

# Reimbursement Claims

*“A House Divided” Property Division Seminar - April 29, 2014*

by Greg Enos

Reimbursement claims are hard to explain to clients and it is unclear to most attorneys how to prove and value such claims. Since reimbursement claims are equitable in nature, it is totally up to the judge whether or not to grant a reimbursement claim, how to value it and what to do about it. It is not even clear what the burden of proof is in asserting a reimbursement claim.<sup>1</sup> Frankly, many judges do not know what to do with reimbursement claims. Worse, a jury can be asked to determine a reimbursement claim. Tex. Fam. Code § 6.711(a). *Marr v. Marr*, 905 S.W.2d 331, 333 (Tex. App.—Waco 1995, no writ).

The 2009 amendments to the Texas Family Code did away with “economic contribution” claims and went back to only reimbursement claims. Section 3.409 says what is not a reimbursement claim and Sec. 3.402(a) lists what reimbursement claims can include. However, most “legal experts” writing about the new statute have concluded that the list of possible reimbursement claims in the statute is not exhaustive, so there may be common law reimbursement claims available (you may need to use the old Southwest 1<sup>st</sup> editions and go back to the early part of the last century for your case law research).

As a practical matter, reimbursement claims seldom play a big role in most divorces. This topic is virtually impossible to adequately summarize in the six page limit imposed on this article, so lawyers should look at the statute, at the section on reimbursement claims in *O’Connor’s Texas Family Law Handbook* (starting at page 807 in the 2011 book) and at the excellent seminar article by Joan Jenkins and Susan Oehl, “Reimbursement”, Chapter 39 of the 2011 State Bar Advanced Family Law Course.

## 1. What is a reimbursement claim?

In Texas (unless there is a marital property agreement to the contrary), a married couple together owns the community estate and each spouse can own his or her own separate estate. If a husband, for example, owns a house prior to marriage, the house is his separate property even if during the marriage the married couple use their community funds to build a \$20,000 pool on the property. A reimbursement claim allows the community estate to recover the money it spent for the capital improvement on the husband’s separate property house. Since, under the “Inception of Title” Doctrine and the Texas Constitution, the husband’s house always remains his separate property, the only way to get the \$20,000 of community funds back or at least have the expenditure recognized is a reimbursement claim. Very vague principles of equity (i.e. fairness) give the judge almost total free rein to decide whether to recognize a claim for reimbursement, how to value it and what to do about it. Claims for reimbursement can go both ways - a separate estate can make a claim against the community or the other separate estate, but usually a reimbursement claim in a divorce

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<sup>1</sup> The Austin and Waco Courts of Appeals have ruled that the spouse asserting the reimbursement claim has the burden to prove by a preponderance of the evidence that the contributions came from the community estate. *Younger v. Younger*, 315 S.W.2d 449, 452 (Tex. App.-Waco 1958, no writ); *Jenkins v. Robinson*, 169 S.W.2d 250, 251 (Tex. App. - Austin 1943, now writ). The Houston 14<sup>th</sup> and El Paso Courts of Appeals hold that a spouse asking for reimbursement to the community estate is aided by the presumption that all contributions made during marriage come from the community estate and so it is presumed that any funds spent during the marriage on a spouse’s separate property were community. This puts the burden on the other spouse to rebut that presumption and prove separate funds were spent. *Zagorski v. Zagorski*, 116 S.W.3d 309, 321-22 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2003, pet. denied); *Kimsey v. Kimsey*, 965 S.W.2d 690, 702 (Tex. App. - El Paso 1998, pet. denied).

involves a claim by the community estate against the separate estate of one of the spouses.

## 2. What sorts of reimbursement claims are listed in the statute and how are they valued?

**Texas Family Code § 3.402. CLAIM FOR REIMBURSEMENT; OFFSETS.**

(a) For purposes of this subchapter, a claim for reimbursement includes<sup>2</sup>:

(1) payment by one marital estate of the unsecured liabilities of another marital estate [value of claim is based on the total amount of payments to paid toward the unsecured debts]

(2) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse [value of claim would presumably be the difference between what the spouse was paid and what “adequate” compensation should have been - there are no cases on this issue and the statute does not define how such a claim is valued]

(3) the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage [value of claim would be the amount of the principal reduction - not interest!]

(4) the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received [value of claim would be the amount of the principal reduction - not interest!]

(5) the reduction of the principal amount of that part of a debt, including a home equity loan:  
(A) incurred during a marriage;  
(B) secured by a lien on property; and  
(C) incurred for the acquisition of, or for capital improvements to, property [value of claim would be the amount of the principal reduction - not interest!]

(6) the reduction of the principal amount of that part of a debt:  
(A) incurred during a marriage;  
(B) secured by a lien on property owned by a spouse;  
(C) for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached; and  
(D) incurred for the acquisition of, or for capital improvements to, property [value of claim would be the amount of the principal reduction - not interest!]

(7) the refinancing of the principal amount described by Subdivisions (3)-(6), to the extent the refinancing reduces that principal amount in a manner described by the applicable subdivision [value of claim would be the amount of the principal reduction - not interest!]

(8) capital improvements to property other than by incurring debt [value of claim is measured by the enhancement in the value of the property by showing its value before and after the improvement,, Sec. 3.402(d)]

(9) the reduction by the community property estate of an unsecured debt incurred by the separate

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<sup>2</sup> The use of the word “includes” implies other claims for reimbursement can be asserted. According to Texas Government Code §311.005(13), “include” is not a term of limitation, and no presumption of exclusivity arises.

estate of one of the spouses [value of claim is presumably the amount paid to reduce the debt]

**3. What claims for reimbursement are not allowed under the statute?**

**Texas Family Code § 3.409. NONREIMBURSABLE CLAIMS.** *The court may not recognize a marital estate's claim for reimbursement for:*

- (1) the payment of child support, alimony, or spousal maintenance;*
- (2) the living expenses of a spouse or child of a spouse;*
- (3) contributions of property of a nominal value;*
- (4) the payment of a liability of a nominal amount; or*
- (5) a student loan owed by a spouse.*

**4. What can a judge do about a reimbursement claim?**

The Texas Family Code says:

**Sec. 3.402(b)** *The court shall resolve a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset against each other if the court determines it to be appropriate.*

**Sec. 7.007. DISPOSITION OF CLAIM FOR REIMBURSEMENT.** *In a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for reimbursement as provided by Subchapter E, Chapter 3, and shall apply equitable principles to: (1) determine whether to recognize the claim after taking into account all the relative circumstances of the spouses; and (2) order a division of the claim for reimbursement, if appropriate, in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage.*

**Sec. 3.406. EQUITABLE LIEN.** *(a) On dissolution of a marriage, the court may impose an equitable lien on the property of a benefited marital estate to secure a claim for reimbursement against that property by a contributing marital estate.*

The judge has total discretion whether to recognize a claim for reimbursement and whether or how to make an award based on the claim. *Penick v. Penick*, 783 S.W.2d 194, 198 (Tex. 1988). If the judge grants a spouse's claim for reimbursement, the Court can:

- Divide the reimbursement claim as part of the division of the community property. *Kamel v. Kamel*, 760 S.W.2d 677, 679 (Tex. App.—Tyler 1988, writ denied). So, if the community estate has a valid reimbursement claim of \$20,000, that is an asset of the community to be divided between the parties. If there are enough other assets, the court can award the reimbursement claim 100% to the spouse whose separate estate benefitted, which has the effect of giving the other spouse more in the property division (see discussion below under “How is a Claim for Reimbursement Shown on the Property Division Spreadsheet?”).
- Grant a money judgment. The court can award a money judgment against one spouse in favor of the other. *Kimsey v. Kimsey*, 965 S.W.2d 690, 696-97 (Tex. App.—El Paso 1998, pet. denied).
- Award specific items of property to a spouse to compensate him or her for the reimbursement claim. *Hilton v. Hilton*, 678 S.W.2d 645, 649 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1984, no writ)(Husband awarded shares of community stock to satisfy a reimbursement claim).

- Impose an equitable lien on the benefitted separate property, including ordering a promissory note and security agreement. Sec. 3.406. The lien can only attach to the property benefitted by the payments that gave rise to the claim, *Winkle v. Winkle*, 951 S.W.2s 80, 88 (Tex. App. - Corpus Christi 1997, pet. denied), and can even attach to a homestead, *Falor v. Falor*, 840 S.W.2d 683, 686-8 (Tex. App.—San Antonio 1992, no writ). If the court grants an equitable lien, it usually orders the spouse to execute a promissory note and deed of trust (if it was real property that benefitted), *Kimsey v. Kimsey*, 965 S.W.2d 690, 698 (Tex. App.—El Paso 1998, pet. denied).

**5. What are the defenses to a reimbursement claim?**

One defense against a reimbursement claim is to insist that the claim be proven and traced with admissible evidence. It is sometimes very hard to go back 15 years and prove where the funds to remodel a separate property house came from.

The only real defenses to a reimbursement claim are: (1) the equitable argument - it just isn't fair under the circumstances and (2) the reimbursement claim should be offset either by another reimbursement claim going the other way [the community owes my separate estate!] or it should be offset because the community estate enjoyed the benefit of what we did.

*Texas Family Code Sec. 3.402 (c) Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate, except that the separate estate of a spouse may not claim an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by the separate estate against contributions made by the community estate to the separate estate.*

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*(e) The party seeking an offset to a claim for reimbursement has the burden of proof with respect to the offset.*

**6. How is a claim for reimbursement shown on the property division spreadsheet?**

If there are sufficient community assets to offset the amount of the reimbursement claim, the proper method is to list the reimbursement claim as a community asset and then award the entire claim to the spouse whose separate property benefitted. This has the effect of awarding the benefitted spouse “pretend” money and causing the other spouse to be awarded more actual, real assets.

**Example:** Assume community estate is worth \$400,000 and your client wants a 50% division of total assets.

**Reimbursement claim against Husband's separate estate listed as asset and awarded all to husband**

Asset/Debt	Value	Husband	Wife
Chase checking	\$ 6,000.00	\$ 3,000.00	\$ 3,000.00
Fidelity brokerage	\$ 85,000.00		\$ 85,000.00
Boeing 401k	\$ 265,000.00	\$ 175,000.00	\$ 90,000.00
Truck	\$ 14,000.00	\$ 14,000.00	
BMW	\$ 22,000.00		\$ 22,000.00
Reimbursement Claim	\$ 20,000.00	\$ 20,000.00	
Chase Visa	\$ (12,000.00)	\$ (12,000.00)	
	\$ 400,000.00	\$ 200,000.00	\$ 200,000.00

The other method of showing a reimbursement claim if a money judgment and lien is to be awarded would be:

Asset/Debt	Value	Husband	Wife
Chase checking	\$ 6,000.00	\$ 3,000.00	\$ 3,000.00
Fidelity brokerage	\$ 85,000.00	\$ 10,000.00	\$ 75,000.00
Boeing 401k	\$ 265,000.00	\$ 175,000.00	\$ 90,000.00
Truck	\$ 14,000.00	\$ 14,000.00	
BMW	\$ 22,000.00		\$ 22,000.00
Reimbursement Claim	\$ 20,000.00		\$ 20,000.00 **
Chase Visa	\$ (12,000.00)	\$ (12,000.00)	
	\$ 400,000.00	\$ 200,000.00	\$ 200,000.00

\*\* money judgment in favor of wife against husband with promissory note for 60 monthly payments at 4% interest secured by a deed of trust on husband's separate property at 123 Elm, League City, Texas.

## 7. What other common-law claims for reimbursement might be available?

Reimbursement claims were recognized as common law in Texas for many years and some of those old sort of reimbursement claims might still be asserted since the 2009 reimbursement statute is clearly not an exhaustive list of possible claims. However, most of the common law claims are now included in the statute and the few that are not seem very unlikely to arise in the vast majority of divorces.

One surprising and relatively new case allows a spouse's separate estate to claim reimbursement for funds spent prior to the marriage! *Nelson v. Nelson*, 193 S.W.3d 624, 631-2 (Tex. App.—Eastland 2006, no pet.). In that case, the future husband (Kenneth) bought five acres from his parents before marriage. The future wife, Bessie Mae, sold her house before marriage and netted \$17,500 from the sale. Construction of the new house on the future husband's land started five months before the marriage. Prior to the marriage, Bessie Mae spent \$16,616.51 of her house sale proceeds on the construction of the new house. The parties were married and moved into the house once it was finished. After a divorce trial, the trial court ruled that the five acres was Kenneth's separate property because he had purchased it prior to the marriage. However, the trial court recognized a reimbursement claim in favor of Bessie Mae's separate estate against her husband's separate estate because of the money Bessie Mae had spent prior to marriage on the house. The court of appeals upheld that ruling stating:

*We believe appellant reads [the reimbursement statute] too narrowly. ... the definition of reimbursement in Section 3.408 is simply a non-exhaustive list of two potential reimbursement claims. Neither example is defined by the timing of the event. The legislature also provided five instances in which a reimbursement claim may not be awarded. These instances are specific categories of expenditure, such as child support and student loan payments. None turn on the timing of the expenditure. Consequently, we do not believe the legislature intended that a reimbursement claim could never exist for prenuptial expenditures.*

*Reimbursement is an equitable remedy. The Family Code specifically provides that courts are to "resolve a claim for reimbursement by using equitable principles." Because reimbursement is an equitable doctrine, a court of equity is bound to look at all the facts and circumstances to determine what is fair, just, and equitable.*

*Great latitude must be accorded to the trial court in applying equitable principles to determine reimbursement claims because this does not involve simply balancing the ledgers between competing marital estates. The discretion to be exercised in evaluating a claim for reimbursement is equally as broad as the discretion exercised by a trial court in making a just and proper division of the community estate.*

*The trial court found, and we have previously affirmed, that the \$16,616.51 spent by the parties on prenuptial construction costs was appellee's separate property. That money helped fund a house on appellant's separate property. The trial court did not abuse its discretion when it found that appellee was entitled to reimbursement. Appellant's fourth issue is overruled.*

*Nelson v. Nelson*, 193 S.W.3d 624, 632 (Tex. App.—Eastland 2006, no pet.)

It should be noted that the trial court in *Nelson* ordered Kenneth to sign a promissory note secured by an equitable lien on Kenneth's separate property five acre lot and house. This is an example of how a reimbursement claim is awarded and secured.

## **8. Examples of evidence needed to prove a reimbursement claim**

*Kimsey v. Kimsey*, 965 S.W.2d 690 (Tex. App.—El Paso 1998, pet. denied), is an example of how to prove a reimbursement claim involving capital improvements by presenting evidence of the value of the land with and without capital improvements. The difference in the values was held to be sufficient evidence of the value of the enhancement to the husband's separate estate using community funds.

Suppose, in a divorce case, that the husband bought a Ford F-350 truck five months prior to marriage with a loan from JSC Federal Credit Union of \$34,200 at 5% interest paid over 60 months. During the marriage, the parties used community funds to pay off the truck loan. At divorce, the wife can assert a reimbursement claim for the community estate per Sec. 3.402(a)(3) for, "reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage."

The wife will need to present the following evidence to prove her reimbursement claim:

1. Note from JSC Federal Credit Union showing date of purchase and terms of the loan, either admitted pursuant to the husband's testimony or attached to a business record affidavit.
2. Amortization schedule created by Wife's attorney from the Internet showing how much each monthly payment is for principal and interest based on \$34,200 at 5% over 60 months. Wife testifies this is a standard amortization schedule based on the numbers involved.
3. Chart showing total principal payments made during the marriage. Wife testifies this is a short hand rendition and explanation of her calculations.
4. Testimony from wife and husband that they made the monthly payments on the truck loan during the marriage until it was paid off.
5. Payment record from JSC Federal Credit Union attached to a business record affidavit.