

INJURY SETTLEMENTS ARE USUALLY COMMUNITY PROPERTY

The Ultimate Property Division Seminar 2011
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A spouse's recovery for an injury claim is usually community property because most settlements mix all of the damage elements together in a single payment.

General Principles

Recoveries in injury claims are treated like other property in a divorce and the usual presumptions and burdens of proof apply. When a spouse receives a settlement from a lawsuit during the marriage, some of which could be separate property and some of which could be community property the burden of proof is on the spouse claiming the funds as separate property. *Kyles v. Kyles*, 832 S.W.2d 194,198 (Tex. App.—Beaumont 1992, no pet). All property is presumed to be community property and “clear and convincing evidence” must be presented to establish that property is separate property. Tex Fam. Code §3.003.

The Texas Family Code provides in its definition of separate property:

Sec. 3.001. SEPARATE PROPERTY. A spouse's separate property consists of:

(3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

Specific Elements of Damages

The following elements of damages have been held to be separate property:

- Mental pain and anguish, *Moreno v. Alejandro*, 775 S.W.2d, 735,737 (Tex. App.—San Antonio 1989, writ denied).
- Physical pain and suffering, *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972).
- Disfigurement, *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972).
- Loss of a spouse's love and companionship, *Osborn v. Osborn*, 961 S.W.2d 408, 414 (Tex. App.—Houston [1st Dist.] 1997, writ denied).

The following elements of personal injury damages have been found to be community property:

- Loss of earning capacity during marriage, *Perez v. Perez*, 587 S.W.2d 671,673 (Tex. 1979)
- Medical expenses incurred during the marriage, *Licata v. Licata*, 11 S.W.3d 269, 273 (Tex. App.—Houston [14th Dist.] 1999, no pet).
- Damage to credit reputation, *Douglas v. Delp*, 987 S.W.2d 879, 883 (Tex. 1999).
- “Other expenses associated with the injury to the community estate,” *Osborn v. Osborn*, 961 S.W.2d 408, 414 (Tex. App.—Houston [1st Dist.] 1997, writ denied). Presumably, this would include damages to community property such as the family automobile.
- Disability insurance payments and workers' compensation benefits are community property, “...to the extent it is intended to replace earnings lost while the disabled or injured person is married.” Texas Family Code §3.008(b).

An old Texas case says punitive or exemplary damages are community property and a new case from 2011 says punitive damages are separate property.

Lump Sum Settlements are Community Property

The basic rule in Texas is that a lump sum injury recovery is all community property if a party cannot prove what part of the lump sum settlement is separate property. See, e.g. *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App.—Beaumont 1992, no pet); *Patt v. Patt*, 689 S.W.2d 505 (Tex. App.—Houston [1st Dist.] 1985, no writ); and *York v. York*, 579 S.W.2d 24 (Tex. Civ. App.—Beaumont 1979, no writ).

As one court has said, “ Without clear and convincing evidence showing the recovery is solely for the personal injury of a particular spouse, the spouse does not overcome the presumption that all recovery received during marriage is community property.” *Licata v. Licata*, 11 S.W.3d 269, 273 (Tex. App.—Houston [14th Dist.] 1999, no pet).

In *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App.—Beaumont 1992, no pet), the husband was injured in a car wreck and filed a lawsuit seeking various damages, including lost wages and lost earnings capacity. An unsigned copy of the release was introduced which had signature lines for both spouses and which stated the release was for, “all sums of any kind or character, including by way of illustration, but not by way of limitation, actual damages sustained by claimant; exemplary damages; medical hospital, drug or nursing bills; prosthetic devices; property damages; loss of wages or profits...” The trial court found that the entire recovery was the husband’s separate property and that it did not include any recovery for loss of earning capacity, medical expenses or property damage. The court of appeals reversed and ruled that the husband failed to rebut the presumption that the recovery was community property, stating:

All property possessed during marriage or on dissolution of marriage is presumed to be community property, and the party claiming that such property is separate, must prove so by clear and convincing evidence. Thus appellee has the burden of proving that the original settlement was his separate property....

We are hard put from the record to find clear and convincing evidence proffered by appellee to rebut the presumption that the settlement proceeds were community property. Without evidence to the contrary, it must be presumed that at least some of the settlement proceeds were attributable to lost wages or lost earning capacity which are community property. The only evidence we can find from the record which comes close to addressing the issue, comes from appellee’s testimony that it was his understanding that the entire settlement was for personal injuries and nothing else. However, in earlier testimony, appellee testified as follows:

Q: How much of that settlement was due to your lost wages in income?

A: I don’t know.

Q: Some of it was, was it not?

A: It would have to be, it wasn’t spelled out how much.

....

Q: You couldn’t say one way or the other? You couldn’t deny it, part of it was for lost wages?

A: I still don’t know.

Since appellee did not prove what amount, if any, of the settlement proceeds were separate or community property, it must be conclusively presumed that the entire proceeds are community property. When a spouse receives a settlement from a lawsuit during a marriage, some of which may be separate property and some of which may be community property, it is the spouse’s burden to

demonstrate what portion of the settlement is his separate property. Moreno v. Alejandro, 775 S.W.2d 735, 738 (Tex. App.— San Antonio 1989, writ denied). This Court has previously held that a spouse that receives a settlement arising out of a personal injury has a burden to show that none of the funds constitute payment for lost wages or lost earnings capacity during marriage. In the absence of such evidence, the entire settlement proceeds are property characterized as community property. York v. York, 579 S.W.2d 24, 25-26 (Tex. Civ. App.—Beaumont 1979, no writ), see also, Patt v. Patt, 689 S.W.2d 505, 509-510.

Kyles, 832 S.W.2d at 198 (emphasis added).

In *Franklin v. Franklin*,¹ a 2006 unpublished opinion from the Amarillo Court of Appeals, the husband settled a phen phen lawsuit in which he sought past and future physical pain and mental anguish, disfigurement and medical expenses. The trial court and then the court of appeals held that annuity payments to the husband that were part of the injury settlement were community property. The Amarillo Court of Appeals stated:

...we deal here with an asset acquired during marriage from the settlement of a lawsuit in which both Robert's separate property claims and community property claims were asserted and settled. The trial court here properly placed on Robert the burden to show that the annuity he claimed as separate property was obtained as a result of his personal injuries and was not compensation for lost earning capacity during marriage or medical expenses.

The trial court's ruling that the annuity was community property was upheld in the Franklin case because the husband was not able to prove how much of the settlement was for each item of damages. His argument that all of his medical expenses incurred during the marriage did not help the husband because, as the court of appeals said, "...that evidence says little or nothing about the amount, or the proportion of the total settlement, for which the medical expense claim was settled."

There have only been two situations in Texas in which a lump sum injury settlement was held to be separate property. In *Slaton v. Slaton*, 987 S.W.2d 180 (Tex. App.—Houston [14th Dist.] 1999, no pet.), the total net recovery was \$450,000 and parties stipulated that \$34,060 was for lost wages and medical expenses which were agreed to be community property. The parties then litigated over whether the rest of the recovery was either the wife's separate property or the husband's separate property based on what they claim they had suffered. They in effect agreed that the rest was separate property and so overcame the community property presumption. In *Licata v. Licata*, 11 S.W.3d 269 (Tex. App.—Houston [14th Dist.] 1999, no pet.), the two releases that settled the injury claims specifically said that the money being paid was for physical pain, mental anguish and disfigurement only. That stipulation was enough to overcome the community property presumption.

A new case decided by the Austin Court of Appeals in June 2011 also involved a stipulation that a recovery was separate property. *Harrell v. Hochderffer*, __ S.W.3d __ (Tex. App.— Austin 2011)(03-09-00007-CV) was a probate case in which a trust agreement signed by both spouses essentially stipulated that the amounts contributed by each spouse (which resulted from the proceeds of a settlement of a medical negligence suit against a nursing home) were their own separate property. The settlement agreement in the nursing home lawsuit also awarded each spouse his and her own separate recoveries and the lawsuit did not seek any element of damages that is considered community property. This was held to be sufficient evidence that each spouse's respective recoveries were their own separate property.

The court in *Osborne v. Osborne*, 961 S.W.2d 408, 415 (Tex. App.—Houston [1st Dist.] 1997, no pet.) suggested that if a case were tried to a jury then the jury's awards of specific damages amounts would be another

¹ June 19, 2006, No. 07-04-0515CV. Opinion is at court's website at <http://www.7thcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=11338>.

way to overcome the community presumption. In *Osborne*, the personal injury lawsuit had not yet been tried or settled. The court of appeals observed that until the case was tried or settled, the parties' estimates of the dollar amounts or percentages of recovery attributable to the various claims would be entirely speculative. *Id.* at 415.

Punitive Damages

In dicta, an old case from the Amarillo Court of Appeals case states that an exemplary damages award was not community property. *In re DeVine*, 869 S.W.2d 415, 429 (Tex. App.—Amarillo, 1993, writ denied). However, *DeVine* involved a \$3,000 exemplary damage award in the divorce trial awarded to the husband against the wife for fraud she committed on the community estate – it did not involve a punitive damage award paid by some third party.

A new case decided by the Austin Court of Appeals in June 2011 basically says the *In re De Vine* case is limited to its facts and does not apply to a lawsuit against a third party in tort. *Harrell v. Hochderffer*, ___ S.W.3d ___ (Tex. App.—Austin 2011)(03-09-00007-CV). In the *Harrell* case, the majority said:

A recovery for personal injuries, such as the one at issue here, is expressly characterized as separate property under the family code, with a statutory exception for any recovery for loss of earning capacity during the marriage. See Tex. Fam. Code Ann. § 3.001(3). The only additional exceptions acknowledged by Texas courts are funds recovered for “medical expenses incurred during marriage, and . . . other expenses associated with injury to the community estate.” Licata, 11 S.W.3d at 273. Unlike lost earning capacity and medical expenses, however, exemplary damages do not represent income to which the community is entitled or an expense for which the community is liable. An exemplary damages recovery is merely “a private windfall,” levied for the public purpose of punishment and deterrence, and is not associated with an injury to the community estate. See Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 17 (Tex. 1994). Because an exemplary-damages award does not fall under any exception to the general rule that the recovery for personal injuries is separate property, such damages must be characterized as separate property under family code section 3.001(3). See Tex. Fam. Code Ann. § 3.001(3).

A case from Louisiana (a community property state with case law and statutes similar to Texas') holds that punitive damages are community property. *Morris v. Morris*, 685 So.2d 673 (La. App. 3 Cir. 1996). The court cited a Louisiana Supreme Court case that stated, “punitive damages are sums awarded apart from any compensatory or nominal damages...” Because punitive damages do not derive from the spouses personal injury, the Court reasoned that punitive damages did not fall under the Louisiana code that stipulates that damages due to personal injuries sustained during the existence of the community by a spouse are separate property, but are governed by the “ ‘omnibus clause’ which clearly states that ‘community property comprises: all other property not classified by law as separate property.’ ” The Court rejected the defendants argument that the exemplary damage should be pro rated between separate and community property in the same manner as the compensatory damages.

The Alaskan Supreme Court in 2000 reaffirmed an earlier decision that, “an award of punitive damages should be apportioned in the same manner as the underlying compensatory damage award.” *Edelman v. Edelman*, 3 P3d 348, 354-55 (Alaska 2000).