

Divorcing the House

The Family Residence in the Divorce: The Complete Guide

September 11, 2017

by Greg B. Enos

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The family home is often the largest asset category in divorces. The divorce attorney and paralegal should understand how real estate is valued and divided in a divorce. But, the family house very often is tied up in the deep emotions, fears and anger involved in a divorce. So, the fight to determine who stays in the house and who has to leave, who gets what out of the house and what happens to the house at the end of the divorce case may involve considerations other than just dollars and sense.

1. Educate the Client Early and Often about How the Family Residence Is Handled in a Divorce

The attorney and law firm staff should educate the client on how the family residence will be handled in the divorce, who gets to use it, how it is valued and how it will be awarded or sold at the time of divorce. The client must be prompted to make a smart dollars and sense business decision about the house and not be swayed by sentiment.

The family home is filled with furniture but also memories, emotions and sentiment. The client needs to be gently urged to set aside personal feelings about the house and make a divorce decision based on cold hard facts and economics. The client needs to calculate if he or she can afford the house after the divorce. A smaller house might make a lot more sense from a financial point of view. Some clients are worried about how a move would effect their children and which school they would attend. Many people simply cannot bear the thought of all the hassle involved in moving. Some people are simply attached to their house and do not want to leave it.

The time to think about all of these considerations for the first time is not half way through mediation when the pressure is on. The lawyer must get the client thinking about this important decision early in a case. The client should be prompted to do the research and thinking (and maybe talking to the children) well before mediation.

2. Who Must / Should Move Out of the House at the Start of the Divorce?

The Texas Family Code Sec. 6.502(a)(6) authorizes a court to award one spouse temporary exclusive use of the family residence.

Sec. 6.502. TEMPORARY INJUNCTION AND OTHER TEMPORARY ORDERS. (a) While a suit for dissolution of a marriage is pending and on the motion of a party or on the court's own motion after notice and hearing, the court may render an appropriate order, including the granting of a temporary injunction for the preservation of the property and protection of the parties as deemed necessary and equitable and including an order directed to one or both parties:

....

(6) awarding one spouse exclusive occupancy of the residence during the pendency of the case;

Note that Sec. 6.502 requires “notice and hearing” before a spouse can be award exclusive use of the residence.

Almost all judges assume that it is not a good idea for divorcing spouses to continue to live together while the divorce is pending (unless the spouses agree). So, at a hearing on temporary orders in a divorce, one of the spouses will be granted the exclusive use of the residence and the other spouse will be ordered to move out if that has not already happened.

There is no statutory or case law guidance for how a judge decides who stays in the house and who must leave during a divorce. Most family court judges will consider these factors:

- Which parent will have the temporary, primary custody of the children? Often, judges want the children to remain in the house during the initial months of the divorce, so it makes sense for the parent with primary custody of the kids to also get the use of the house.
- Has one spouse already moved out?
- Is the house the separate property of one party? This is a factor to consider, but in theory a court can allow a spouse exclusive use of a house that is the separate property of the other spouse. This can be done in final orders while the children are minors. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 138 (Tex. 1977); *Gerami v. Gerami*, 666 S.W.2d 241, 242) Tex. App.--Houston [14th Dist.] 1984, writ dismiss'd; *Villarreal v. Laredo National Bank*, 677 S.W.2d 600, 607 (Tex. App.--San Antonio 1984, writ refused n.r.e.) (en banc); *Burney v. Burney*, 225 S.W.3d 208, 220 (Tex. App. – El Paso 2006, no pet.). It has even been held that a court may award the use of one spouse's separate property home to the other spouse for a specific time period until remarriage, even if there are no minor children. In *Bush v. Bush*, 237 S.W.2d 708 (Tex. Civ. App.--Amarillo 1950, no writ), the appellate court upheld the

trial court's giving the wife the right to use the husband's separate property house until she remarried. *Accord Farris v. Farris*, 15 S.W.2d 1083 (Tex. Civ. App.--San Antonio 1929, no writ) (separate property home of husband set aside to wife for life).

- Which spouse can afford the house and related payments? Of course, the Court may order temporary spousal support if needed during the divorce, so usually ability to pay is not an important issue.
- Does a party work out of the house and if so, what would be the impact of moving the work out of the residence be on their job or business?
- Is there some reason why one spouse cannot maintain or repair the house (or pay someone to do so). For example, if the husband is half way through laying wood flooring on the entire first floor of the house, he may want to stay to get that done.
- Does a spouse have other children (or relatives) who also live at the house?

New divorce clients often ask if they should move out of the house without a court order. Some are worried that it will be “abandonment” of the property or their children. Most lawyers respond to such concerns with this advice:

- If this is going to be a fight over custody of the children, you may not want to move out;
- If there is arguing and yelling or bad behavior in front of the children, it may be best to go stay with a relative or friend or at a hotel until we get before a judge.
- If there is violence or a serious threat of violence, we could seek a protective order that will force your spouse out of the house.
- A spouse who moves out of the house may still be awarded the house at the end of the divorce.

Clients frequently do not understand what “temporary exclusive use” of the house means. Some spouses (especially controlling husbands) will still just walk into the family residence without permission even after a court hearing. I explain the situation to clients this way:

You still are an owner of the house. It is just that while the divorce case is pending, your wife has the sole use of the house unless she invites you in or gives you permission. It is temporarily like it is just her house even though it is still your’s too. Think of my house – you cannot just enter my house without my okay.

One common area of dispute between spouses when one must move out of the house involves what

can be taken out of the house and what must be left. This should be a matter of agreement or at least common sense and fairness. If the children are going to primarily live at the house with the father, for example, the mother should not take out the children's beds unless there is an agreement to do so.

I strongly urge clients to make a video of a walk through of the house, opening closets and drawers and looking in the garage and attic so that months later they can remember what personal property they want from the house when the divorce is being finalized.

3. Characterization: Is the House Community Property, Separate Property or Jointly Owned Separate Property?

The usual rules of characterization apply to houses, including the inception of title rule. This has an unusual application when it comes to real estate: ownership of real estate is traced back to the date an earnest money contract is signed. *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 732 (Tex. App. - Houston [1st Dist.] 1981, no writ)(guy signs earnest money contract, then gets married then closes on the house purchase during the marriage – house is his separate property!).

If a lot is separate property, but during the marriage the couple builds a house on the lot, then the house is separate property. In *re Marriage of Morris*, 12 S.W.3d 877, 881 (Tex. App. - Texarkana 2000, no pet.)(but there may be a reimbursement claim for the capital improvement!).

A spouse who purchases real estate during the marriage with her separate property, but takes title to the property in the names of both spouses is presumed to have made a gift to the other spouse of one-half interest in the property. *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex.1975); *Whorrall v. Whorrall*, 691 S.W.2d 32, 35 (Tex.App. - Austin 1985, writ dism'd). This presumption may be rebutted by clear and convincing evidence that there was no intent to make a gift. *Cockerham*, 527 S.W.2d at 168; *Whorrall*, 691 S.W.2d at 35.

When one spouse buys real property during the marriage with his separate funds, but takes title in the name of the other spouse, it is presumed that there was a gift and the real estate is the separate property of the other spouse. *Powell v. Jackson*, 320 S.W.2d 20, 23 (Tex. App. - Amarillo 1958, writ ref'd n.r.e.). This presumption can be rebutted by clear and convincing evidence that the purchasing spouse did not intend to make a gift to the other spouse. *Id.* at 23.

A deed transferring property from one spouse to the other spouse during the marriage creates a presumption that the grantee spouse received the property as separate property by gift. *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App. - Houston [1st Dist.] 2005, no pet.).

If a deed recites that a property purchased during the marriage is the separate property of the purchasing spouse, that rebuts the community property presumption. *Kyles v. Kyles*, 832 S.W.2d

194, 196 (Tex. App. - Beaumont 1992, no writ).

A deed which recites consideration of “ten dollars and love and affection” is a gift deed. *Babb v. McGee*, 507 S.W.2d 821 (Tex. App. - Dallas 1974, writ ref’d n.r.e.). When real property is conveyed by gift to both spouses as grantees, then each spouse has an undivided one-half separate interest in the property. *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App. - Houston [1st Dist.] 2005, no pet.).

There is a presumption that a parent intends to make a gift if property is purchased in the name of the child. *Dennis v. Dennis*, 256 S.W.2d 964, 965 (Tex. Civ. App. - Amarillo 1952, no writ).

4. Refinancing Usually Does Not Change Who Owns the House.

The court in *In re Marriage of Jordan*, 264 S.W.3d 850, 856 (Tex. App. - Waco 2008, no pet.) said:

The fact that the home was refinanced during the marriage does not change its character as separate property although the refinancing may give rise to a claim for economic contribution or reimbursement of any community funds paid toward the refinanced debt.

Clients often insist that their spouse’s separate property house is now community property because, “we refinanced and my name is on the deed.” The client is almost certainly partially correct because his or her name is probably on the deed of trust which allows the mortgage company to foreclose, but that is required in almost all refinances because Texas is a community property state. However, the deed of trust does not transfer ownership like a general warranty deed, it just allows for foreclosure. In the typical refinance situation, the owner of the separate property real estate would testify he or she certainly did not intend to make a gift, it was just that the mortgage company requires both spouses to sign the deed of trust since we are in a community property state. Most importantly, the clear language of the deed of trust does not transfer ownership from one spouse to the other.

Justice Ann McClure in the recent case of *Rivera v. Hernandez*, 441 S.W.3d 413, 420 (Tex. App.—El Paso 2014, pet. denied) wrote, “Simply stated, the fact that Husband and Wife borrowed funds during marriage for which the real estate served as collateral has no effect on its characterization whatsoever.” In that case, the husband had bought the land prior to marriage and during marriage the couple built on the land and signed a designation of homestead on the property. Justice McClure wrote that the joint homestead designation did not change the separate property character of the land, but the homestead designation is why both husband and wife had to sign the loan papers secured by the land.

However, there might be a few unusual situations where a refinance does transfer ownership. A deed for property from one spouse as grantor to the other spouse as grantee creates a presumption the grantee spouse received the property as separate property by gift. *Raymond v. Raymond*, 190 S.W.3d

77, 81 (Tex. App. - Houston [1st Dist.] 2005, no pet.); *Roberts*, 999 S.W.2d at 432. The presumption may be rebutted by proof the deed was procured by fraud, accident, or mistake. *Raymond*, 190 S.W.3d at 81; *Roberts*, 999 S.W.2d at 431. There are two cases where these principles and the wording of deeds signed during the refinancing resulted in one spouse's separate property being converted into jointly owned separate property with the other spouse owning 50%!

In re Marriage of Skarda, 2011 WL 2502946 (Tex.App. - Amarillo 2011)(No. 07-09-00191-CV)(June 23, 2011) involved a husband who bought a property in 2002, got married in 2004 and refinanced in 2006. In addition to the usual joint deed of trust, the closing on this refinance also involved the husband and wife signing as grantees a warranty deed conveying the property to themselves as "joint tenants with right of survivorship." Despite that the fact that the wife at the time of refinancing apparently did not have any ownership of the property, the deed's granting clause identified the grantor as "Gregory Skarda, a married man and joined by his spouse Vicki Skarda," and its grantee as "Gregory Skarda and Vicki Skarda, husband and wife as joint tenants with right of survivorship." The husband testified he did not intend to make a gift to his wife and the wife asserted the land was now community property.

The Amarillo Court of Appeals said:

Here, trial began with the presumption that the FM 1264 property was community property. Without dispute from Vicki, inception of title in Gregory before marriage was established. The January 17 deed created a joint tenancy in the FM 1264 property in Gregory and Vicki. Otherwise, evidence of characterization was meager. Gregory testified he intended only to refinance the property and not give a half interest to Vicki. Vicki agreed she received a one-half interest in the property by gift "or otherwise" but also agreed the property was community in which she owned a one-half interest by deed. There was no evidence the January 17 deed was procured by fraud, accident, or mistake. By its nature, the joint tenancy created in Vicki by the January 17 deed was her separate property. On this record, we are unable to say the trial court abused its discretion in finding Vicki received a one-half interest in the FM 1264 property by gift.

Magness v. Magness, 241 S.W.3d 910 (Tex. App. - Dallas 2007, pet. denied) also involved a refinance, but this time it was the wife who owned the house prior to marriage. The house was refinanced five years into the marriage and the wife signed a deed showing both spouses as grantees transferring a one-half interest in the house to the husband. The wife testified that she signed the deed as a condition of the refinancing and she did not intend to make a gift. The husband never testified about the transaction. The trial court found that each spouse owned 50% of the house as his and her separate property and the court of appeals affirmed.

The cases on the refinancing of separate property homes during a marriage can be summarized as follows: the house is still separate property after a refinance unless more than just the usual deed of trust is signed by both spouses. Ownership changes only if the owner spouse signs a deed that

transfers ownership to the other spouse and most refinances do not involve such a deed.

5. A House Bought in One Person's Name Before Marriage Can Still Be Jointly Owed Separate Property

A man and woman lived together with her children and the man signed an earnest money contract and closed on the purchase of a home solely in his name. Then the couple got married. When the inevitable divorce occurs, most lawyers would assume the house is the husband's separate property because he purchased it in his own name prior to marriage. Yet, in *Aaron v. Aaron*, No. 14-10-00765-CV (Tex. App. Houston [14th Dist.] 1/31/2012)(mem. op.), Judge David Farr and then the Fourteenth Court of Appeals found the house was jointly owned separate property. The moral to this story is for lawyers to not assume and not give up on a house purchased before marriage when the man and woman were a couple (albeit unmarried). This article would probably apply to same sex couple who bought properties together before their marriage became legal (as I predict will happen this summer thanks to the U.S. Supreme Court).

In *Aaron v. Aaron*, the Court of Appeals said:

The Green Top Residence was acquired on May 28, 1999, prior to Daryl and Kimberly's marriage. Daryl and Kimberly planned to purchase the Green Top Residence together and, on April 23, 1999, they signed an earnest money contract for the purchase of the home. However, Kimberly learned that her credit was poor and that they could purchase the home for a lower interest rate if the home were purchased in Daryl's name alone. Daryl alone signed a second earnest money contract and the closing documents were in Daryl's name alone.

Kimberly testified that, even though the home was to be purchased in Daryl's name alone, they still had an agreement to be joint owners of the Green Top Residence. Because Kimberly was not able to contribute as much towards the down payment as Daryl, Daryl paid a down payment of \$6,700. An additional \$1,366.04 was required for closing costs. The parties dispute who paid the additional \$1,366.04. The \$1,366.04 check showed Daryl as the remittur, but Kimberly testified that she provided the funds, and Daryl told her to put his name as remittur on the check because all the closing documents were in his name alone. To make up for Daryl's having paid more of the down payment on the house, Kimberly paid the mortgage and utilities for the first six months while Daryl was selling a house he had owned previously. After Daryl had sold his house, he started making the Green Top mortgage payments, while Kimberly paid for the food and the utilities. Kimberly testified that the amount she paid monthly for food and utilities would be about the same as the monthly mortgage payment.

....

Daryl, on other hand, argued that, because he acquired the Green Top residence prior to

marriage, it is his separate property, and the trial court was prohibited from dividing that property. The trial court found that, even after Daryl and Kimberly had decided that the house would be purchased in Daryl's name alone, they purchased the Green Top Residence jointly and intended to be joint owners of the house, and that Kimberly paid one-half of the down payment and closing costs. The trial court concluded that Daryl and Kimberly jointly owned the Green Top Residence as tenants in common, each owning a one-half, undivided separate property interest in the house.

....

Here, it is undisputed that the parties initially agreed to buy a home together. There is evidence that the parties looked for house together and chose this house so that Kimberly's children could continue to attend the same schools. There is also evidence that the parties agreed that the home would be purchased in Daryl's name only due to Kimberly's poor credit, and that the parties had agreed on how to handle the payment of the mortgage and expenses. Thus, there is evidence to support the trial court's finding that Daryl and Kimberly owned the Green Top Residence as tenants in common. We overrule Daryl's first issue.

A similar result was reached in *Harrington v. Harrington*, 742 S.W.2d 722 (Tex. App. - Houston [1st dist.] 1987, no writ). Some lawyer named Burta Rhoads Raborn convinced the trial judge and then the Court of Appeals that the house purchased prior to marriage solely in the husband's name was jointly owned separate property. The *Harrington* decision states:

The court found, inter alia, that the parties began to live together in December 1971; that they were ceremonially married on December 18, 1977; and that they stopped living together as husband and wife on May 30, 1985. The court found that they lived in leased residences in their joint names from 1972 until the purchase of the Talbot Street residence; that in the spring of 1975, the parties agreed to look for a home to purchase in West University Place; that they looked for prospective homes together for a period of approximately three months; that both parties agreed on the choice of the home to purchase, i.e., the Talbot Street property; and that both parties attended the closing of the sale of the Talbot Street house. The court further found that at the time of purchase, the appellee had a bachelor's degree in journalism; that the appellant had a master of business degree in finance and had taken courses in business law; and that at that time of the purchase, the appellee was terminating her employment to attend law school full time.

The court further found that at the time of the purchase of the home, the parties agreed that title to the property would be taken in the appellant's name, at appellant's suggestion, for credit purposes and convenience only, but intended the residence to be owned, used, and enjoyed jointly. The parties expended labor and money in improvements to the home and planned to use the appellee's separate property funds to remodel the home. Finally, the court found that the reason for the marriage was to have children and that the appellee became pregnant immediately after the parties married.

The trial court concluded that the parties entered into an oral partnership/joint venture to own and occupy the home located on Talbot Street jointly; that they took title to the home in appellant's name for convenience and credit purposes only; and that the parties owned the home as tenants in common.

742 S.W.2d at 723-4.

The *Aaron* and *Harrington* case appear to be the only reported cases on this specific topic in Texas and both allowed a wife's testimony to support a finding that a house purchased by the husband prior to marriage was jointly owned separate property.

6. What Can a Divorce Judge Do with Jointly Owned Separate Property?

There are at least four situations when a house might be characterized as jointly owned separate property:

1. The house was jointly purchased before marriage;
2. The house was gifted to both spouses during the marriage, see e.g. *White v. White*, 590 S.W.2d 587 (Tex. Civ. App. - Houston [1st Dist.] 1979, no writ);
3. A spouse with a separate property house makes a gift of a half interest to the other spouse, see e.g. *Motley v. Motley*, 390 S.W.3d 689 (Tex. App. - Dallas 2012, no pet.); or
4. A house was inherited and left to both spouses.

A court cannot award a house that is jointly owned separate property to one of the spouses because a court cannot divest a party of his or her separate property. *White v. White*, 590 S.W.2d 587 (Tex. Civ. App. - Houston [1st Dist.] 1979, no writ).

The spouses who jointly own a separate property house can reach an agreement that allows one spouse to buy the other out, either for cash or an award of some other item of community property. However, a divorce court judge cannot order a buy-out of separate property that is jointly owned because that would violate the rule that a court cannot divest a party of his or separate property. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex.1977)

If the spouses cannot agree on what to do with joint owned separate property, the only options for a trial judge in a divorce case involving jointly owned separate property are:

1. Leave the divorcing spouses as co-owners; or
2. If either party requests a partition, the judge must decide if the property can be physically divided (partition in kind) or if it cannot be literally divided, then order the house sold (partition by sale).

The court in *Halamka v. Halamka*, 799 S.W.2d 351, 354 (Tex. App. - Texarkana 1990, no writ) stated:

A partitioning of separate property is not a part of a divorce proceeding. TEX.FAM.CODE ANN. § 3.63 authorizes a division "of the estate of the parties." The "estate" to be divided in a divorce proceeding is the community estate. To hold that the term "estate of the parties" as used in Section 3.63 encompasses separate as well as community property violates the legislative intent in view of the historic use of the phrase as referring only to community property.

The trial court could, however, divide the property in a partition proceeding, and this would be done under the general laws pertaining to partition suits between co-tenants, not under the laws applicable to a divorce action. On appeal, there is no complaint about the partitioning of the separate property, and there is no prohibition against the trial court's considering a partition action concurrently with the divorce proceeding. Applying the laws of a partition action, the trial court determined that the house and twenty-four acres were incapable of partition in kind and that equity required an immediate partition by sale through a receiver appointed by the court.

(Citations omitted)

Partition of jointly owned property is governed by very specific procedures in Texas Rules of Civil procedure 756 - 771. Texas law favors partition in kind over partition by sale. *Cecola v. Ruley*, 12 S.W.3d 848, 853 (Tex. App. - Texarkana 2000, no pet.). "Partition in kind" means the property is literally divided - I get the eastern 3 acres and you get the house and the western 1.2 acres, for example. Partition by sale means the house is ordered sold and the owners split the proceeds.

TRCP 770 says, "Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, cannot be made, it shall order a sale of so much as is incapable of partition...." Courts have explained that, although the Rule seems to provide that the property must be "incapable" of partition in kind, the Rule "does not mean incapable in a physical sense." *Cecola*, 12 S.W.3d at 855. The inquiry is focused on whether partition in kind is "fair and equitable," which includes whether "property can be divided in kind without materially impairing its value." *Id.* The party seeking partition by sale bears the burden of proving a partition in kind would not be fair and

equitable. Usually a house on a typical city lot cannot be partitioned in kind and must be sold.

Divorcing spouses who are joint owners of separate property are better off agreeing to sell a property and deciding for themselves who the realtor and what the terms of sale are. TRCP 770 provides for the appointment by the court of a receiver to sell the property and TRCP 761 requires the appointment of three or more commissioners to manage the partition in kind of the property, which would be an expensive proposition.

7. How to Value the House

Do **not** use Zillow to value a home. Real estate agents and appraisers almost all confirm that Zillow is wildly inaccurate. A homeowner filed suit in May 2017 against Zillow, claiming the company's controversial "Zestimate" tool repeatedly undervalued her house, creating a "tremendous road block" to its sale. The suit was filed in Cook County Circuit Court, Illinois by a real estate lawyer. The suit alleges that despite Zillow's Zestimates constitute "appraisals," the fact that they offer market-value estimates and "are promoted as a tool for potential buyers to use in assessing [the] market value of a given property," shows that they meet the definition of an appraisal under state law. Not only should Zillow be licensed to perform appraisals before offering such estimates, the suit argues, but it also should obtain "the consent of the homeowner" before posting them online for everyone to see.

It has long been the rule in Texas that the owner of a property can testify as to the property's value even if the homeowner cannot qualify as an expert witness. *Mata v. Mata*, 710 S.W.2d 745, 758 (Tex. App. - Corpus Christi 1986, no writ). However, some courts have held that the owner should show she has some familiarity with the market for that particular property. *Young v. Young*, 168 S.W.3d 276, 285 (Tex. App. - Dallas 2005, no pet.).

The divorce lawyer can look to four sources for the value of a house or other real estate:

1. Market Analysis by a Real Estate agent - free, quick and often good enough for mediation or settlement.

The Enos Law Firm uses Catherine Healy at Martha Turner to prepare a free market analysis because that firm produces really detailed, impressive looking valuation reports for free (Catherine is also Greg Enos' daughter, but data is data and she is not designated as an expert witness). The realtor does not have to even go to the home but should be sent some digital photographs of the house.



2. Central Appraisal District - historically, CAD values were always low but in the current economy the CAD is sometimes higher than the number a costly real estate appraiser will provide.
3. Look at the property owner's financial statements and loan applications to see what they indicate the property is worth. This would be an admission against interest per Tex. R. Evid. 801(e)(2). If the property is owned by a company, look at its balance sheet to see what it values the property at.
4. A formal appraisal by a licensed real estate appraiser (averages \$400 for residential properties). Real estate appraisers use three methods to value real estate:
 1. Comparable sales approach - the key is to ask whether the comparable properties really are comparable and whether the comparable sales were close enough in time to be relevant. See the discussion in *Exxon Corp.v. Middleton*, 613 S.W.2d 240, 246 (Tex. 1981). A very subjective part of the comparative sales approach is the final step in which the appraiser adjusts the comparable sales numbers up or down depending on differences between the comparable properties (including the condition of the property to be sold).
 2. Income approach - if the real estate produces income (e.g. - a rent house), future income is estimated and then divided by a capitalization rate (which is a very subjective determination).
 3. Cost approach - if there are no comparable sales and the property does not produce income, then the appraiser can estimate the cost to replace the property.

As a practical matter, residential real estate is almost always appraised using the comparable sales

approach. The lawyer who wants to cross-examine the appraiser usually focuses on: (1) the condition of the property and what it will cost to repair the house and get it in salable condition, and (2) whether the other properties used as comparables are really similar to the subject property. For example, this house is on a cul de sac unlike the Smith's home and this house was a foreclosure and this house says it has three bedrooms but wasn't one really a poorly converted garage?

The Enos Law firm usually uses these real estate appraisers:

<p style="text-align: center;">Paul R. Smith Paul Smith & Associates PO Drawer 170 League City, Texas 77574-0170 Tel: 281-334-2682 psmith863@comcast.net</p>
<p style="text-align: center;">Bradley J. Page Apex Appraisals 16876 Royal Crest Drive Houston, TX 77058 Tel: 281-286-0663 Fax: 281-286-1442</p>
<p style="text-align: center;">Steve Hughes Bay Area Real Property Appraisers 1802 Broadway, Suite 212 Galveston, TX 77550 Tel: 409-762-8453 Fax: 409-762-9056 E-Mail: bayapp10@aol.com</p>

8. The Cost of Sale Is Not Usually Deducted From the Value of a House in a Texas Divorce

A divorce court in Texas should usually not reduce the value of a house because of closing costs and realtor fees because that approach is not consistent with the definition of "fair market value," and because such closing costs are too speculative. There is no definitive Texas case law on point, but the majority of other states have held that closing costs should not be considered in the value of a house unless a sale is actually imminent or planned.

Two older Texas cases could be interpreted to approve of reducing the value of a house in a divorce by the cost of sale. In *Pelzig v. Berkebile*, 931 S.W.2d 398, 403 (Tex. App. - Corpus Christi 1996, no writ), the court of appeals said, “The judge’s finding of a \$99,000 value after deducting ten percent closing costs was within the range of values suggested by the evidence.” In *Cole v. Cole*, 880 S.W.2d 477, 484 (Tex. App. - Fort Worth 1994, no writ), it is not clear at all what method the trial court used in finding the house had a net value of \$180,440. An appraiser testified about a range of possible values and estimated closing costs. The court of appeals upheld the trial court and said, “It is possible that the court started with the figure of \$275,000 because it took into account the various deductions that would be made for closing costs and taxes.” Neither of these cases involved an appellant specifically challenging the trial court’s deduction of sales costs from the value of a house. In *Pelzig v. Berkebile*, the parties apparently both agreed to deduct the cost of sale from the value. It was not clear even to the court of appeals what methodology the trial court used in *Cole v. Cole* to value the house and there are no other Texas cases on point.

Case law and the Texas Pattern Jury Charge define “fair market value” as “the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.” Texas Pattern Jury Charges - Family & Probate (2012), PJC 203.1. The amount paid in cash by a willing buyer for a house is the total amount paid and the definition does not say “the net amount the seller walks away with after paying all costs and fees.” If I sell my house to Sheri Dean for \$250,000, the fair market value is \$250,000 and not what I net after paying the real estate agent and all closing costs. The mortgage is taken into account in a divorce because it is a current community debt. If there are no current plans to actually sell the house, the amount of realtor fees and closing costs is speculative. It is likely a real estate broker will be used but some houses are sold directly without an agent. In some cases, the broker’s fee is negotiated down from the usual six percent. Other typical closing costs for a seller include the cost of title insurance (which is negotiable and not always paid by the seller) and prorated property taxes and homeowners association dues (which are not paid in many situations). It is thus impossible to predict accurately what the cost of sale for a particular house will be, especially if the house is not for sale and may not be sold for years or decades. In a divorce, the trial court properly may not consider liabilities that are uncertain and speculative. *Means v. Means*, 535 S.W.2d 911, 914 (Tex. App. - Amarillo 1976, no writ)(trial court properly did not consider the potential liability of lawsuits against the husband’s business because they were too speculative).

Courts from the vast majority of other states have held that the value of a house should only be reduced by the costs of sale if there is evidence in the record of an imminent sale and evidence of the estimated costs of sale. *In re Marriage of Berg*, 737 P.2d 680, 683 (Wash. App. 1987); *McDaniel v. McDaniel*, 829 P.2d 303 (Alaska 1992); *Coviello v. Coviello*, 605 A.2d 661 (Md. App. 1992); *Virgin v. Virgin*, 990 P.2d 1040, 1049 (Alaska 1999); *In re Marriage of Kopplin*, 703 P.2d 251, 253 (Or. App. 1985); *In re Marriage of Stenshoel*, 866 P.2d 635, 641-42 (Wash. App. 1993). See also *Taber v. Taber*, 626 So.2d 1089, 1089-90 (Fla. Dist. Ct. App. 1993); *In re Marriage of Benkendorf*, 624 N.E.2d 1241, 1245-46 (Ill. App. 1993); *Carlson v. Carlson*, 487 S.E.2d 784, 786-87 (N.C. App. 1997); *Waldow V. Wadlow*, 491 A.2d 757 (N.J. App. Div. 1985). A minority of states

have approved deduction of closing costs from the value of a home even if the parties do not expect to sell the house in the near future. See e.g., *Abrams v. Abrams*, 516 N.W.2d 348, 350-351 (S.D. 1994).

9. Reimbursement Claims and the House

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.

Several types of reimbursement claims frequently apply to real estate:

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

(a) For purposes of this subchapter, a claim for reimbursement includes:

....

(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)]

If one spouse has a separate property house with a mortgage that has been paid during the marriage, the attorney for the other spouses needs to prove how much the principal on the mortgage has been reduced during the marriage to prove a reimbursement claim. This can be done using mortgage statements or by obtaining the note (showing amount borrowed and interest rate) and creating an amortization table (which will not reflect any extra or missed principal payments). Tax returns showing the amount of mortgage interest paid each year could be used since the amount of interest subtracted from the amount of total payments in a year would tell you how much principal was paid (unless the mortgage payments include escrowed taxes and insurance). Perhaps the best way to prove such a reimbursement claim is to do a deposition on written question and subpoena the records from the mortgage company.

The other common reimbursement claim applied to houses is using community funds to improve a separate property house. The value of this sort of claim is how much the value of the house increased because of the improvement. This is a hard claim to prove since it is not always apparent how much a new roof or remodeled kitchen added to the value of the house. An experienced real estate agent could be designated as an expert to opine on how much a capital improvement increased the value of a home, but it would be at best an educated guess and thus subject to a *Daubert* challenge.

A reimbursement claim involving the family residence cannot be offset by the fact the family got to use the house:

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.

10. How the House is Divided in a Divorce?

The judge's options in a divorce trial regarding the residence are:

1. Confirm the house as one spouse's separate property
2. Award the house to the husband or to the wife
3. Order the house sold (see discussion below)
4. Award the house to one spouse but allow the other spouse to live in the house for a specific period of time
5. Partition the real estate if that is possible (a house in a suburb could not be partitioned but a house on 220 acres in the country could be partitioned - one spouse gets the house and five acres and the other spouse gets the remaining 215 acres)
6. Award the house to one spouse and award the other spouse a money judgment secured by the house (the divorce decree would contain a judgment and lien and one spouse would be ordered to sign a real estate lien note and deed of trust).

The judge will have to address the mortgage secured by the house (and possibly a home equity loan also). Usually the party who is awarded the house is responsible for the mortgage. However, a judge could make the spouse not awarded the house pay the mortgage.

11. What To Do About the Joint Mortgage?

Attorneys often do not discuss with their clients how they will be effected by the mortgage that is in both names once they are divorced.

If, for example, the husband is awarded the house and ordered to pay the joint mortgage, the wife needs to be told:

1. The divorce decree does not take your name off the mortgage. Late payments by your husband will affect your credit rating.
2. If you want to buy a house, your ability to qualify for your own mortgage may be effected by this joint mortgage since it will impact your debt to income ratio. This is theoretically true but in my experience if the other spouse is current on the joint

mortgage, I have not had a former client ever tell me he or she could not get their own mortgage because of the joint mortgage that is still in their name.

The options for getting a spouse's name off the joint mortgage include:

1. The spouse awarded the house is ordered to refinance within 90 days of the date of divorce (the refinance cannot happen until after the divorce and only after ownership of the house has been transferred solely to that spouse). See the discussion below on owelty liens and partitions. Often, the spouse who gets the house cannot qualify for a mortgage in his or her own name however.
2. The spouse awarded the house can sometimes sign documents to assume sole responsibility for the mortgage. Most mortgage companies have a process for this and assumption is cheaper than refinancing. However, this assumes the spouse awarded the house can qualify for the assumption and this process can take a while to complete.
3. The house is ordered sold.

The Mediated Settlement Agreement and the divorce decree can order the spouse who is awarded the house and responsibility for the associated loan to timely pay the mortgage, using language like:

SALLY ROBINSON is ORDERED to timely pay each mortgage payment on or before the date it is due.

12. How to Get the Equity Out of the Family Residence

The sale of the family residence is the easiest way to get the equity out of the house to divide between the parties. If one spouse is going to continue to own the house after the divorce, the options for paying the other spouse for his or her share of the home equity include:

1. The other spouse is awarded some other asset to offset the equity. So, if the wife is getting the house with \$80,000 of equity, then the husband might get \$40,000 more of the wife's savings account. Sometimes, there are no other assets to balance out the award of equity to one spouse or, for example, the award of part of a 401(k) retirement plan is not the same as cash out of a house because the retirement money is still taxable.
2. One spouse is awarded the house and he or she agrees to refinance the house with a "cash out" within a specific period of time (e.g. - within 120 days of divorce) or to get a home equity loan after the divorce. However, sometimes the spouse who wants the house cannot qualify for a refinance or home equity loan because of his or her income or credit score.

Under Texas law, homeowners are limited to only cashing in on equity up to 80% of the value of the property.

3. The divorce decree creates an owelty lien which allows the spouses to divide the equity and provides numerous advantages. Texas law allows an “owelty partition” pursuant to Texas Constitution Art. XVI, Sec. (50(a)(3)), which allows the owners of a home to access the equity they have in the home to assist in dividing the property. An owelty partition establishes a lien against the property for the party wishing to cash in on their interest. Without an owelty lien, the parties would be limited to only cashing in on equity up to 80% of the value of the property under Texas law. The owelty lien allows the parties to recoup their equity up to 95% of the property’s value (although as a practical matter many lenders will not lend beyond 80% of the property’s value). The owelty partition also allows the refinancing spouse to obtain a regular refinance instead of a home equity loan. That is very important because it may afford the borrower easier qualifying, lower rates and better terms.

Consider this example: Adam and Sally are getting divorced and they own a home together with a mortgage. Their home is valued at \$300,000 and the couple currently owes \$150,000. Let’s assume they agree that Adam will keep the house and that they will split the equity 50/50 (or \$75,000 each). Their divorce decree must specify the owelty partition and lien and an owelty deed must be recorded with the county clerk. Adam would then refinance the property at \$225,000: the \$150,000 owed on the mortgage in addition to Sally’s \$75,000 owelty lien. The end result is Sally gets her \$75,000 and Adam is the full owner of the home. Sally is no longer on the mortgage nor the deed. Of course, Adam must be able to qualify for the \$225,000 loan.

The owelty partition and lien must be:

- included in the divorce decree (see language under 11.D in the Final Decree of Divorce Form 23-1 of the Texas Family Law Practice Manual) and
- set forth in a separate Special Warranty Deed with Encumbrance for Owelty of Partition (TFLPM Form 24-4).

The attorney must also prepare a Deed of Trust to Secure Owelty of Partition (TFLPM Form 24-10).

Two important considerations with an owelty loan are the cost of the refinance, taxes and insurance. A refinance is not free and can cost quite a bit depending upon the loan amount. The cost of the refinance should be incorporated in the division of property. If an escrow account is in place for taxes and insurance, the funds in the account should also be considered in the division of property. If an escrow account is not in place, the division of property should address who is responsible for paying the upcoming taxes and insurance, and in what proportions. In cases without an escrow account, it may be fair to consider that

the departing spouse owes taxes and insurance for the portion of the year prior to the divorce being finalized.

With an owelty partition and lien in the divorce decree and a recorded owelty deed, the owning spouse--after the divorce has been finalized--may now refinance the property solely into his or her name and use proceeds from refinancing to pay-off the owelty lien and any existing mortgage. Making this happen, of course, rests on the assumption that the spouse who will receive sole title can qualify for refinancing and sufficient equity exists to execute the buy-out. Once everything has been completed, the non-owning spouse executes a release of lien and his or her name is off the deed and mortgage.

Any spouse who wants to keep the family residence after the divorce should meet with a mortgage broker or loan company before mediation to confirm that he or she can qualify for a loan on the house.

13. Closing Documents in Typical Divorce

The divorce which results in the house being awarded to one party, generally requires these closing documents:

- Special Warranty Deed (TFLPM Form 24-3)
- Deed of Trust to Secure Assumption (TFLPM Form 24-7)
- Assignment of Escrow Accounts (TFLPM Form 24-14)
- Assignment of Utility Deposits (TFLPM Form 24-15)

The party who is awarded the house needs to inform insurance carriers of the change of ownership.

14. Selling the Residence

The settlement agreement and divorce decree should anticipate future issues and disputes involving the sale of the family residence. Divorced spouses will disagree over which real estate agent to use, what the list price should be, which repairs are needed and who pays for it, what the terms of final sale are and how the proceeds are divided. An agreement on the sale of a residence must also address who lives in the house, who deals with the realtor, who pays the mortgage and utilities and upkeep (lawn service, pool maintenance, etc.) and how taxes will be paid. A very specific formula for calculating the division of the net proceeds of the sale should be agreed upon. Finally, to avoid

going to court with lawyers and possibly having to pay for a receiver, the agreement should include a mechanism for quickly and cheaply deciding the inevitable disputes over the sale.

Here is a form The Enos Law Firm uses for settlements which addresses almost all of these issues:

Provisions Dealing with Sale of Residence - Greg Enos Version

IT IS FURTHER ORDERED AND DECREED that the property and all improvements located at 4203 Elm Street, League City, Texas 77573 shall be sold under the following terms and conditions:

1. *The property shall be listed for sale as follows:*

___ *The property is already listed for sale with _____ of _____ Realty Co.*

___ *The parties are ORDERED to list the property for sale with _____ of Realty Co. within __ days of entry of this order and are ORDERED to sign any listing agreement or other documents needed to list the property for sale.*

___ *The parties are ORDERED to list the property for sale with a duly licensed real estate broker having sales experience in the area where the property is located, provided further that the real estate broker shall be an active member in the Multiple Listing Service that includes the area where the property is located. If the parties cannot agree on a realtor to list the property with, then _____ [husband or wife's name] shall provide the names of three brokers with the above qualifications to the other party, who shall select the broker to list the property from the list of three names provided.*

2. *The parties are ORDERED to timely sign any required extension of the listing agreement with that broker unless the parties agree in writing to use another broker to list the property.*

3. *Initial List Price:*

___ *The property shall be initially listed for sale for \$ _____.*

___ *The initial list price of the property shall be determined by agreement of the parties. If the parties cannot agree on the initial list price, then the initial list price shall be determined by:*

___ _____ *[list a spouse]*

___ *The real estate broker described above shall conduct a market analysis regarding the property and shall make a recommendation for the initial list price, which shall be the list price if either party agrees with the recommendation.*

4. *Sales Price and Terms of Sale:*

___ *The property shall be sold for a price and according to terms that are mutually agreeable to the parties. If the parties cannot agree on reductions in list price or the sale price or terms of sale of the property, then:*

___ _____ *[list a party] shall make the final decision.*

___ *The real estate broker described above shall make a recommendation on the issue in dispute, which shall be followed if one of the parties agrees with the recommendation.*

___ Disputes over sales price and terms of sale shall be determined by the arbitrator named below.

___ The property shall be sold for a price and according to terms determined by ___ [name the spouse] after consultation with the other party.

5. *Duty to Cooperate With Showing, Upkeep and Sale of Property:* The parties are ORDERED to sign all necessary documents and to do all steps necessary to facilitate the sale of the property, including but not limited to, keep the property well maintained and presentable for showings, cooperate with the Broker in scheduling showings of the property and promptly communicate with the Broker regarding efforts to market and sell the property.

6. *Use of Property Pending Sale:*

___ [name the party] shall have the exclusive use of the property pending the sale.

___ The parties may both continue to reside by agreement in the property pending the sale; provided that if one party moves out of the property, then the other party still living at the property shall have the exclusive use of the property after the other party moves out.

___ The property shall remain vacant pending the sale unless the parties agree in writing otherwise.

___ The property shall be leased [continue to be leased] on terms determined by:

___ The parties by agreement

___ [name a party].

[Describe how lease payments are used and accounted for]

7. *Payments Related to Property Pending Sale:*

___ shall be responsible for the timely payment of the following payments related to the property: mortgage payments, taxes, insurance, homeowner association dues, utilities.

___ The parties shall each timely pay 50% of the following payments related to the property: mortgage payments, taxes, insurance, homeowner association dues, utilities.

8. *Repairs, Maintenance and Upkeep of the Property*

___ shall pay for necessary repairs, maintenance and upkeep on the property [provided that any repair that shall cost over \$500.00 shall be paid 50% by ___ and 50% by ___ as long as they agree on the details and cost of the repair.]

___ The parties shall each pay 50% of the cost of necessary repairs, maintenance and upkeep of the property.

___ If the parties cannot agree on the need for repairs or maintenance or on the contractor to perform the work or on the cost of such work, then the broker described above shall make a recommendation and the broker's recommendation shall be followed if either party agrees with the recommendation.

9. *Division of net sales proceeds from the sale of the property:*

“Net proceeds” means the balance remaining after the title company pays off any loan or liens secured by the property, taxes, insurance, closing cost, broker commissions and fees related to the sale of the property.

The net sales proceeds from the sale of the property shall be distributed as follows:

___ *First, the party who paid a mortgage or loan payment secured by the property and any taxes, insurance, or homeowner association dues related to the property shall be repaid for the amount of any such payments from the net proceeds of the sale of the property.*

___ *Any party who paid more than \$ _____ for a repair to the property necessary for the property to be sold or lived in pending sale shall be repaid for the amount of any such repair from the net proceeds of the sale of the property.*

___ *Any party who paid for a repair to the property agreed to by the other party in writing in advance shall be repaid for the amount of any such repair from the net proceeds of the sale of the property.*

___ *The remaining balance of the net proceeds of the sale of the property shall be divided Fifty percent (50%) to ___ and fifty percent (50%) to ___ [change percentages if needed]*

___ *_____ shall be appointed arbitrator to determine any dispute over the calculation of the net proceeds of the sale of the property or the division of the net proceeds between the parties. Each party shall pay 50% of the arbitrator’s fees.*

___ *The net proceeds of the sale of the property shall be:*

___ *Paid directly to each party by the title company according to the calculations described above.*

___ *Held in trust by _____ [name one attorney] pending further written agreement of the parties or court order.*

___ *Deposited into a joint interest bearing account at _____ bank established by the parties. The parties are ORDERED no to make any withdrawals from the account unless they agree in writing in advance or upon further court order.*

10. *Tax deductions related to the property pending the sale shall be utilized:*

___ *exclusively by _____ [name party]*

___ *50% by each party.*

11. *Disputes over the Sale*

___ *David Salinsky*

___ *Shari Goldsberry*

___ *Kristina Lucas*

shall arbitrate via phone any disputes that arise regarding the sale of the property, its upkeep and payments related to the sale, including division of net proceeds. The ruling of the arbitrator shall be binding and each party shall pay 50% of the arbitrator’s fees.

15. Out-of-State Real Estate

The Texas divorce decree cannot pass title to real estate outside of Texas. *Brock v. Brock*, 586 S.W.2d 927, 930 (Tex. App.—El Paso 1979, no writ). The Texas court can, however, order the parties to execute conveyances of the property located in another state. *Id.* A Texas divorce decree may be enforced in the other state under the principle of comity. *McElreath v. McElreath*, 345 S.W.2d 722 (Tex.1961).

The Texas lawyer will usually refer the client to a real estate attorney in the state (or country) where the out-of-state- residence is located. The divorce decree can order the spouse giving up his or her interest in the residence to appear at the offices of that out-of-state attorney to sign specific documents (real estate documents often have different names in other states or nations).