

# Characterization Rules & Presumptions

by Greg Enos

1. **A premarital or marital property agreement can change all of the rules discussed below.**
2. **Inception of Title Rule:** The character of the property, whether separate property or community property, is fixed at the time a person first acquires an ownership interest in the property. *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984); *Zagorski v. Zagorski*, 116 S.W.3d 309, 316 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Weird twist for 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 [1<sup>st</sup> 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!).

Wages earned during the marriage but paid after divorce are community. *Keller v. Keller*, 141 S.W.2d 308, 310 (Tex. 1940). Wages earned before marriage, but paid while married are separate. *Moore v. Moore*, 192 S.W.2d 929, 930 (Tex. App.—Fort Worth 1946, no writ).

Damages awarded in a trial during marriage are still separate property if the cause of action arose before the marriage. *Smith v. Smith*, 22 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, no pet.)

3. **Presumption of Community Property** – All property possessed by the parties at the time of divorce is presumed to be community property. Tex. Fam. Code §3.003(a)

Community property includes:

- Pay of spouses, employee benefits and retirement earned during the marriage, *Herring v. Blakeley*, 385 S.W.2d 843 (Tex. 1965)
- Earnings of children (and items purchased with these funds), *Insurance Company of Texas v. Stratton*, 287 S.W.2d 320 (Tex. Civ. App.—Waco 1956, writ ref-d n.r.e.)
- Income from separate property, *Arnold v. Leonard*, 273 S.W. 799 (Tex. 1925). Income received during marriage from a separate property patent issued prior to marriage is community property. *Alsenz v. Alsenz*, 101 S.W.3d 648, 654 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) .

There are two exceptions to the rule that income from separate property is community:

1. If a spouse gives the other spouse a gift, income from that gift is presumed to be separate. Tex. Fam Code §3.005
  2. Royalties from a separate property mineral estate are still separate property. *Norris v. Vaughn*, 260 S.W.2d 676, 679 (Tex. 1953).
- Property acquired with community credit is community property and property acquired with separate property is separate. *Whorrall v. Whorrall*, 691 S.W.2d 32, 35 (Tex. App.—Austin, writ

dism'd).

- Money used for the purchase of properties during the marriage is presumed to have been community funds unless the evidence to the contrary is clear and convincing. *Cooke v. Cordray*, 333 S.W.2d 461 (Tex. Civ. App.—Beaumont 1960, no writ).
- A debt or loan acquired during the marriage is presumptively a community debt unless the lender agreed to look solely to the borrowing spouse's separate property for repayment. *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975).

#### 4. **Separate Property:**

- Defined in the Texas Family Code, §3.001:
  - property owned or claimed by the spouse before marriage,
  - property acquired by the spouse during the marriage by gift, devise or descent, and
  - recovery for personal injuries sustained by spouse during marriage, except for recovery for loss of earning capacity during the marriage.
- Property purchased during the marriage with separate funds is separate property. *Hilley v. Hilley*, 161 Tex. 569, 573, 342 S.W.2d 565, 567 (Tex.1961).
- Separate property is defined by the Texas Constitution as that acquired prior to the marriage or that acquired after by gift, devise, or descent, Tex. Const. Art. XVI, sec. 15.
- A trial court may not divest a party of his separate property by a divorce decree. *In re Marriage of Murray*, 15 S.W.3d 202, 205 (Tex.App.—Texarkana 2000, no pet.), *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977).

5. **Proving Separate Property** - The spouse attempting to prove that something is separate property has the burden to prove it is separate by "clear and convincing evidence" *McKinley v. McKinley*, 496 S.W.2d 540, 532 (Tex. 1973).

6. **Evidence of Separate Property** - Documents, admissions and the testimony of fact or expert witnesses can be used to prove an item is separate property.

Some cases say the uncontradicted testimony of a spouse seeking to overcome the community property presumption does not have to be corroborated (by documents or other testimony) to meet the clear and convincing standard. *Holloway v. Holloway*, 671 S.W.2d 51, 56 (Tex. App.—Dallas 1983, writ dismissed); *Newland v. Newland*, 529 S.W.2d 105, 107 (Tex. Civ. App.—Fort Worth 1975, no writ).

The Beaumont Court of Appeals in *Burgess v. Burgess*, No. 09-06-301-CV (Tex. App.—Beaumont 2007, no pet.)(memo op.; 5-24-07) stated:

*A spouse is competent to testify about the character of his property; however, his testimony usually must be corroborated by other testimonial or documentary evidence to rebut the community-property presumption. See Bahr v. Kohr, 980 S.W.2d 723, 730 (Tex. App.—San Antonio 1998, no pet.); Robles v. Robles, 965 S.W.2d 605, 620 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). A spouse's uncorroborated testimony that is contradicted "may not meet the clear and convincing standard." Pace v. Pace, 160 S.W.3d 706, 714 (Tex. App.—Dallas 2005, pet. denied). A spouse's uncorroborated and uncontradicted testimony is sufficient to constitute clear and convincing evidence. See id.*

On the other hand, the Houston First Court of Appeals has said, "Mere testimony that property was purchased with separate funds, without tracing of the funds, is generally insufficient to rebut the [community property] presumption." *McElwee v. McElwee*, 911 S.W.2d 182, 188 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1995, pet. denied). See also *Boyd v. Boyd*, 131 S.W.3d 605, 611 (Tex. App.—Fort Worth 2004,

no pet.).

An uncontradicted inventory admitted into evidence can be sufficient evidence that property is separate. The Houston First Court of Appeals in *Nowzaradan v. Nowzaradan*, No. 01-05-00094-CV, (Tex. App.—Houston [1<sup>st</sup> Dist.] 2007, not pet.)(memo op. 2/8/07), stated:

*[the husband's] contentions ignore that Delores identified the two accounts as her separate property in her sworn, second amended inventory and appraisal. Delores filed this document before trial, in compliance with the trial court's orders and local rules, and it was admitted into evidence at trial, but [the husband] did not file a sworn inventory and appraisal to controvert Delores's filing. Because the inventory and appraisal was both properly sworn and admitted into evidence, the document constituted probative evidence, sufficient to overcome the community-property presumption, that the two accounts were Delores's separate property*

Another case from 2004 shows how not to prove separate property when inventories disagree:

*Both parties argue that [the dog] Lucky is their separate property, and Lucky is listed in both appellant's and appellee's inventories as their separate property.*

....

*Neither party presented any evidence to clarify the source of funds used to purchase Lucky. However, it is undisputed that appellee purchased Lucky prior to the marriage. Under the family code, a spouse's separate property consists of the property owned or claimed by the spouse before marriage. Tex. Fam. Code Ann. § 3.001(1). However, in this case the parties lived together prior to marriage, and commingled their funds in a joint bank account. Both appellant and appellee testified that the funds used to purchase Lucky were the commingled funds from the joint bank account. Therefore, because neither of the parties established by clear and convincing evidence that Lucky was purchased with the separate property funds of either appellant or appellee, the most the evidence shows is that they own Lucky as tenants in common. Thus, the trial court erred in confirming Lucky as appellee's separate property.*

....

*Appellant listed the Kiwi laptop computer and accessories in his inventory as his separate property. In contrast, appellee listed the computer as community property and indicated it was "husband's." Neither party presented evidence to support the proposition that the computer was purchased prior to marriage or with separate funds. Consequently, we hold that the trial court abused its discretion with regard to its characterization of the Kiwi laptop computer and accessories because appellee did not establish by clear and convincing evidence that the computer was her separate property. However, appellant did not meet the burden of proving that the computer was his separate property either. Therefore, the trial court erred by mischaracterizing the computer as separate property when it should have been characterized as community property.*

*Schneider v. Schneider*, No. 02-02-00075-CV (Tex. App.—Fort Worth 2004)(citations omitted)

## **7. Presumption of Separate Property:**

- 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.

- 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).

## 8. Gifts

Three elements are required to establish the existence of a gift: (1) intent to make a gift; (2) delivery of the property; and (3) acceptance of the property. *Long v. Long*, 234 S.W.3d 34, 40 (Tex.App.—El Paso 2007, pet. denied). The intent must exist at the time of the transfer, not at the time of a subsequent divorce. *Id.*

Spouses may not make a gift of their separate property to the community estate, *Tittle v. Tittle*, 148 Tex. 102, 220 S.W.2d 637, 642 (1949); *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex. App.—Tyler 1993, no writ)

A transfer of ownership from a parent to a child is presumed to be a gift, but the presumption is rebuttable. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)

A gift made by a third party to both spouses creates jointly owned separate property. *Roosth v. Roosth*, 889 S.W.2d 445, 457 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1994, writ denied) (engagement and wedding gifts).

## 9. Property and Casualty Insurance

Tex. Fam. Code §3.008(a) says, “Insurance proceeds paid or payable that arise from a casualty loss to property during marriage are characterized in the same manner as the property to which the claim is attributable.” So, if a house is separate property, the windstorm insurance claim on that house after a hurricane is separate property. However, if community funds were used to pay for the insurance, their might be a reimbursement claim (albeit a small one).

## 10. Gambling Winnings

Gambling winnings are considered income and income from either separate or community property is community (with two exceptions noted above), so if a spouse wins big at a poker tournament during the marriage, then the winnings will be community property (unless the buy-in was with funds gifted by the other spouse). However, a lottery ticket purchased the day after a divorce was orally granted was separate property. *In re Marriage of Joyner*, 196 S.W.3d 883, 892 (Tex. App.—Texarkana 2006, pet. denied).

## 11. Livestock

New born livestock are treated like income, so the new born foal from a separate property mare is community (income from separate property is community unless the separate property was a gift from the other spouse). *Bobbitt v. Bass*, 713 S.W.2d 217, 220 (Tex. App.—El Paso, writ dism'd).