

# PROPERTY DIVISION FACTORS

by Greg Enos

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**General Practice Tips:**

- Be sure to request a disproportionate property division in your pleadings and set forth brief factual reasons for the request when you provide your legal theories in response to requests for disclosure.
- The trial court’s division of the community property is reviewed under the “abuse of discretion” standard, meaning the trial court’s decision is most likely going to be binding. Hugely disproportionate property divisions have been upheld (e.g. 83.5% to wife, *Morrison v. Morrison*, 713 S.W. 2d 377 (Tex. App.—Dallas 1986, writ dism’d).
- An organized and persuasive presentation in favor of a disproportionate division using the following factors can be greatly successful in mediation, settlement talks or trial. Use a poster-size blow-up of the property division factors, create bar charts, etc. to illustrate how these factors apply to your case.
- Decide which assets your client really wants - considering value, ability to sell and tax consequences. Your client may actually prefer (or need) certain property that would appear to have less value.
- “An even division won’t be fair five years from now based on earning capacities,” is usually a stronger argument than, “he broke up the marriage.”
- The court is required to state in writing its finding of fact and conclusions of law as to characterization and values of community property and claims, if requested after trial (Tex. Fam. Code §6.711).

FACTOR	HUSBAND	WIFE
<p><b>Disparity of incomes and earning capacities of the spouses</b></p> <p>Source: <i>Murff v. Murff</i>, 615 S.W. 2d 696 (Tex. 1981); <i>Bokhaven v. Bokhaven</i>, 559 S.W. 2d 142 (Tex. Civ. App.—Tyler 1977, no writ) (unequal division could be based solely on finding of difference in earning capacities).</p> <p>Practice Tip: Project each spouses income for the next 10 years to show the disparity in income. Argue that a 50-50 division now will be a 90-10 division ten years from now.</p>		
<p><b>Fault in the break up of the marriage</b></p> <p>Source: <i>Murff v. Murff</i>, 615 S.W. 2d 696 (Tex. 1981); <i>Massey v. Massey</i>, 807 S.W. 2d 391 (Tex. App.—Houston [1st Dist.] 1991, writ denied).</p> <p>Practice Tip: Court may consider fault for purposes of property division, however, the courts are split on whether fault must be pleaded as a ground for divorce. <i>In re Marriage of Brown</i>, 187 S.W. 3d 143 (Tex. App.—Waco 2006, no pet.)(if fault is proven, it may be considered regardless of whether it was plead); <i>Phillips v. Phillips</i>, 75 S.W. 3d 564 (Tex. App.—Beaumont 2002, no pet.)(plurality op.)(court cannot consider fault if Petitioner plead only no-fault grounds for divorce); <i>Faram v. Gervitz-Faram</i>, 895 S.W. 2d 839 (Tex. App.— Ft. Worth 1995, no writ) (72.9% to wife based in part on husband’s violent behavior to wife).</p>		
<p><b>Length of Marriage</b></p> <p>Source: <i>Patt v. Patt</i>, 689 S.W. 2d 505 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1985, no writ)(long marriage was one factor supporting disproportionate property division).</p> <p>Practice Tip: The longer the marriage, the more willing most judges are to deviate from a 50-50 property division.</p>		

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<p><b>Custody of Minor Children</b></p> <p>Source: Tex. Fam. Code § 3.63 says the court’s division of property shall have, “due regard for any children of the marriage.” <i>Borlack v. Borlack</i>, 541 S.W. 2d 237 (Tex. Civ. App.—Corpus Christi 1976, writ dismiss’d)(fact- father awarded custody would “in itself justify unequal division favoring him.”); <i>Vannerson v. Vannerson</i>, 857 S.W. 2d 659 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1975, writ dismiss’d)</p> <p>Practice Tip: Argue that child support does not cover all of the costs of raising children and that, for example, mom and the two kids cannot live as three nearly as cheap as dad can live as one.</p>		
<p><b>Financial &amp; Parental Responsibility for Adult Children of the Marriage</b></p> <p>Source: Tex. Fam. Code § 3.63; <i>Young v. Young</i>, 609 S.W. 2d 758 (Tex. 1980)(Husband was caring for sick, adult child of the marriage and Supreme Court said “any children of the marriage” language in § 3.63 literally means <u>any</u> children, even adult children).</p>		
<p><b>Fraud &amp; Waste of Community Assets</b></p> <p>Source: <i>Schleuter v. Schleuter</i>, 975 S.W.2d 584 (Tex. 1998)(in abolishing separate cause of action against a spouse for breach of fiduciary duty, the Supreme Court said the trial court may consider actual and constructive fraud as well as waste of community assets in the property division). <i>Reaney v. Reaney</i>, 505 S.W. 2d 338 (Tex. Civ. App.—Dallas 1975, no writ) is an example of waste being a factor in the property division. <i>Leal v. Leal</i>, 628 S.W.2d 168 (Tex. App.—San Antonio 1982, no writ) and <i>Haining v. Haining</i>, 01-08-00091-CV (Court of Appeals of Texas [1<sup>st</sup> Dist.]) are good examples of money spent on a paramour being considered in the property division.</p> <p>Practice Tip: Prove the amount of fraud damages or amount wasted and argue that at least 50% (or 60%, etc.) of that amount should be added to your client’s column as the only legal remedy available for the other spouse’s wrong doing. Also, remember that even after <i>Schleuter</i>, the trial court may still award a money judgment to achieve an equitable division of the property.</p>		
<p><b>Reimbursement Claims</b></p> <p>Source: Tex. Fam. Code §7.007; <i>Morrison v. Morrison</i>, 713 S.W.2d 377 (Tex. App.—Dallas 1986, writ dismiss’d)(trial court may adjust property division to compensate spouse entitled to reimbursement). Presumably, this would only apply to reimbursement or economic contribution claims owed to a spouse’s separate estate, when the court could simply adjust the community property division to compensate one spouse for the claim owed to his or her separate estate.</p>		
<p><b>Benefits the Innocent Spouse May Have Derived From the Continuation of the Marriage</b></p> <p>Source: <i>Murff v. Murff</i>, 615 S.W. 2d 696 (Tex. 1981).</p> <p>Practice Tips: Prepare a chart summarizing the benefits your client would have received from continuation of the marriage, such as: health insurance coverage, club memberships, frequent flyer miles, business opportunities with other spouse’s friends, etc.</p>		

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<p><b>Tax Consequences of Property Division</b></p> <p>Source: Tex. Fam. Code §7.008. The courts can consider the tax consequences that may result as a result of the division of the community estate.</p> <p>Practice Tip: A CPA can testify about the tax consequences of awarding a certain piece of property to your client. If your client is getting part of a 401k but will have to cash some out now to make ends meet, calculate the cost of doing so. This is most common in the case of capital gains or losses, income-generating property and tax penalties.</p>		
<p><b>Size of Separate Estate</b></p> <p>Source: <i>Murff v. Murff</i>, 615 S.W. 2d 696 (Tex. 1981); <i>Padon v. Padon</i>, 670 S.W. 2d 354 (Tex. App. —San Antonio 1984, no writ).</p> <p>Practice Tips: Prepare a colored bar chart comparing the dollar values of the respective separate estates.</p>		
<p><b>Health of the Spouses</b></p> <p>Source: <i>Murff v. Murff</i>, 615 S.W. 2d 696 (Tex. 1981); <i>Cravens v. Cravens</i>, 533 S.W.2d 372 (Tex. Civ. App.—El Paso 1975, no writ) is an example of a disproportionate property division justified by one spouse’s disability.</p>		
<p><b>Ages of the Spouses</b></p> <p>Source: <i>Roberts v. Roberts</i>, 535 S.W.2d 373 (Tex. Civ. App.—Tyler 1976, no writ) is an example of a 20+ year disparity in ages justifying an unequal division.</p>		
<p><b>Education Levels of the Spouses</b></p> <p>Source: <i>Cooper v. Cooper</i>, 513 S.W. 2d 229 (Tex. Civ. App. —Houston [1<sup>st</sup> Dist.] 1974, no writ).</p> <p>Practice Tip: A colored bar chart showing the years of education and degrees earned by each spouse can effectively show the disparity in education levels.</p>		
<p><b>Spouses’ Capacities and Abilities</b></p> <p>Source: <i>Murff v. Murff</i>, 615 S.W.2d 696 (Tex. 1981).</p> <p>Practice Tip: This can be an important factor if one spouse is an artist, computer wizard or professional athlete.</p>		
<p><b>Business Opportunities of the Spouses</b></p> <p>Source: <i>Murff v. Murff</i>, 615 S.W.2d 696 (Tex. 1981)</p>		
<p><b>Relative Financial Conditions of the Spouses</b></p> <p>Source: <i>Murff v. Murff</i>, 615 S.W.2d 696 (Tex. 1981)</p>		

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<p><b>Nature of the Property</b> Source: <i>Murff v. Murff</i>, 615 S.W. 2d 696 (Tex. 1981)</p> <p>Practice Tip: The nature of the property may affect one spouse more than the other, and as such may affect the property division. Examples include <i>Kimsey v. Kimsey</i>, 965 S.W. 2d 690 (Tex. App.—El Paso 1998, pet denied), where husband was awarded assets related to his oil and gas business; <i>Riley v. Riley</i>, No. 14-02-00797-CV (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no pet.), where husband was awarded trailer because he had the truck capable of pulling it; and <i>Phillips v. Phillips</i>, 75 S.W. 3d 564 (Tex. App.—Beaumont 2002, no pet.), where the court awarded real estate to the wife because it was more closely associated with her, as the parties bought the property from her parents.</p>		
<p><b>Attorney Fees for the Parties</b></p> <p>Source: <i>Murff v. Murff</i>, 615 S.W. 2d 696 (Tex. 1981); <i>Beard v. Beard</i>, 49 S.W. 3d 40 (Tex. App.—Waco 2001); <i>Wilson v. Wilson</i>, 44 S.W. 3d 597 (Tex. App.—Fort Worth 2001).</p> <p>Practice Tip: This can be a persuasive factor if one side’s attorney fees are much larger than the opposition or if one spouse has easily paid his attorney and the other spouse still owes a substantial amount to her attorney.</p>		
<p><b>Foreign Property Outside the Court’s Jurisdiction</b></p> <p>Source: <i>Walker v. Walker</i>, 231 S.W.2d 905 (Tex. Civ. App.—Texarkana 1950, no writ)(court could consider husband’s investment of community property funds in Florida real estate that could not be divided by the Texas trial court).</p>		
<p><b>Need for Future Support</b></p> <p>Source: <i>Simpson v. Simpson</i>, 727 S.W.2d 662 (Tex. App.— Dallas 1987, no writ); <i>Goren v. Goren</i>, 531 S.W.2d 897 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1975, writ dismiss’d)(probable needs for future support was an important, if not the most important, factor in the property division).</p> <p>Practice Tip: This could be an important factor in a case in which spousal maintenance is not available because the marriage did not last 10 years.</p>		
<p><b>Credit for Temporary Spousal Support Paid</b></p> <p>Source: <i>Edsall v. Edsall</i>, 240 S.W.2d 424 (Tex. Civ. App.—Eastland 1951, no writ).</p> <p>Practice Tip: <i>Edsall</i> is such an old case that one could argue it is no longer persuasive since it was decided in days when spousal support was much rarer and indeed, was frowned upon by most courts.</p>		
<p><b>Liquidity &amp; Income Production</b></p> <p>Source: <i>Smith v. Smith</i>, 836 S.W.2d 688 (Tex. App. — Houston [1<sup>st</sup> Dist.] 1992, no writ); <i>Haggard v. Haggard</i>, 550 S.W. 2d 374 (Tex. App.—Dallas 1977, no writ); The court can consider ability of the property to produce income.</p>		
<p><b>Expenses Paid to Maintain Community Property</b></p> <p>Source: <i>LaFrensen v. LaFrensen</i>, 106 S.W.3d 876 (Tex. App.—Dallas 2003, no pet.)(husband’s IRA was awarded to wife because she had used hers to maintain the family business during the divorce). The court can consider the expense of one spouse to maintain the community property while the case is pending.</p>		

## **Texas Family Code Provisions:**

### **Sec. 6.711 FINDINGS OF FACT AND CONCLUSIONS OF LAW**

(a) In a suit for dissolution of marriage in which the court has rendered a judgment dividing the estate of the parties, on request by a party, the court shall state in writing its findings of fact and conclusions of law concerning:

- (1) the characterization of each party's assets, liabilities, claims, and offsets on which disputed evidence has been presented.
- (2) the value of amount of the community estate's assets, liabilities, claims and offsets on which disputed evidence has been presented.

(b) A request for findings of fact and conclusions of law under this section must conform to the Texas Rules of Civil Procedure.

### **Sec. 7.008 CONSIDERATION OF TAXES**

In ordering the division of the estate of the parties to a suit for dissolution of marriage, the court may consider:

- (1) whether a specific asset will be subject to taxation; and
- (2) if the asset will be subject to taxation, when the tax will be required to be paid.