired on the date of divorce.
* ***Berry* says to use date of divorce to find the community interest !!!** *Berry v. Berry, 401*
  + - **[ # of months married & employed under plan ]**
    - **Wife’s share ×[ # of months employed under plan at date of divorce ] × Value at date of divorce**
* The *May* case explains *Berry May v. May, 404*
* EX: [ 40 years employed / 10 years married & employed ] x 25% CP = 12.5%
  + - This means that 35% of his retirement was considered CP
* **Example of “The *Berry* Gap”** *Hagen v. Hagen; Problem 2, 412*
* H & W married in May 1958, H’s employment began the day he married W1 in 1958 until 78.
* Then married W2 from 78-98. That same year he retired.
* Thus he had been employed for 40 years
* At the time of W1 divorce, he’d been married for 240 months & employed for 240 months.
* Lump sum from employer was $200K. Later, at retirement it was worth 2,000,000
* Apply *Berry* formula:
  + - W1: [ 240/240 ] x 200,000 ] = 200,000 CP interest
    - W2: [ 240 months employed / 480 months employed ] x 2,000,000 = 1,000,000 CP interest
* The Ct has discretion to chose the percentage each spouse will receive. If divided 50/50, you’d be left with 100,000 interest for W1 & H, and then 500,000 for W2 & H
* Then, take his total retirement value of 2,000,000 - 600,000 (total owed to W1 + W2), 1.4 million remains
* Then, 1,000,000 - 200,000 = 800,000. *Berry* would categorize the 800,000 as H’s SP, but that can’t be right. We call this the *Berry* Gap. It’s a gap because he’s been married the entire time, so it can’t be CP.
* **Solution:**Windfall *not* subject to a just & right division
* *Hagen v. Hagen*

Maintenance (it’s not called Alimony in TX)

* **Do not use old outlines on maintenance or alimony b/c law changed in 2011 !!!**
* **Overview**
* **TX:** Maintenance not alimony. Difficult to obtain.
* **Updated in 2011:** Expanded who could get it, the length, & amount
* **Post divorce maintenance**: Awarded in very limited situations, such as while a divorce is pending
* **Prerequisites for Receiving Spousal Maintenance** **§ 8.051**
* Can get maintenance if w/in 2 years before suit, spouse convicted of a family violence w/in 2 years **or**
* Incapacitated physical/mental disability + can’t meet physical needs + insufficient property award to meet needs **or**
* Married 10 years + lack ability + insufficient SP & not awarded enough to meet min reas needs **or**
* Child w/ physical or mental disability + insufficient SP & not awarded enough to meet your min reas needs
* **Maximum Amount:** Can’t Exceed the lessor of **$5,000**/month **or** **20%** of the spouses average monthly income  **§ 8.055**
* ~~Prior to 2011 it was capped at $3,000~~
* …
* **Factors: Setting Amount § 8.052**
* Ability to meet min reason needs
* Education & employment
* Duration of marriage
* Age, employment history, earning ability, & physical & emotional condition
* Effect of child support they’re obligated to pay
* Bad faith expenditures EX: Blow net worth in Vegas
* Contributions to the other spouse to increase their education/earning power
* Property contributions to the marriage
* Adultery, cruel treatment (goes both ways, might not get alimony, might not receive alimony)
* History of Family Violence
* **Spouse must have exercised Diligence in Earning Sufficient Income or Developing Necessary Skills § 8.053**
* **History:** Used to have to prove you sought employment
* **Modern: Rebuttable presumption** against maintenance
* **Duration § 8.054**
* Married >10 years + family violence → 5 year max
* Married 10-20 years → 5 year limit
* Married 20-30 years → 7 year limit
* Married <30 years → 10 year limit
* **Generally:** Must limit maintenance to shortest reasonable time **§ 8.054(2)**
* **Exception:** They’re totally & substantially unable to meet their min reasonable needs bc **§ 8.054(b)**
  + - Mental or physical disabled **or** custodian for mentally/physically disabled child
* **Termination:** When oblige dies **or** marries **or** lives w/ another in a romantic relationship (even same sex) **§ 8.056**
* **Modification § 8.057**
* **Rule:** Ct of continuing jsd can reduce **(not increase)**
* **Requirement:** Material & substantial change in circs relating to either party or their child
* **Doesn’t Apply** 
  + - Incapacitated post-divorce
    - Lose job
* **Enforcement**  **§ 8.059(a)(b)**
* Can enforce by contempt (but not more than what would have been ordered)
* Voluntarily enter K for alimony of $10,000/month → Can’t enforce bc doesn’t comport w/ alimony, it’s more like a bonus, not just to meet their min needs
* **Affirmative Defenses § 8.059(c)(d)**
* Lacked ability to pay support ordered **&**
* Lacked property to sell/mortgage **&**
* Attempted to borrow funds from a source unsuccessfully **&**
* Doesn’t know any other place to get it **&**
* Pleaded
* **Overpayment by the Obligor - Recoupment § 8.059(1)**
* Must return any overpayment that obligor pays **( NEW !!! )**
* Don’t return → Can be liable for atty fees
* Couple makes improvements on property → CP *Anderson*

Appellate Review of Property Divisions

* **Appeal of Marital Property Issue** *pg 428*
* **Rule:** Mischaracterization of SP as CP doesn’t require reversal
* **Must show:** it caused an abuse of discretion in the division
* TrCt must assess the value of property that’s subject to a just & right division (Not CtApp) *McKnight v. McKnight, 429*
* Can't divide partnership property (But can award a % of the partnership interest) *McKnight v. McKnight, 429*
* **TrCt Mischaracterization Errors**
* **Usual Rule:** TrCt error in mischaracterizing CP as SP **doesn’t require reversal** unless AppCt finds the TrCt would have made a different division if it had been properly characterized **!!! very important**
* **De Minimus Rule (New Rule)**  *McElwee v. McElwee, 433*
* **Definition:** When a mischaracterization has more than a de minimus effect upon the TrCts division, the AppCt must remand the community estate to the TrCt for a just & right division based upon the correct characterization **!!! very important**
  + - If it skews the division in more than a divesture → Should be reversed

|  |  |
| --- | --- |
| **Scenarios Pg 428** | **Answer** |
| W claims Blackacre is her SP, H says it’s CP.  TrCt characterizes it as CP & awards to W | * Not automatically reversible. Must show abuse of discretion in the division (causing harm) |
| Same, but TrCt characterizes it as W’s SP. | H must show it’s CP & abuse of discretion in the division (causing harm) |
| Same, but TrCt characterizes it as CP & awards to H. However, W can establish it’s her SP. | Automatic reversal. Can’t divest W of her SP  Not necessary to show harm bc it is reversible error |

Other Post-Judgment Actions

Motions in Aid & Clarification of Judgment

* **Continuing Authority to Enforce Decree § 9.002**
* TrCt that renders the decree of divorce or annulment retains the power to enforce the property division
* Can’t ask for a jury in an enforcement action  **§ 9.005**
* Ct can’t amend, modify, alter, or change the division of property named in the decree. Can assist or clarify
* Can’t re…
* Can’t make a substantive change
* **Ct Enforcement of Division of Property § 9.006**
* Can render further orders to enforce a property division of property to assist in clarifying or implementing it
* Can specify more precisely the manner of effecting the previous property division **if the substantive division of property is not altered or changed.**
* Doesn’t alter or affect the finality of the divorce decree
* **Limitation on Power of Ct to Enforce § 9.007**
* **Rule:** Can’t alter the property division made by the divorce decree *Shanks v. Treadway, 440*
* **If decree is clear enough** → Enforce it
* **If not clear enough →** May only make order to clarify or implement it. But not while an appellate proceeding is pending **!!!**
* **If Ct alters it** → Unenforceable
* **Clarification Order § 9.008**
* **When:** On parties request or Ct motion, before/in conjunction w/ or denial of a motion for contempt
* **Applies:** Property division not specific enough to be enforceable by contempt
* EX: Language doesn’t specify how division will take place
* **Effect:** May render a clarifying order w/ specific terms to enforce compliance
* Can’t be retroactive
* Must provide a reasonable time for compliance before enforcing a clarifying order by contempt
* Can’t alter the ultimate division made by the divorce decree *Shanks v. Treadway, 440*

Omitted Property

* **§ of Limitations § 9.202**
* Must file before 2nd anniversary when former spouse unequivocally repudiates the existence of the ownership interest of the other former spouse & communicates it to the other former spouse.
  + - SUM: 2 years from when spouse *unequivocally* repudiates your interest (not from date of divorce)
* 2-year limitations is tolled if Ct doesn’t have jsd over parties or property
* **Omitted Asset Division (Prior Ct had jsd)****§ 9.203**
* **Applies:** Ct fails to dispose of property subject to division in a divorce, even though it had jsd **!!!**
* **If TX Ct didn’t do it:** Do a just & right division w/ due regard for the rights of the parties & children **!!!**
* **If another state’s Ct didn’t do it & under their law:** TX Ct applies that states law re: undivided property as req’d by § 1, Art. IV, US Constitution (the full faith & credit clause), & enabling federal statutes **!!!**
* **Division of Undivided Assets (prior Ct w/out Jsd) § 9.204**
* If Ct failed to dispose of divorce property bc:
* No jsd & it later acquires jsd **or**
* Another state Ct didn’t have jsd but now TX does

→ May divide the property in a just & right division, having due regard for the rights of each party & children

**Rule:** If a woman can show she had a fiduciary relationship w/ her former H → H has duty *Miller v. Miller, 445*

**Applies:**  H handles all financial affairs & W knows nothing

Once fiduciary relationship & signed agreement → BOP to show the agreement was fair, honest, & equitable

# Interspousal Torts

* **~~History:~~** ~~Spouses couldn’t sue each other~~

Negligent Torts

* **Rule:** Interspousal tort action is aggregated for both intentional & negligent torts (spouses can sue each other) *Price v. Price, 458*
* **Can recover:** SP (vs. Fraud on the community which isn’t allowed, recovering CP) **!!!**
* **Can’t recover:** CP in an interspousal tort action. Must be SP recovery

No Double Recovery

* **Rule:** Can’t have double recovery. A disproportionate division must be explained as to how they are separate when a tort action & divorce decree are joined
* **Requirement:** Explain disproportion w/out considering the tort. Explain & treat them separately
* **Applies:** Tort + divorce joined
* **Solution if too complicated to explain:** Sever them
* If separate party, joining with divorce
* Claim 1 - adultery, insupportability…
* Claim #2 - tort action because…

Intentional Torts

Death

* **Interspousal Tort Immunity Doctrine (1977):**Can sue for wrongful death of a spouse caused by an intentional tort *Bounds*
* **Standing:** A child or family member can stand in the shoes of the spouse to sue
* **§oL:** 2 years

Divorce

* **Rule:** Can join tort w/ divorce to reach their SP *Mogford v. Mogford, 454*

Negligence

* **TX doesn’t allow**: *Negligent* infliction of emotional distress **!!!** *Twyman v. Twyman, 462*
* **TX allows**: *Intentional* infliction of emotional distress **!!!**

# Property Rights that Arise When There’s no Formal Marriage

* **History:** Women couldn’t recover if they were in a meretricious relationship w/ married man (she was living in sin)
* **Modern:**

Meretricious Relationships

* **Definition:** Cohabitation by persons who both know they’re not married
* **Similar to:** In CA it might be a meretricious relationship, whereas TX might recognize it as a CL marriage
* **CA:** Express agreements of companionship can be the basis of compensation. Relationship must be more than just sexual.
* Can’t recover in quantum meruit for household services bc creates a totally new substantive right
* Don’t use defenses (lack of oral partnership/joint venture) against someone w/ a valid claim just b/c they’re in a meritritious relationship *Harrington v. Harrington, 474*

Putative Spouse

* **Definition:** Not a valid marriage bc of some impediment, but putative spouse has some rights upon learning the marriage is void
* **Requirement**
* Entered into the relationship in good faith **&**
* No knowledge a previous marriage was undissolved (or mistaken, good-faith belief it was dissolved)
* **Effect:**Putative spouse gets ½ of marital property acquired during their marriage (up to the point of knowledge) (bc innocent party, like a partner)
* **File:** Suit to declare marriage void & that you seek to declare property under the putative spouse status
* **EX:** Unknown prior marriage
* **Presumption:**Most recent marriage is presumed valid
* **To Rebut:** No divorce anywhere they could get one
* **Lord Mansfield’s Rule:** A child born in wedlock is presumed to be a child of that marriage → Can’t bastardize your own child w/out evidence it isn’t yours (EX: by showing no access to mom @ conception)
* *Davis v. Davis, 477*

Common-Law Marriage

* **History: 1970-1989**
* Declaration of marriage (still good)
  + - 1) Agreed to be married **&** ~~Can be inferred~~
    - 2) Afterwards lived together as husband & wife in TX **&** No specific time period
    - 3) Represented to others they were married
* **Requirements to Prove § 2-401**
* a) Circumstantial Evidence **OR**
  + - 1) Agreed to be married **&**  §SoL= 2 yrs or rebut presumption
    - 2) Afterwards lived together as husband & wife in TX **&**  No specific time period
    - 3) Represented to others they were married No waiting period
* b) Statutory Declaration of Marriage
  + - 1) Heading: “Declaration & Registration of Informal Marriage + County
    - 2) Full names, maiden surname, address, DOB, POB, SSN
    - 3) Prove age (18) & identity
    - 4) Not related by consanguinity or affinity
* **Main Advantage:** Can be back-dated **!!!**
* **Other Advantages:**SS benefits, employment benefits, right to bring a lawsuit, CP, etc
* **§ of Limitations § 2.401**
* **~~Historical Rule until ’89:~~** ~~CL marriage could be inferred~~
* **~~Historical Rule ’89-97’:~~** ~~1 year~~  *Shepherd v. Ledford*
* **~~Historical Rule ’97-05’:~~** ~~2 years~~
* **Rule:**2 years w/in CL marriage ending & ceased living together (rebuttable presumption no agreement to be marriage existed)
* **Purpose:** Avoid stale claims EX:EP claim bc property concerns → Can file a declaration to extend  *Shepard*
* **Don’t file w/in 2 years** → rebuttable presumption no CL marriage existed
* **TX Rule:**Minor lacks capacity to consent to CL marriage (even if meets holding out req’ts). Must be over 18.
* **TX Rule:** Can’t be presently married to another person
* **TX Rule:** Denial of marriage by both parties doesn’t bar CL marriage [CL marriage § later amended]  *Claveria v. Claveria, 483*
* **TX Rule:** If an insurer stipulates there was a CL marriage, then the stipulation overcomes the §oL’s  *Transamerican v. Fuentes*
* **Trusts**
* A woman living in meretricious relations w/ a man when he purchased land in his own name must show she contributed to the price
* **How?** 
  + - Worked together toward a common purpose
    - Proceeds of their labor became their joint property
    - Proceeds, a specified part to which she contributed, were used to purchase the land
* **Limit:** Can win favor in trust **after title vests**
* *Claveria v. Claveria, 482*
* An explicit agreement isn’t req’d. Can prove w/ circumstantial evidence *Russell v. Russell, 486*

# Test Tips

* **For Class**
* Print disc out or use family code
* [pgeorge3@comcast.net](mailto:pgeorge3@comcast.net)
* 25-30 pages per class, many less
* pages 43-66 is the MOST IMPORTANT lecture of the semester
* Course & most of the code is based on CL
* **The Exam**
* 50 % essay. 50% multiple choice (10 true/false, 40 MC)
* It annoys her to see incorrect stuff from old outlines. The laws have changed
* **MC:** Analyze each MC or T/F and analyze in accordance w/ preceding statement
* **When:** Wednesday, May 15 at 6pm
* **Essay:** She’ll use a bar exam question from last 5 years w/ recent dates, diff names.Read state of TX bar examiners/exam info for 5 years of exams. Marital prop questions - 1 will be modeled on the exam
* **On exam**
  + - Know everything in Chap 4 of TX Fam Code **!!!**
    - Know modern const very well. It is the key to the cases & the bar exam
* **Not on exam:** Chapter 8 homestead

**Exam review**

$ dividends from SP → CP

**Goodwill**

* **Commercial Goodwill**
  + - Not tangible. Reputation of the business.
    - EX: Reputation of the business to stock ERs w/ good dr’s
* **Professional Goodwill**
  + - *Attributable to the person*
      * EX: Reputation for being a good trial lawyer
    - *Attributable to a partnership*
      * EX: Vincent and Elkins → No value bc its bw partners
      * Look to partnership agreement to find share of goodwill
      * Experts can value it
* **Parole Evidence**
* *Usually:* If you have a significant recital → No parole evidence allowed (absent fraud, duress, etc)
* *Rare case:* Affirmative act to make a gift w/out significant recital → No parole evidence
* **Divorce**
* Can have punitive DAS
* **One tort recovery not allowed:** No punitive DAS for fraud on the community
  + - **Reason:** Not an independent tort. Make up for it w/ a just & right division
* Can make a jt tenancy w/ right of survivorship out of CP (per Constitution). No 2-step process anymore.
* Don’t have to know economic contribution. Do need to know reimbursement
* **Reimbursement**
* Commingle SP w/ CP & can’t trace → had 1 million to start & never dipped below that → Upped to 4 million → The 1 million can be considered
* Know the situations where you can’t…reimbursement
  + - No offset when seeking 1st or 2nd residence
* H& W have a 500K Community estate. H has a trust fund that he’s going to come into the principal in 10 years. He now gets monthly payments. → Ct can consider that he’s taken care of & give W < ½ the 500K
* Can’t divest a spouse of their SP
* **Consider:** Can have maintenance (alimony) that comes out of SP. TX Legislature hasn’t codified it, but it hasn’t been disallowed
* EX: H has what he claims is SP. Ct says it’s CP, but Ct awards to H → No divesture of SP
* EX: Ct says CP is worth $1,000,000. H claims $200K is his SP. If Ct divides it 50/50, giving both H & W $500K → They divested H of his SP. It should have been CP of $800K, so each get $400K and H keeps his $200K SP.
* EX: Ct says $700,000 CP estate. Ct says divide 50/50 ($350K each). W’s parents left her a commercial building as SP. She put all the rents in a separate account, worth $300K. → The $300K is CP. So both get $350 + $150

# Practice Exam Problems

5 (out of 50) True/False QUESTIONS (5% of the test)

* **During marriage, a corp can be used to establish SP if the initial capitalization of that corp is SP.** True, *Valone*
* **H & W are getting divorced in TX where they’ve lived for the past 2 years. During one year of their marriage, H and W lived in NY. While residing in NY, H received a 10K employment bonus and purchased 1000 shares of Apple stock in his name. NY doesn’t recognize CP principles. Last month, H sold the Apple stock, the entire 1000 shares, for $100K. H purchased a Mercedes. With regard to the car, upon divorce it will be dealt w/ as follows:**
* A) SP of H → Wrong
* B) SP of H w/ a right of reimbursement to the community estate → Wrong
* C) CP → Correct
* D) H’s sole management CP and thus awarded to him wrong → Wrong, not & thus awarded to him. It’s up for grabs. She could get the Mercedes
* E) H’s SP only if he can trace it to the employment bonus → Wrong
* **A H may sue his W for:**
* A) Assault and battery → Y
* B) Transmission of VD → Y
* C) Negligent Infliction of Emotional Distress → No. Doesn’t Exist
* D) A& B → Correct Answer
* E) All of the above
* **In considering premarital agreement, which of the following is a true statement**
* A) If one clause is unconstitutional the entire agreement fails → False
* B) A claim that an agreement was involuntarily signed will be sustained if the opponent of the agreement claims she was under duress due to pregnant → False. *Orsono*
* C) Due to the factual nature of the inquiry, a premarital agreement can never be enforced via summary judgment → FALSE
* D) 2 of the above → Nope
* E) None of the above → Correct
* **Assuming no controlling clauses in the decree of divorce, if CP is omitted from the decree, the following is true once its proved CP was omitted**
* A) The spouses will be tenants in common w/ regard to the property and will have to share it 50/50 → Wrong. Old law
* B) The possessory spouse will be allowed to keep the omitted prop → Wrong. Possession is 9/10ths of the law. The one in possession keeps it
* C) The property will be divided in a just and right division → Correct
* D) The non-possessory spouse will be awarded the entirety if he proves it to be purposefully omitted (i.e. hidden) → No
* E) None of the above

Bar Exam Questions (how she likes them answered, same as bar exam)

* 1. Conclusion
* 2. Issue
* 3. Rules of law
* 4. Application
* --*Talk about the facts in relation to the rules of law--*
* **Question 12, from February 2012 exam**
* **Did the TrCt err in finding the prenup enforceable? Explain fully.**
  + - *Conclusion:* No, the Trial Court did not err in finding the prenuptial agreement enforceable.
    - *Issue:* The issue is whether Gloria voluntarily signed the prenup in light of the facts that she was 40, unmarried, pregnant and had limited earning capacity and that Henry would not marry her unless she signed
    - *Rules of Law:* Under the TX Family Code, a party attacking a premarital agreement has the burden to show 1) she did not sign the agreement voluntarily or 2) it was unconscionable and she did not receive…of the other parties property and liabilities.
    - *Application:* Gloria relies on the first round, arguing she signed the premarital agreement involuntary…*(she’ll email if we ask her to)*
* **Did the Trial Court abuse its discretion in its division of the property not covered by the prenuptial agreement? Explain.**
  + - Yes, the TCt abused its discretion in the division of property not covered by the prenup.
    - *Issue:* The issue is whether the TrCt abused its discretion in awarding 87.5%, ie 350K of the 400K of the property not qualified by the prenup.
* **During the…** This is reimbursement for purchased money
* **In 1990…** they don’t say its SP so presume its CP. Calculate using the enhancement value attributable to the improvements
* **In 2005…** it’s a tenancy in common bc doesn’t say he was…before marriage
* **Kay’s…**
* **The home (includeing the issues…**
* The home is Kays SP. There’s going to be reimbursement to the community for payments made on the mortgage during the marriage. And theres going to be reimbursement to the community for the 75K addition/improvement made to the home
* The issue is whether there is reimbursement and whether there is a community claim for reimbursement based on the mortgage payments made and the addition to the house.
* When title inepts before marriage, the title is SP. When…there will be a reimbursement claim. Improvements made…. We measure reimbursement for improvements by the enhancements attributable. The law is that you can get purchase money reimbursement.
* **The home**
  + - Purchase before marriage → SP
    - ….clearly reimbursements for payments made to the mortgage
* **The lake property.**
  + - Character: tenancy in common. The property is fully paid for no reimbursement issues, fully paid at acquisition
    - Issue is what is the character of the property
    - Property acquired after marriage establishes a tenancy in common bw the 2 estates….
    - …so its 50/50
* **the cash dividends and the savings accounts:**
  + - The stock is SP. Dividends are CP.
    - The issue is whether or not the savings, although kept in an account solely in her name are CP
    - The rule is that dividends paid on separately owned stock will be CP