* **HOMESTEAD LAW**
  + Purpose of law: Increase the likelihood that people will have a place to live; put homeowner’s concerns over creditor’s rights.
  + Lien Process:
    - Basic Process: Get judgment against debtor by taking the suit to court 🡪 file judgment with county office 🡪 judgment is abstracted 🡪 lien created on debtor’s non-exempt property in the county (with effective date = day of proper recording).
    - Trust Deed v. Judgment Lien
      * A trust deed attaches to specifically named property when the Deed is signed and recorded. This means that if the property is exempt when the Deed is recorded, then it WILL NOT attach to the property.
      * A judgment lien attaches to all non-exempt property owned by the defendant in the county where the judgment is abstracted. It may attach at a later date if circumstances change. EFFECTIVE DATE OF LIEN IS ABSTRACT DATE.
    - If the defendant later abandons the homestead while remaining the owner, a non-consensual lien may attach. (Stewart v. American Industrial Linings)
    - A lien that is unenforceable can still cast a cloud on title and cause problems for the seller. Remedy - seller may sue creditor for slander of title. (Tarrant Bank v. Miller)
    - Subrogation = subsequent lender steps into shoes of original lender; if the borrower uses part of the subsequent funds to pay off the original debt 🡪 second lender has a lien on homestead for amount of their loan used to pay off first loan.
  + **Basic Rules:**
    - What property counts:
      * Homestead rights can be created in separate property or community property.
      * Fee simple ownership is not required (homestead rights can arise from any interest in land). But, the person must have a PRESENT POSSESSORY INTEREST in the land. (Laster v. First Huntsville Properties Co.)
      * The property must be realty. Limits:
        + A timeshare can’t be considered homestead. (In reBrown)
        + A mobile home can be realty if permanently affixed as a fixture to the land. (WHV v. Assocs. Hous. Fin.)
        + A houseboat can’t be homestead. (In re Morris)
    - **The homestead is protected from forced sale for the payments of all debts, except for consensual liens. (TX Const. Art. XVI, Sect. 50).**
      * **The homestead exemption protects against anything that is attached AFTER homestead designation, but it will not destroy pre-existing rights. (This does not apply to an earlier encumbrance that is later amended… no obligations will be enforced that result because of the amendment. Inwood North Homeowners Ass’n v. Harris).**
      * Debts that CAN result in forced sale (TX Const. Art. XVI, Sect. 50(a)):
        + Purchase money;
        + Taxes owed on the property (federal or state);

*The federal government can enforce a federal tax lien against the TX homestead interest of the non-debtor spouse, but the innocent spouse must be compensated for their half. (Harris).*

* + - * + Owelty of partition imposed on the property resulting from a division or award of a family homestead in a divorce proceeding;

*Note: “Owelty of Partition” = when 1 spouse buys out the other spouse’s interest in a community property homestead, any promise to pay money in the future may be secured by a lien on the whole homestead. Lien may also be created to secure payment of an amount awarded to the other spouse, but amount is limited to amount of homestead interest awarded. Must be expressly created or arise by operation of law.*

* + - * + Refinance lien;
        + Work and material used in constructing new improvements on the homestead (Home Improvement/ Mechanic’s Lien);

*Note: Owner must sign all documents before labor and materials are provided for the loan to be secured. (TX Prop. Code 53)*

* + - * + A home equity loan;
        + Reverse mortgage.

What it is:

Most useful: when you’re looking for an ongoing source of income throughout requirement.

Available to people older than 61 years.

No payment due until the borrower dies, moves or sells the house. Loan is paid when the borrower or borrower’s estate sells the property.

Any excess remaining after repayment of the loan is retained by the borrower.

They are non-recourse (no personal liability).

Money is tax free and doesn’t affect SS payments.

* + - * + Illegally obtained funds invested in a homestead – maybe (Curtis Sharp Custom Homes v. Glover):

If the person improves an already existing homestead with stolen money, the improved home is NOT subject to forced sale.

If the person buys a new homestead with the illegal money, then creditors CAN force a sale.

* + - * The house can be foreclosed based on the owner’s use for criminal activity. (Lot 38 v. State of Texas)
      * **Proceeds of Land Sale:**
        + **The homestead claimant’s proceeds of a sale of homestead property are not subject to seizure for a creditor’s claim for 6 months after the date of sale. (TX Prop. Code 41.001)**
        + Meaning of “6 months”: Sale for cash is completed when money is actually in hand 🡪 6 months tolls until cash is received.
        + The proceeds of homestead sale lose their homestead character when they are used. Once part of the proceeds are used, the exemption is lost for the rest of the proceeds 🡪 only exemption now is for new homestead. (In re England).
    - **Surviving Spouse Rule – When a spouse dies, the survivor has the right to remain in the homestead for the rest of his life, as long as the survivor does not abandon the homestead.**
  + **Creation of Homestead:**
    - **Basic Rule: Homestead rights are created when a person (1) intends that a place will be his home for an indefinite period + (2) takes an affirmative act consistent with that intention.**
    - If any part of the structure is used for residential purposes, the whole structure is a homestead. As long as the area used for residential purposes is not broken down into separate legal units from the rest of the area, the whole property is encompassed as homestead.
  + **Type/Size of Homestead Available (TX Const. Art. 16, Sect. 51; TX Prop. Code 41.002):**
    - Protection is determined by size of land, not value.
    - **Rural:**
      * **What is rural?**
        + Old Test = Multi-Factor consideration: character of land, proximity to a city, etc.
        + **New Test = [INSERT TX Prop. Code 41.002(c)] – Look to circumstances that existed at time it was bought (so changes in surrounding use will NOT change rural 🡪 urban)**
      * **Size of Property:**
        + **Family: Up to 200 acres may be exempted.**
        + **Single Person: Up to 100 acres may be exempted.**
      * **What kind of land uses warrant homestead exemption:**
        + **Contiguous property: Use as a home + anything else**
        + **Non-contiguous parcels: home on one parcel** (need overt act to build home at minimum) **+ other property is “used for the support of the family” (economic use)**

NOT a use “for the support of the family”:

Continuous rental of farmland, UNLESS the owners of the land can’t farm their own land (if disabled or the like).

Actively developing the land for commercial use destroys “used for the support of the family” (must be successful in commercial development for this to apply – negotiations or attempts is not enough)

Sharecropping

Aesthetic use is not enough\*\*

\*\* = minority view is that aesthetic use IS enough.

Inheriting the property is not enough 🡪 person now on land must do something to impress homestead character on the land.

*Note: If any of these are temporary, and the property had already been designated as homestead, then the property remains homestead. Permanent use as above would lead to abandonment of homestead.*

IS “used for the support of the family”:

Small economic/supporting use (i.e. like grazing or farming or chopping wood) 🡪 economic profit is NOT necessary.

Partial renting of the property, where the other part is a proper homestead use.

* + - * + **Severance:**

**If the non-home part of the rural homestead is permanently no longer “used for the support of the family,” that part of the homestead will be abandoned 🡪 abandoned portion severed, and new homestead just has non-abandoned (home) portion.**

Severance does NOT occur if split of use is within same building – entire property is generally protected.

* + - * **What is a “family”?**
        + **May consist of two spouses and/or without children.**
        + **May be a divorced person + a dependent child. The parent’s right to a family homestead derives from the relationship with the child, and there must be evidence of the “family” unit at the time the property acquired its homestead character. (Renaldo v. Bank of San Antonio)**
        + **Is NOT a man + woman living together in unmarried state. (Tremaine v. Showalter)**
    - **Urban:**
      * **Urban homestead exemption is only available for 1 lot. The lot may include multiple buildings, but not non-contiguous parcels. (In re Nerios)**
      * **Size of Property: Up to 10 acres may be exempted.**
      * **What is urban?**
        + **A homestead is considered urban if, at the time of designation, the property is:**

**Located within the limits of a municipality, and**

**Served by police protection, fire protection, and at least 3 of the following services provided by the municipality:**

Electric;

Natural gas;

Sewer;

Storm sewer; or

Water.

* + - **CANNOT HAVE BOTH AN URBAN AND RURAL HOMESTAED – ONLY GET ONE. (Davis v. Hawn Lumber)**
    - Rural homestead can become urban after the original homestead designation based on a change in circumstances. (MH Lauchheimer v. Saunders)
  + **Homestead Use**
    - **Basic Rule: May be for purposes of a home, or both a home and a place to   
      “exercise a calling or business.” (TX Const. Art. 16, Sect. 51).**
      * What is a “calling or business”?
        + Calling or Business = “all such employments as by course of study or apprenticeship in any of the learned professions, liberal arts or mechanical occupations, a person has acquired skill or ability to follow. A business occupies a property owner’s time, attention or labor for purposes of profit or improvement.”
        + Renting or Leasing Property is NOT a business or calling, even if rental income is an individual’s sole source of income. It is an investment.
    - Establishing a home generally gives the entire building homestead designation. (Tyler v. Thomas)
  + **Consent of BOTH Owners**
    - **Basic Rule: An owner or claimant of property claimed as homestead may not sell or abandon the homestead without the consent of each owner. (TX Const., Art. XVI, Sect. 50). They also cannot fix a home improvement lien on the homestead without consent of both parties. (TX Prop. Code 53.254)**
      * This applies to spouses – a homestead cannot be abandoned without the consent of the claimant’s spouse. (TX Prop. Code 41.004)
      * Consent of both couples is not necessary for a purchase money lien. (Skelton v. Washington Mutual)
  + **Waiver of Homestead Exemption**
    - **Basic rule: A waiver of homestead rights is NOT enforceable. But, where (1) the physical facts observed (2) lead to a conclusion that the property is not the homestead of the mortgager, and (3) its use is not inconsistent with the waiver made by the owner, and (4) these representations were intended to be and actually were relied upon by the lender, (5) the owner is estopped from asserting a homestead claim. (First Interstate Bank of Bedford v. Bland)**
    - 3 different problems with waivers:
      * 1. The claimant owns only one piece of property and said it was being used as the claimant’s homestead at the time of the mortgage. **Here, estoppel will not be a remedy, despite any declarations of waiver in the mortgage contract.**
      * 2. The claimant owns more than one piece of property at the time of the mortgage, but only one parcel could be homestead as a matter of law. **Here, the lender cannot shut his eyes to the fact that the mortgaged premises occupied at the time of the deed of trust was the only property suitable for homestead purposes. Estoppel is not a remedy.**
      * 3. The claimant owns more than one piece of property which is used and occupied prior to the time one of them is mortgaged. **Here, because the tangible facts respecting the two pieces of property are such that the homestead character could attach to either, according to the intent of the claimant, a waiver may estop the claimant from disputing its truth.**
  + **Estoppel**
    - **Basic Rule: If a homeowner’s misrepresentation causes the lender to rely on validity of a lien, the homeowner can’t assert homestead exemption.**
    - Judicial Estoppel: If a homeowner argues that a lien is valid in one case, he cannot argue later that the same lien is invalid because of homestead exemption.
  + Special Rules for Certain Types of Homestead Liens
    - Home Improvement Contract
      * The contract must contain the Sect. 41.007 notice (1) conspicuously printed, stamped or typed (2) in a size equal to at least 10-point bold type (3) next to the owner’s signature line on the contract. (TX Prop. Code. 41.007)
    - Home Equity Loans:
      * Purpose: Allows borrower to use homestead as collateral.
      * The refinance lien is not valid against the homestead unless:
        + The refinance of debt is an extension of credit; or
        + The advance of additional funds is for reasonable costs necessary to refinance the debt.
      * The amount of all loans secured by the property after the home equity loan must not exceed 80% of the value of the homestead.
      * Costs of the loan may not exceed 3% of the loan amount.
      * Lender cannot require the borrower to apply proceeds to pay off another unsecured debt.
  + **Impacts of Homestead Law:**
    - **Bankruptcy:**
      * **Basic rule: A debtor is able to exit from bankruptcy still owning certain exempt property, including his homestead. Exemptions are determined AT THE DATE OF FILING of the bankruptcy petition.**
      * Remember, it matters whether the creditor is a secured or unsecured creditor – if unsecured, we don’t even ask what property is exempt, because the creditor can’t get the property.
      * Bankruptcy law permits a debtor to choose between federal exemptions or state law exemptions in his home state. Because TX exemptions are generous, TX debtors usually choose TX exemptions.
      * Rules:
        + Residency Reqmt. – A TX filer may not choose any TX exemptions unless he has been a resident for 2 years (730 days) before filing.

Remember, residency and homestead can be different; residence = location debtor actually lived.

* + - * + Homestead Designation –

TX homestead rights are only available for property located within the state of Texas.

The Debtor must have had a TX homestead before filing for at least 1215 days (apx. 3.3 years). Otherwise, the max homestead protection available in bankruptcy is $125,000.

Even if the debtor meets the 1215 requirement, the homestead exemption is capped at $125,000 if the debtor owes a debt from:

Violation of federal or state securities laws;

Fraud, deceit or manipulation in a fiduciary capacity; or

Any criminal act, intentional tort or willful or reckless misconduct that caused serious physical injury to an individual in the preceding 5 years.

Domestic support obligations CAN be satisfied from the debtor’s exempt homestead property.

* + - * Other Property Exempt in Bankruptcy:
        + Personal Property

Couple can exempt $60k of personal property, unmarried can exempt $30k

Includes:

Home furnishings, including family heirlooms

Farming or ranching vehicles and implements

Tools, equipment, books, boats and motor vehicles used in a trade or profession

Clothing

Up to $15k of jewelry (for married)

Two firearms

A two-wheeled, three-wheeled or four-wheeled motor vehicle for each member of the family.

Two horses, mules or donkeys, and a saddle, etc for each

12 head of cattle

60 head of other types of livestock

120 fowl

Household pets

* + - * + Retirements Accounts

Have unlimited protection from creditors.

Roth IRAs are also protected even though you contributed after-tax dollars.

After-tax contributions to other types of retirement accounts are not protected.

* + - * + Life Insurance

Life insurance policies also enjoy unlimited protection.

If you own the type of life insurance that accumulates value, such as universal or variable insurance, then all of your cash values will be protected.

Texas law also protects the life insurance proceeds once they pay off.

* + - * + Annuities

Are completely protected under Texas law no matter how large they are.

* + - * + Current Wages

Current wages from employment are also protected, unless a court has ordered you to make payments for child support, alimony or other support or maintenance.

* + - * **Property will NOT be exempt and the creditor will prevail if:**
        + **The debtor disposed of the property within 10 years preceding the bankruptcy filing;**
        + **The property that the debtor disposed of was non-exempt;**
        + **Some of the proceeds from the sale of the nonexempt property were used to buy a new homestead, improve an existing homestead, or reduce the debt associated with an existing homestead, or, alternatively, to buy a new principal residence used by dependents of the debtor, improve an existing principal residence used by dependents of the debtor, or reduce the debt associated with a principal residence used by dependents of the debtor; and**
        + **The debtor disposed of the non-exempt property with the intent to hinder, delay or defraud a creditor.**
        + Indicia the Court considers in determining whether the Debtor intended to hinder, delay, or defraud:

The transfer or obligation was to an insider.

The Debtor retained possession or control of the property after the transfer.

The transfer or obligation was concealed.

Before the transfer was made or obligation incurred, the Debtor had been sued or threatened with suit.

The transfer was of substantially all the Debtor’s assets.

The Debtor avoided service of process/concealed himself.

The Debtor removed or concealed assets.

The value of the consideration received by the Debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

The Debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

The transfer occurred shortly before or shortly after a substantial debt was incurred.

The transfer was done just prior to the filing of the Debtor’s bankruptcy petition.

The Debtor is unable to explain the disappearance of assets.

The Debtor has engaged in a pattern of self-dealing prior to bankruptcy.

* + - * Community Property Homestead v. Separate Property Homestead in Bankruptcy (Parrish):
        + If a lien is placed on SP HS during divorce, this can be avoided under bankruptcy b/c it is judicially created.
        + CANNOT avoid a lien on CP HS even if judicially created, b/c at the time of divorce, spouse’s interest in the property changed from ½ to whole, so the lien is able to attach at this point. BUT, the lien must still be constitutionally valid.
    - **Sale of Property Part Homestead**
      * **Basic Rule: Before a forced sale is made of the property, the exempt homestead portion must be ascertained and, if possible, the excess segregated from the homestead. The owner has the right to choose which part of the parcel is exempted as their homestead. If the land cannot be partitioned, it must at least be determined what percentage of the value of the whole property is subject to sale, and the rest of the value be retained by the claimant. (Mallou v. Payne & Vendig)**
    - **Divorce**
      * **Division of homestead:**
        + **Basic Rule: The Court has the right/power to order a homestead sold and the proceeds be distributed to the parties, if this is the best “just and right” property division between the spouses (called “owelty of partition”). (Mallou v. Payne & Vendig). The proceeds of any sale will have homestead protection. (Laster v. First Huntsville Prop. Co.)**
        + A spouse can be held in contempt of court for failure to remit presently existing property awarded to his former spouse, via an express lien on the homestead. A contempt action CANNOT be used to enforce the future payment of nonexistent/unspecified funds. (Ealy v. Ealy)
        + A domestic relations court cannot order a homestead sold and the proceeds be paid to creditors. (Mallou v. Payne & Vendig)
      * **Old/New homestead:**
        + **A married person separated from his spouse may not designate a new homestead until AFTER divorce. (Tremaine v. Showalter)**
        + **Once the homestead character is established, it continues as long as constituent members of the family, including minor children, continue to occupy the property. (Rimmer v. McKinney)**
    - **Retroactivity of Law**
      * **Basic Rule: Changes to the homestead definitions only have prospective effect. Property that has attained the status of homestead does not lose homestead status by later changes of the law, unless the Constitution/Legislature expressly grants retroactivity. (In re Jay).**
      * A previously valid lien is normally not affected to a later homestead designation, whether the designation results from establishment by the person or by a change in law. (In re Barnhart)
    - **Getting a “New” Homestead**
      * **Basic Rules:**
        + **Before someone can designate a new property as homestead, they must abandon the old homestead.** This stems from the idea that someone can only have one homestead at a time.
        + **Abandonment = intention to no longer use as home** (actually leaving or selling to fee to a 3rd party) **+ actual discontinuance of use by everyone. (In re Hunt).**

Note: temporary absence (even up to 3 years) ≠ abandonment

* + - * Renting: Temporary renting or temporarily leaving the homestead DOES NOT constitute abandonment. (In re Leonard). But, permanent renting IS abandonment.
    - **Pretended Sales**
      * = occurs when a human tried to Deed his homestead to a business to avoid homestead exemption and get loan.
      * **Basic Rule: Humans can have a homestead. Business associations cannot. Pretended sale = void = exempt homestead.**
      * **Considerations:**
        + **Was the sole purpose of the transaction to place a lien on the homestead in violation of Tex. Const. Art. 16, Sect. 50?**
        + Whether the parties treated the sale as people in an arm’s length transaction would?
        + Who was the named insured after the transfer?
        + Was rent paid to the new “owner”?
        + Who paid the taxes?
      * Banks have due diligence to be sure the transaction is not a pretended sale – they should be more diligent than just relying on a title check; they should visit the homestead, look at insurance policies, etc.
    - **For a Surviving Spouse**
      * **General Rule: When a spouse dies, the surviving spouse (and their minor children) has the right to remain in the homestead for the remainder of his/her life, as long as the homestead is not abandoned (i.e. as long as the spouse elects to USE or OCCUPY the homestead). Surviving spouse has life estate. (Petrus v. Cage Bros.). Homestead exemption means free from creditors.**
        + “Size” of surviving spouse’s homestead: same size as homestead magnitude the parties had together (i.e. keeps FAMILY exemption)
        + Surviving homestead exemption is ONLY for the surviving spouse + minor children. Non-minor children living with the decedent on homestead have no continuing right to reside on the homestead. Other heirs only have rights by fee interest.
        + **LIFE ESTATE**

**General Rule = SURVIVING SPOUSE GETS ALL REVENUES, RENTS AND INCOME DERIVED FROM THE HOMESTEAD DURING THEIR TIME ON THE LAND.**

Reimbursement:

The surviving spouse is NOT entitled to reimbursement for expenditures on account of permanent improvements made on the property during the time he retains possession of the property as a homestead, where such improvements are voluntarily made.

NOT entitled to reimbursement for payment of current taxes.

IS entitled to reimbursement for paying down community debt (i.e. remaining loans on the property)

* + - * + Two ways to lose surviving spouse right:

Moving out of the home before the spouse dies (abandoning the homestead);

Murdering your spouse.

* + - * + Tie to marital property agreements (pre or post-nuptial):

While a surviving spouse is granted the right to occupy the homestead, there is no constitutional prohibition to a waiver of that right by prospective spouses 🡪 marital agreement can waive surviving spouse rights. (Williams v. Williams).

* + - * + Effect of surviving spouse re-marrying:

The surviving spouse’s homestead rights and her new family’s homestead rights can merge, so long as the surviving spouse continues to use the original tract for appropriate homestead uses. (Rancho Oil Co. v. Powell).

Example:

H and W1 have community property homestead. W1 dies intestate, so kids get 50% fee. Day before death, H and W1 had 100% fee in homestead, so H has 100% surviving spouse homestead rights.

H remarries to W2. H’s 50% fee goes to kids. Day before death, H and W2 had 50% fee in homestead, so W2 has 50% surviving spouse homestead rights (not clear what that even entitles her to).

W2 remarries H2. W2 dies. Day before death, W2 and H2 had 0% fee interest, so kids can make H2 leave.

* + - * **Surviving spouse takes homestead free and clear of all debts, except for those listed in Tex. Const. Art. 16, Sect. 50 (Childers v. DJ Henderson & Co.).**
        + For children, the rule varies based on age (Nat. Union):

Minor children – always get homestead free and clear of all debts

Adult children – get homestead free and clear of all debts IF they are living with their parents at the time of the decedent’s death.

* + - * + If more than one child, none have a superior right of occupancy and a devisee can move to partition the homestead. (Estate of Casida).
      * Open Mine Doctrine application:
        + If mining began BEFORE the spouse got the life estate, she gets to continue the activities and retain all proceeds when she gets the surviving spouse homestead.
        + If there is no mining before the first spouse dies, there is no open mine doctrine, so proceeds split based on fee 🡪 heirs get portion, living spouse gets portion.
* **MARITAL PROPERTY LAW** 
  + CONSTITUTIONAL FRAMEWORK
    - Basic Rule: The Legislature cannot alter constitutional definitions of separate v. community property by statute.
    - State Constitution:
      * Denotes what is separate property 🡪 the court cannot order divestiture of separate property in a decree (Eggemeyer; LeBlanc v. LeBlanc).
      * Texas has enacted a form of the Equal Rights Amendment. (Tex. Const., art. 1, sect. 3a). This means that marital property rights or appointment of managing conservator for children must be made without regard to the sex of the parent. (Glud v. Glud)
      * Due Process Clause:
        + Retroactivity of changes of law may violate the due process clause. Retroactivity will be lawful if it is “sufficiently necessary to the public welfare to justify the impairment.”
        + TX LAW: Factors to consider (In re Marriage of Bouqet):

Significance of the state interest served by the law;

The importance of retroactive application to effectuate the interest;

Extent of reliance upon the former law;

Legitimacy of reliance;

Extent to which actions were taken based on that reliance;

Extent to which retroactive application of the new law would disrupt those actions.

* + - * + CA Law: Every couple is governed by changes in the law, even if married for a long time and they relied on the old laws – state has a substantial interest in protecting spouses when dividing marital property.
    - Federal Constitution
      * Choice of Law: Law of forum where divorce occurs applies to the case.
      * Jurisdiction
        + Personal Jurisdiction (Hoffman v. Hoffman)

PERSONAL JURISDICTION = MINIMUM CONTACTS OR SERVICE IN THE STATE (“transient jurisdiction”)

NO universal principle for personal jurisdiction in every family law issue.

For divorce:

State must have jurisdiction over one spouse to order the divorce.

For division of property:

IF the property is located in Texas, parties have a presumption of sufficient minimum contacts with TX to justify a TX court dividing that property. (Shaffer v. Heitner, SCOTUS).

Where the trial court lacks personal jurisdiction over the respondent, the court may grant the divorce, but does not have jurisdiction to divide property outside of the State.

When the parties own out-of-state-real property, the trial court can still consider the existence and value of that realty in dividing the community property of the parties, even if it cannot actually divide the property out-of-state. (In re Marriage of Glaze)

For custody issues:

Court may exercise custody determinations IF THE CHILD HAS BEEN LOCATED WITHIN THE STATE’S BORDERS FOR AT LEAST 6 MONTHS, even if the parents lack minimum contacts with the state for the purposes of rendering a personal judgment or enforcing affirmative duties on the non-resident.

* + - * + Federal Preemption

Supremacy Clause 🡪 Federal Law will preempt State Law.

This means that certain types of federal benefits, if intended by Congress to be separate property, benefits will be separate property, regardless of state law.

BUT, if the parties make a waiver in the decree or otherwise agree, then the agreement can trump the ordinary outcome by federal preemption.

Application to certain types of property:

Note: NO uniform rule for federal benefits.

Federal military retirement benefits (based on divorce date):

3 Eras:

Pre-McCarty (before June 26, 1981) = follows state law

Post-McCarty but before Feb. 1, 1983 = separate property

After Feb. 1, 1983 (date of Uniform Services Former Spouse’s Protection Act) = follows state law

Relevant date is date of divorce

But, for cases considered in the gap not finalized, the court of appeals decision date determines the relevant law.

If the divorce decree expressly disposes of the retirement benefits, those benefits are not subject to later partition. But, if there is no disposition, the court can later divide them in a “just and right” manner. (Eddy v. Eddy)

Military Disability benefits = separate property (b/c USFSA doesn’t apply).

ERISA (federal private employee benefits) = separate property

*But, the beneficiary of the pension plan may authorize payment of benefits to spouse, former spouse, child or other dependant of a participant with a QDRO, but it must be done before the divorce. (Manning v. Hayes)*

Railroad Retirement Act benefits = separate property

Veteran’s Administration benefits = separate property

Social Security benefits = separate property

* + What law to apply:
    - Law for validity of marriage:
      * Traditional Rule: The law of the place where the divorce or marriage occurred determines the validity of the ceremony.
      * New law: If foreign spouses come to TX to get divorced, the law of the jurisdiction with the MOST SIGNIFICANT RELATIONSHIP should govern, using these Choice of Law considerations (Seth v. Seth):
        + (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
        + (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

The needs of the interstate and international systems,

The relevant policies of the forum,

The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

The protection of justified expectations,

The basic policies underlying the particular field of law,

Certainty, predictability and uniformity of result, and

Ease in the determination and application of the law to be applied.

* + - * + (usually TX law is applied.)
    - **RULES for property categorization:**
      * **The spouses’ property rights are determined by the law of the marital domicile. (i.e. if a spouse earns wages in NY while being domiciled in CA, CA law governs treatment of wages). Domicile = where the married couple spends most of their time. (Tirado v. Tirado)**
      * **SEE TX PROP CODE SECT 7.002 – Property that would have been community property had the spouses been domiciled in TX when they acquired it will be divisible at divorce as community property, even if the state they acquired it in would call it separate property.**
    - Law for non-community property states:
      * For in-tact marriage: each spouse’s income is separate property.
      * At divorce, equitable rights may arise (“quasi-community property”).
  + **marital agreements**
    - **Underlying Policy:**
      * **A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of marriage. (Rstmt. Sect. 189).**
        + A promise in restraint of marriage is not necessarily unenforceable – it is subject to the rule of reason. Duration of the restraint on marriage and its extent are important. The restraint must serve some purpose other than merely discouraging marriage.
        + The most common acceptable purpose is that of providing support until marriage.
      * **A promise by a person contemplating marriage or by a married person, other than as a part of an enforceable separation agreement, is unenforceable on grounds of public policy if it would change some essential incident of the marriage relationship. (Rstmt. Sect. 190).**
        + The policy that limits the parties in modifying the marital relationship does not apply if that relationship has ended. But, a separation agreement must still be fair in the circumstances.
        + A promise that merely disposes of property rights in the event of divorce or separation does not itself tend unreasonably to encourage divorce.
    - Pre-1980 Cases:
      * Ability to have pre-marital agreements:
        + The statutory authorization for pre-marital agreements in Texas is Sect. 5.41 of the Family Code. The statute should be construed as broadly as possible in order to allow the parties as much flexibility to contract, provided public policy or the Constitution is not violated. (Williams v. Williams)
      * Classification of “future” property:
        + An agreement will be void to the extent that income or other property acquired marriage should be the separate property of the party who earned or whose property produced income or acquisition 🡪 can’t agree to change character of separate property that doesn’t exist yet. (Williams v. Williams).
    - **Post-1980 Cases:**
      * **TX RULE: Pre-nuptial agreements are enforceable, as long as (DeLorean v. DeLorean; Uniform Premarital Agreement Act in 1987):**
        + **There was no fraud or duress in the execution of the agreement 🡪 both parties signed voluntarily.**

Duress: Is a question of fact depending on all the circumstances. (Matthews v. Matthews)

There can be no duress unless there is a threat to do some act which the party threatening has no legal right to do.

The threat must be of such character as to destroy the free agency of the party to whom it is directed – it must overcome his will and cause him to do that which he would not otherwise do.

* + - * + **The agreement cannot be unconscionable 🡪 should be “fair and just.”**

**THIS PRONG IS VERY HARD TO PROVE.**

The fact that what a spouse receives under an agreement is small, inequitable or disproportionate does not in itself render the agreement voidable if the spouse entered into the agreement voluntarily.

So long as the spouse is not left destitute, the parties can agree to divide marital assets in any manner they wish.

Some things to consider in determining “fair”:

Duration of the marriage,

Age and health of the spouses

Their respective economic condition and earning capacity,

Their contributions to the accumulation of property,

Society’s interest in preventing a person from becoming a public charge,

All of the alternatives available to the parties at the time of making the contract,

Whether it is illegal or against public policy.

In marriages of short duration, an agreement will be considered fair if it allows each spouse to live as well as before the marriage.

* + - * + **The spouse seeking to enforce the agreement made a full and complete disclosure of his or her financial wealth before the agreement was signed.**
      * **Post-Nuptial Agreements**
        + **Same rules as for pre-nuptial agreements.**

Old Rule: Consideration necessary for post-nuptial agreements:

Husband and wife assume mutual obligations of support upon marriage 🡪 supporting or caring for the spouse CANNOT be consideration. (Borelli v. Brusseau).

Agreeing not to commit an illegal action CANNOT be consideration.

* + - * Different state’s rules:
        + NJ Law: Pre-Marital Agreements must be:

Voluntarily signed by both parties;

Not unconscionable; and

Be made after full and complete disclosure of wealth.

* + - * + CA Law: Pre-Marital Agreement must be:

Signed after at least 7 days of deliberation; and

Be made after general disclosure.

* + - * + TX Law: to invalidate a Pre-Marital Agreement it must be:

Signed involuntarily; or

Unconscionable at time of signing, with inadequate disclosure, and with no waiver of disclosure;

Not deal with custody or waiving obligation to pay child support (those specific provisions will be unenforceable).

* + - * + FL Law: Presumption of undue influence when it is clear that the dominant party grossly and disproportionately benefits from an agreement. (Lutenberg case)
        + DC Law: Three requirements to make it enforceable:

Must be fair

Must be voluntarily entered

Full disclosure

* + - * Suggestions to make a agreement enforceable:
        + Independent counsel for both parties;
        + Don’t do it at the last minute;
        + Full disclosure;
        + Videotape the signing.
  + **INTERSPOUSAL GIFTS/PARTITIONS**
    - **Basic Rule: Community property may be transmitted into separate property by partition or exchange. Also, if one spouse makes a gift of his interest in certain community property to his spouse, the property becomes the recipient’s separate property.**
    - **Partition v. Exchange**
      * **Partition = division (not necessarily equal) of one thing to create two separate parts 🡪 community property to two different bits of separate property of each spouse.** 
        + The division does not need to be equal, but if one spouse is left with nothing after partition, then it’s a forfeiture and it is unconstitutional. (Bymes v. Bymes).
      * **Exchange = trade of community property interests between spouses**
        + **i.e. wife trades her community property interest in husband’s earned income during marriage for husband waving his interest in her earned income**
      * **TX Const. allows for this to be done 🡪 by premarital agreement or agreement during the marriage.**
      * **MUST BE (Tex. Fam. Code 4.203, 4.205)**
        + **IN WRITING,**
        + **SPEFICILY REFERENCE A PARTITION OR LANGUAGE INDICATING THAT SUCH A DIVISION WAS INTENDED,**
        + **SIGNED BY BOTH SPOUSES,**
        + **Made voluntarily and with full disclosure.**
      * The more aggressive we are with the agreement, the more likely the court may invalidate it.
    - **3 Elements to Establish a Gift:**
      * **Intent to make a gift;**
      * **Delivery of the property; and**
      * **Acceptance of the property.**
  + **DIVISION OF PROPERTY AT DIVORCE:**
    - **At divorce, the court is directed to “order a division of the estate of the parties in a manner that the court deems just and right.” Estate = property. Tex. Fam. Code § 7.001.**
      * **TX Rule: Parties are considered divorced on the date of the decree for purposes of stopping accumulating community property.** (No remand back to trial court alters this.) (Gordon v. Blackmon).
        + CA rule: Community property stops accumulating at permanent separation.
        + Other states: Community property stops accumulating at filing for divorce.
      * Division of property need NOT be equal 🡪 just must be FAIR.
        + In TX, a pure 50/50 division of every item is an abuse of discretion. (Walston)
        + In CA, a division MUST BE 50/50 in the aggregate.
      * Factors the court may consider in making a “just and right” division:
        + The spouse’s capacities and abilities;
        + Benefits which the party not at fault would have derived from continuation of the marriage;
        + Business opportunities;
        + Education;
        + Relative physical conditions;
        + Relative financial condition and obligations;
        + Disparity of ages;
        + Size of separate estates;
        + Nature of the property;
        + Attorneys’ fees.
      * **Consideration of fault:**
        + Old Rule: Fault (i.e. who caused the marriage to end) is never a basis for consideration in dividing the community estate. (Young v. Young). *But, any fraudulent conveyances by one spouse can be considered – not same as fault.*
        + **New TX Rule: If the divorce is granted on a fault basis, the trial court may consider the fault of one spouse in breaking up the marriage when making a property division. If a divorce is granted on a fault and non-fault basis, the court can consider fault. If the divorce is granted only on a non-fault basis, the court CANNOT consider fault in making the property division.**
    - **A DIVORCE COURT (AND ONLY A TRIAL COURT) CAN ONLY DIVIDE COMMUNITY PROPERTY, NOT SEPARATE PROPERTY.** 
      * **If a decree divides separate property, it is automatically reversible if appealed. But, if not appealed, the decree becomes final.**
      * **The parties CAN agree to divide separate property 🡪 this is just a gift.**
      * Jury findings – Impact:
        + Jury findings are binding regarding:

Character of property;

Value of property; and

Custody

* + - * + Jury findings are advisory regarding:

Division of estate; and

Amount of child support.

* + - **FOR PROPERTY TO BE COMMUNITY PROPERTY, IT MUST BE (i) SUSCEPTIBLE OF OWNERSHIP IN COMMON, (ii) OF TRANSFER, AND (iii) OF SURVIVAL. (Lorenz v. Lorenz). Community property stops accumulating at the date of divorce.**
    - **General Rules:**
      * **Property accumulated during marriage is community property, unless proven otherwise. Property accumulated from (i) gift, (ii) inheritance, (iii) before marriage or after divorce, is NOT part of the community estate. (Tex. Fam. Code § 5.01; 3.003(a)).**
        + Gift:

Intention of donor controls identity of the donee. (i.e. to determine if gift was given to both or just one spouse). (Hamilton v. Hamilton). If the donor intended the gift for the spouses together, the gift is not community property, but is 50% separate property of each spouse.

Receipt of property via contract is NOT a gift, so it is community property. (Andrews v. Andrews)

There is no such thing as a gift from employer to employee 🡪 it is consideration. (Holby v. Holby)

If one spouse acquires property using separate funds but record title includes the name of the other spouse, courts usually have the presumption that the spouse intended to make a gift to the other spouse (so each has a 50% separate property interest). (Johnson v. Johnson)

* + - * **CHARACTER OF PROPERTY IS DETERMINED WHEN EARNED, NOT received.**
      * **ANY INCREASE IN THE VALUE OF SEPARATE PROPERTY OF A SPOUSE OCCURING DURING THE MARRIAGE WHICH IS DUE IN PART TO THE CONTRIBUTIONS OF THE OTHER SPOUSE MAY BE CONSIDERED COMMUNITY PROPERTY. (Golub v. Golub).** Increases in value from the inherent qualities of the business itself is NOT community property. (Cockrill v. Cockrill).
        + **This means that apportionment between community and separate increase will be necessary. (Cockrill v. Cockrill)**
        + How to determine the community property value (Speer v. Quinlan):

Ask whether the community has received fair and adequate compensation for its labor, considering:

Is the corporation just an alter-ego for a spouse?

The nature of the business

The size of the business

The number of employees

The nature and extent of community involvement in the conduct of the business

The growth pattern of the business

Salaries of non-owner employees in comparable businesses

Dividend policy – was money being given out or reinvested? Who controlled it?

If the community has been deprived of adequate compensation for its services, the community would be entitled to a judgment against the owner-spouse = income the community SHOULD have received – income ACTUALLY received.

* + - * **INCOME FROM SEPARATE PROPERTY OR EARNED BY ONE SPOUSE DURING MARRIAGE = COMMUNITY PROPERTY.**
      * **TRACING:**
        + **PROPERTY ACQUIRED FROM A SEPARATE PROPERTY SOURCE CAN BE EXCHANGED FOR ANOTHER THING AND NOT LOSE ITS STATUS AS SEPARATE PROPERTY, AS LONG AS IT CAN BE TRACED BACK TO THE SEPARATE PROPERTY SOURCE. (Tex. Fam. Code. Sect. 3.003(a)).**
      * **COMMINGLING**
        + **Traditional Rule: Where separate and community funds are so commingled that it is impossible to trace funds, the whole will be treated as community property. (Stahl v. Stahl).**
        + **3 approaches to commingling:**

Identical sum inference: If account is commingled and there is a deposit for a strange amount and then a withdraw of the exact same (or similar) amount shortly after deposit 🡪 withdrawal takes on character of deposit.

**Strict tracing approach (DEFAULT RULE): If separate & community funds are commingled in an account 🡪 account is community property.**

**Community Out First (TX appellate courts starting to recognize): If account is commingled, all withdrawals are deemed community withdrawals until all community funds are used up.**

* + - * + Equitable Limits to Comingling –

If this rule leads to a result so contrary to common sense, courts may limit the rule to give a fair result.

* + - * **inception of title rule: Character of property is fixed at the time of inception of title or acquisition (TX LAW).**
        + This means that the nature of the consideration transferred at the time of purchase determines community or separate. Any later payments do not affect ownership.
        + We don’t look behind the transactions to see what was “really” going on 🡪 surface character determines character (Hilton case)
        + TX Rule: For real estate, earnest money contract date determines title inception 🡪 if separate property is used for the earnest money contract, remainder paid with community property, entire home is separate property. (Wierzchula v. Wierzchula)

But, some courts look to all of the consideration given on the closing date to characterize the property.

* + - **How to keep separate property separate:**
      * **Make sure there is no co-mingling;**
      * **Keep records to trace funds/property;**
      * **Make a “significant recital” – whereby spouses at the time of acquisition clarify the nature of property (i.e. separate or community) with a statement of consent by both parties.**
    - **One spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse. (Gillmore v. Gillmore).**
    - **types of property:**
      * **pensions:**
        + There is a difference between an early buy-out and pension… must determine whether benefits accrued over time before treating as a pension.
        + **Viewed as compensation for employment. A non-employee spouse may be awarded his community interest in the employee spouse’s pension benefits TO THE EXTENT THE BENEFITS WERE EARNED BY SERVICE RENDERED DURING MARRIAGE. (Cearley v. Cearley).**
        + Three stages of retirement benefits:

*Vesting = right to pension plan, Maturing = right to benefit (money)*

Unvested – only a contingent right to benefit in future.

Vested, but Un-Matured – right to receive, but employee can’t receive benefit until he reaches some age/condition.

Vested and Matured – employee has right to retire and immediately receive benefits, but he doesn’t have to.

* + - * + **Two kinds of pension plans:**

**Defined Contribution**

**= A specified amount of money is periodically contributed to a fund by the employer, the employee, or both. Funds are invested and earnings are later divided proportionately among plan participants.**

At any moment in time, there is a specified amount of money in the account of each participant, so you can directly measure the pension.

The total amount of benefits receivable depends on the success of fund investments.

**Defined Benefit**

**= Benefits are specified in advance, usually as a percentage of salary and related to years of service, and no account is kept for the employee.**

Benefits are always initially “unvested” – if the employee dies, quits or is fired before the “vesting date” the employee has no interest in the plan.

* + - * + For the employee to give the non-employee spouse an interest in a private pension plan, a QDRO must be done. Even if the decree references it, but the QDRO isn’t done correctly, then they won’t get the interest. (Harvey v. Harvey)
        + Two methods of awarding interest (Johnson v. Johnson):

Present Cash Value Method:

The court first determines the community interest in the pension,

Figures the present cash value of that interest, and

Awards half of that amount to the non-employee spouse in a lump sum, usually in the form of equivalently valued property.

Pro Rata Deferred Payment Apportionment/ Reserved Jurisdiction Method

The court determines the formula for division at the time of the decree; but

The court delays the actual division of the pension until payments are received, retaining jurisdiction to award the pension payment.

**PRESENT CASH VALUE METHOD IS PREFERABLE.**

* + - * + **CALCULATING COMMUNITY INTEREST:**

**for defined benefit 🡪 time rule = general calculation formula**

**TX fAM. CODE 3.007(A) NOW GOVERNS, BUT IS UNCLEAR 🡪 USE TAGGERT/BERRy.**

**WHEN SPOUSE HAS ALREADY RETIRED (Taggart v. Taggart):**

**CP = (years worked while married)/(total years worked at time of retirement) x actual retirement pension monthly payment**

Note: This method of calculation is ONLY appropriate when each year of employment is of approximately the same value for purposes of pension benefits. (Taggart v. Taggart)

**WHEN SPOUSE HAS NOT RETIRED AND THE VALUE OF PAYMENTS IS NOT KNOWN:**

**CP = (number of months married/total months worked at divorce) x hypothetical monthly payment (amt of payments if collecting at divorce) (Berry v. Berry)**

Note: CA doesn’t recognize the Berry formula – only Taggert

Retirement Cap:

If plan is capped and cap is reached before divorce, the continued years working don’t count.

Community property = ((months married and working – months post-cap)/(total months worked at time of divorce – months post-cap)) x retirement benefit

**FOR DEFINED CONTRIBUTION:**

**Community Interest = Amt in account at divorce – amt in account at marriage**

* + - * + One spouse cannot defeat the community interest of the spouse in the retirement benefits. The employee spouse can still choose alternative retirement plans, with a “reasonable non-detrimental modification of the pension system”…

By (Gilmore v. Gilmore):

Changing or terminating the employment ;

Agreeing to a modification of the retirement benefits; or

Electing between alternative benefits.

One spouse can compensate the other by:

He could “buy out” her share of the retirement benefits, paying her the present value of her share of the pension plan.

He could begin to pay her a share of the retirement payments on a monthly basis.

* + - * + **Effects of Death on Pension:**

**Terminable Interest Rule:**

**Right to pension doesn’t survive death – estate of non-earning spouse doesn’t have a claim to benefits if the non-earning spouse predeceases earning spouse.**

TX RULE:

Private pension plans: treated as normal community property, so first deceased spouse can devise 50% interest in benefits. (Allard v. French)

Federal pension plans – follows terminable interest rule.

* + - * **STOCK**
        + **Rule: Inception of Title Rule determines character of stock.**
      * **STOCK OPTIONS**
        + **Stock options are intended to compensate employees from the date of grant until the date they become exercisable.**
        + **Treatment of Options:**

**If granted & exercised before divorce 🡪 community property**

**If granted before divorce but exercisable after divorce 🡪 partially community property + part separate property**

% CP claim = (time between grant and divorce)/ (time between grant and vesting)

**If granted and exercisable after divorce 🡪 separate property**

* + - * **SEVERANCE PAY**
        + **Rule: Termination pay received AFTER the parties are separated is separate property. Severance pay received during marriage and before separation is community property. (Wright v. Wright)**
        + Must determine whether it is compensation for past services (then community property) or present compensation for loss of future earnings (separate property). (In re Marriage of DeShurley)
      * **DISABILITY BENEFITS:**
        + **TX and CA Rule: Look at what the disability benefit replaced and not when the disability occurred to determine whether separate or community property. (Trahan v. Trahan**; Tex. Fam. Code 3.008(b)**).**

**If meant to be deferred compensation for past earnings 🡪 community property.**

**If meant to compensate for loss of future earnings 🡪 separate property.**

* + - * + But, if disability benefits come from a type of disability insurance, then ask what funds were used to pay policy premiums. If CP funds used to pay for it, then disability benefits are CP. (Andre case).
      * **BUSINESS ENTITY**
        + **Rule: If a business is started by a spouse during marriage with community property, the value of that business is community property. If it is started with separate property, then must measure income during marriage that resulted from the marriage.**
        + **For increases in value:**

**Corporation: There is no property increase for the owning spouse until salary or dividends are paid out (which would be community during marriage) b/c the business is a separate entity.**

BUT, ASK: Is the corporation really just an alter ego of one of the spouses? If yes, then assets in corporation’s name should really be treated as community property. (Vallone v. Vallone)

Alter Ego = such unity between corporation and individual that the separateness of the corporation has ceased + holding the corporation liable would result in injustice. (Lifshutz v. Lifshutz)

**Proprietorship/Partnership: increase in value of business = increase in value of property (with community or separate determined by what funds were used to start it); profits received during marriage = community**

Note: On divorce, a trial court cannot award specific partnership assets to the non-partner spouse… the trial court can only award the spouse an interest in the partnership (which is a right to future income).

2 different methods of calculation:

Pereira Formula:

SP claim = value of SP business + reasonable annual rate of return

CP claim = value of business at divorce – SP claim

**VAN CAMP FORMULA (TEXAS LAW):**

**CP = reasonable value of owner’s services during marriage – compensation/benefit received by the community**

What this means:

CP only gets reimbursed for services if its efforts were > compensation received. If community was adequately compensated, no community claim.

If SP Corp. (or partnership) earns income, it’s SP until paid out; if it declares dividends, it’s CP. But Solo Prop. income = CP.

Also followed by IL, ID.

* + - * + **For dividend payments:**

**Stock dividend = separate property**

**Cash dividend = community property**

* + - * + Fraudulent Hiding of CP Assets in SP Corp. (TX Outcome):

Basic Rule: One spouse cannot unilaterally change community property into separate property. If an alter-ego corporation is used to change spousal salary into separate property, salary will still be community property.

* + - * **GOODWILL**
        + Goodwill = “the advantage or benefit, which is acquired by an establishment beyond the mere aggregate value of the capital stock, funds and property on hand in consequence of general public patronage, which it receives from constant or habitual customers, on account of its local position, common celebrity or reputation for skill”
        + **General Rule: Goodwill created by personal services of a spouse cannot be valued and CANNOT be part of the community estate** (b/c really future earning potential of spouse). **Goodwill created by the personal services of others (commercial goodwill) CAN be valued and MAY BE part of the community estate. (Geesbreght v. Geesbreght).**
        + **TX Rule: TWO PRONG GOODWILL TEST (Finn v. Finn):**

**1. Goodwill must be determined to exist independently of the personal ability of the professional spouse.**

**2. If such goodwill is found to exist, it must then be determined whether that goodwill has a commercial value in which the community estate is entitled to share.**

*The commercial value must be realizable after the spouse stops practicing – if the spouse has no goodwill by death or withdrawal, then no divisible community property. (Finn case).*

* + - * + CA and Washington Rule: Amount of professional’s earning capacity of similar professional without clientele = community property.
        + NY Rule: Any increase in separate property during marriage that is due in part to contributions of other spouse may be community property, including goodwill.
      * **PROFESSIONAL EDUCATION**
        + **TX Rule: A professional educational degree is not divisible property upon divorce. (Frausto v. Frausto).**

This means there is no reimbursement for obtaining the professional education during marriage or for making payments on education loans.

* + - * + Majority rule of other states: If community funds are used to enhance separate property of one spouse, it is a loan and the community must be reimbursed at divorce.
      * **LIVESTOCK**
        + If an animal brought into the marriage (separate property) gets bigger or more valuable during the marriage, the animal is still separate property.
        + If the animal has offspring, the offspring are community property.
      * **INTEREST (ON ACCOUNT)**
        + **Rule: Interest earned during marriage in a separate property account is community property.**
      * **INSURANCE PROCEEDS**
        + **Rule: Proceeds mirror the nature of the property the insurance policy covers. But, if community funds are used to pay premiums, community gets reimbursement for payments.**
        + I.e. If the house is the husband’s separate property, a fire destroys it, and he gets insurance proceeds, the insurance proceeds are the husband’s separate property.
      * **PERSONAL INJURY SETTLEMENT PROCEEDS**
        + **Rule: The body of each individual spouse belongs to them, so any compensation for injuries to them is separate property.**
        + But, any expenses incurred by the community for medical care and treatment and any loss of wages resulting from the personal injury should be considered as community property.
        + Loss of consortium = other spouse’s separate property.
        + Wrongful death of a child = separate property.
      * **CREDIT PURCHASES**
        + **Rule: Credit received during marriage normally is deemed a community contribution. (Bell v. Bell)**
        + Rare Exception: It doesn’t matter which spouse receives the credit 🡪 issue is whose assets are considered. If the lender ONLY looks to the borrower’s separate assets to recover the funds, the loan is a separate property loan.
        + When combo cash + credit purchase: Must “characterize every bit of consideration given during the purchase” to determine whether community or separate funds are used for the purchase.
        + Ex. House purchased with part SP and part CP credit: Two estates have tenancy in common and split increase in value according to the initial proportion of investment. (Bell v. Bell)
      * **TRUST:**
        + **Basic Rule: Interest accruing on a separate property trust is separate property, as long as the beneficiary spouse doesn’t have ABSOLUTE RIGHTS (i.e. is both trustee and beneficiary).**
        + **But, if income is distributed from the trust during marriage, it is community property.**
      * **LOTTERY TICKET**
        + **If bought with separate property, but win during marriage, income is community property.**
      * **LIFE INSURANCE**
        + **Two types:**

**Term insurance:**

**Pays a specified amount to beneficiary if you happen to die during the insurance coverage 🡪 community property**

**If covered spouse is alive at divorce 🡪 is worthless (NOT A DIVISIBLE ASSET)**

**Whole Life Insurance**

**Maintains Value for life, death = $ to beneficiary.**

**Considered an inter vivos gift made by one spouse when the beneficiary designation is made 🡪 beneficiary’s separate property**

* + - * + Basic ways to look at life insurance payments:

TX Rule = Inception of Title Approach = character of life insurance is determined at time when interest in insurance is first acquired; equity will prevent fraudulent title acquisitions

CA Rule = Pro Rata Approach = Character of insurance changes proportionally as community payments are made (creating reimbursement claim if insurance started before marriage)

* + - * + When the spouse is NOT the beneficiary:

If the designation occurred BEFORE marriage, then donor can gift to whomever he wants (his separate property). The community would still be reimbursed for any premiums paid on the life insurance.

Each spouse during the marriage may make REASONABLE gifts of community property to a party outside the marriage.

REASONABLE = considering…

Relationship (“no girlfriends rule”)

Circumstances (special circumstances to justify gift?).

Amount (are remaining community assets reasonable?)

If the gift is not reasonable, the donor spouse may be engaging in FRAUD ON THE COMMUNITY. (Jackson v. Smith)

If this occurs and the donor spouse has died, the beneficiary gets ½ the proceeds and the spouse gets the other half.

If the donor spouse is still alive, then the non-donor spouse will get the entire gift for the community estate.

* + - * + When the spouse is the beneficiary:

TX Rule: If you don’t change your beneficiary after divorce (either to a new person or back to the old spouse), it is presumed that you mean to change the beneficiary, and the proceeds go to the alternative beneficiary rather than the former spouse. (Tex. Fam. Code 7.005).

* + - * **OIL & GAS ROYALTIES**
        + **Basic Rule: Royalties are separate property if the oil & gas interest is separate property** (so community if O&G is community property). **Delay rentals are income, so they are community property.**
        + This is because oil & gas royalties are received for depletion of resources, so it is a mutation of the oil, not income.
        + LA Rule: Oil and gas royalties from SP land = CP.
      * **PATENT ROYALTY PAYMENTS** 
        + **Basic Rule: Royalty payments are income; community property if received during the marriage.**
      * **ATTORNEY CONTINGENCY FEES**
        + **Basic Rule: When the case began determines base separate or community. Community estate has reimbursement claim in community labor expended in earning attorney’s contingency fee. (Marriage of Garrett)**
      * **EMPLOYMENT FRINGE BENEFITS/VACATION PAY**
        + **Basic Rule: If fringe benefits have no cash value (access to health club, sick time, vacation benefits, etc), then there is no community asset.**
        + But, if the fringe benefit can be exchanged for cash, then it is a community property asset.
    - **REIMBURSEMENT:**
      * **General Principle: The community should be reimbursed for the value of time and effort expended by either or both spouses to enhance the separate estate of either, other than that reasonably necessary to manage and preserve the separate estate, less any amount of compensation received by the community. (Jensen v. Jensen).**
      * **TX STATUTE – REIMBURSEMENT IS AVAILABLE FOR:**
        + **HOUSE PAYMENTS**
        + **CAPITAL IMPROVEMENTS**
        + **TIME, TOIL AND TALENT TO A SEPARATE PROPERTY BUSINESS.**
      * **Property/Payments:**
        + **The community is has an equitable right to reimbursement for payments on the purchase price of separately owned property, or in discharging encumbrances thereon. (Hawkins v. Hawkins)**
        + Net reimbursement claim (to community) = payments made by the community toward the separate property – benefit to the community of living in the house.
        + Reimbursement Claims:

Principal Reduction 🡪 Reimbursement

Payment on Interest 🡪 NO Reimbursement

Credit Card Debt 🡪 Reimbursement

Student Loans 🡪 NO Reimbursement

Family Living Expenses 🡪 NO Reimbursement

Capital Improvements 🡪 Reimbursement

Child Support 🡪 NO Reimbursement

* + - * **Family Expense Doctrine:**
        + **Family living expenses should be first paid out of the community estate, then from separate property.** This is because spouses have a general duty to support each other, without reimbursement from the community estate.
        + What this means in a commingled account:

Any withdrawals during marriage are deemed community property until all community deposits have been offset. This assumes that the expenses were used to pay family living expenses.

* + - * **Debts:**
        + **Basic Rules:**

**Debts incurred during marriage are generally incurred for family living expenses, and community funds should be used to pay those debts.**

**Debts incurred before marriage are considered separate debts. The community should be reimbursed for payment of separate debts.**

* + **MANAGEMENT OF PROPERTY**
    - **Basic Rule: Sole management property can be sold or encumbered by one spouse acting alone. Joint management property cannot generally be sold or encumbered without the consent of both spouses.**
    - **2 TYPES:**
      * **Sole Management Property:**
        + **Separate Property = Sole management property of the owner.**
        + **Community property – can be sole OR joint management**

**Sole:**

**Includes property accumulated by the spouse during marriage “that he or she would have owned if single” OR property made sole by agreement.**

Includes, but is not limited to (Tex. Fam. Code. Sect. 5.22):

Personal earnings;

Revenue from separate property;

Recoveries for personal injuries; and

The increase and mutations of, and the revenue from, all property subject to his or her sole management, control and disposition.

* + - * **Joint Management Property:** 
        + **Consent of other spouse: Generally, the managing spouse has sole right of control and disposition of the community property as he sees fit. It is unnecessary for the managing spouse to obtain the approval/agreement of the other spouse for basic acts with the property. (Mazique v. Mazique)**
        + **Homestead = Joint management, regardless of whether separate or community property. (Vallone v. Miller)**

This means that before the homestead is sold or encumbered, BOTH parties must consent. But, some courts say that a spouse has a right to convey a ½ interest in joint management community property without the consent of the other spouse.

A 3rd party may rely on one spouse’s management authority to deal with the property so long as the 3rd party has no notice of the other spouse’s claim. (Tex. Fam. Code 3.104)

* + - * + **Actions by Managing Spouse: Court generally doesn’t want to police the actions of the managing spouse, unless one of two things occur:**

**A large sum of money/property goes missing 🡪 managing spouse has a duty to explain where those funds went. (Arrington v. Arrington).**

**The managing spouse has made UNREASONABLE gifts outside the community.**

* + - * + **But, there is a duty owed to non-managing spouse:**

**Spouses have a duty to act in GOOD FAITH when making investment decisions, but this is not a strict fiduciary duty.**

**The managing spouse owes a duty to not act with fraud and to act in fair dealing with to the non-managing spouse. This does not include mere negligence, being dumb or stupid, as long as the decision was made in good faith. (Andrews v. Andrews)**

This means that persuading the other spouse to invest funds in another’s business plan without informing them about their true relationship with the outside party is a violation of the duty. (Devine v. Devine)

Remedy for violation:

A personal judgment for damages may provide a means for recoupment of the value lost to the community as a result of the constructive fraud. (Mazique v. Mazique)

* + - **Impact on Creditors’ Rights**
      * **General Principles:**
        + **Creditors’ rights normally flow from management, EXCEPT when dealing with tort liability.**
        + **Parties can agree (orally or in writing) to alter the default rules. (3.012 Tex. Fam. Code.)**
        + **Must view the entire circumstances to determine management for creditors rights purposes.**
        + Earlier creditors get priority over later creditors (i.e. purchase money lender typically gets 1st dip).
        + The creditor may limit his rights in the instrument involved 🡪 the restricting agreement will then supersede TX law.
        + CANNOT impact creditors rights by act of divorce 🡪 even though a court may order one spouse to pay the debt, it is still community for creditors’ rights.
      * **If debt is for:**
        + **Necessity (food, water, shelter, “things based on your station in life”) during marriage 🡪 community liable + each spouse individually.**
        + **Spouse’s Separate Debt (when a creditor agrees only to look at that spouse’s separate property during marriage) 🡪 that spouse’s separate property**
        + **Spouse’s Pre-Marital Debt 🡪 that spouse’s separate property + that spouse’s sole management community property + joint management community property**
        + **Spouse’s Non-Tortious Liabilities 🡪 that spouse’s separate property + that spouse’s sole management community property + joint management community property**
        + **Spouse’s Tortious Liabilities 🡪 that spouse’s separate property + joint management community property + both spouse’s sole management community property**
        + **Joint Liabilities of Spouses 🡪 both spouses’ separate property + both spouses’ sole management community property + joint management community property (CREDITOR CAN ATTACH TO EVERYTHING)**
      * Miscellaneous Issues:
        + Solution for a client who wants to marry a person with a lot of debt:

Be sure that the spouse with the debt is given sole management of pre-marriage debt.

* + - * + For tax lien purposes (Broday v. United States):

The government may be entitled to a lien for tax plus any interest upon all of one spouse’s “property and right to property.

State law determines what is the spouse’s “property and right to property.”

Once it has been determined under state law that the taxpayer owns property or rights to property, federal law is controlling to determine whether a lien will attach to certain property.

* + - * + Premarital Agreements

If a premarital agreement re-characterizes each spouse’s income as separate property, the government will not be able to subject one spouse’s earnings to collect the other’s tax debt. (Calmes v. US).

But, if the agreement is made during the marriage, and the spouse already has an interest in the other’s income, the government can still attach a tax lien. (State Bd. of Equalization v. HY Woo)

* + **SETTLEMENT AGREEMENTS**
    - **In connection with a divorce, parties normally negotiate a settlement agreement which sets forth the terms of the dissolution. This settlement agreement is frequently incorporated by reference into the divorce decree 🡪 becomes a judgment of the Court. (Cayan v. Cayan)**
    - Alternative Dispute Resolution (ADR) & Settlement Agreements:
      * Arbitration procedures are binding ONLY if the parties agreement that it is binding. (Tex. Fam. Code 6.601).
      * A mediated settlement agreement will be binding if, at a minimum, a neutral 3rd party mediator is present. Parties cannot change their minds between date of signing and day of divorce – only way to get out of it is if a party was wrongfully induced to enter into it. (Tex. Fam. Code 6.602).
      * For other settlement agreements, parties may change their mind up to the day the decree is entered. (Tex. Fam. Code 7.006)
      * Collaborative Law – Parties essentially have two years to create a joint resolution of divorce without judicial proceedings – creates a binding settlement. (Tex. Fam. Code 6.603).
    - **Remedies when one party is not following the settlement agreement:**
      * **Breach of contract 🡪 not possible if incorporated into decree – must attack judgment in court.**
      * **Child support and alimony may be collected by income withholding.**
      * **Contempt may be available, as long as:**
        + **The order SPELLS OUT THE DETAILS OF COMPLIANCE IN CLEAR, SPECIFIC AND UNAMBIGOUS TERMS SO THAT THE PERSON AFFECTED BY THE ORDER WILL READILY KNOW EXACTLY WHAT OBLIGATIONS ARE IMPOSED ON HIM** (incorporation by reference is enough for ONLY child support and maintenance obligations) (Ex parte Shelton; Tex. Fam. Code 153.007);
        + **Order was in a final order** (except for child support) (Ex Parte Bible);
        + **Obligor has ability to pay** (Ex parte Barnes); and
        + **Obligor has not paid.** (ex parte Gorena).
  + **Contempt Actions:**
    - **If the decree orders a party to sign specific documents for a transaction: the decree must note the documents SPECIFICALLY (either by name or by attachment). (Ex parte Choate)**
    - **Order to pay money in the future: can only be enforced if the order is tied to CERTAIN money IN EXISTENCE at the time the order is rendered. (Ex parte Choate)**
    - **Visitation Schedule: will not be enforced if the decree just says that the spouses will agree later as to an appropriate visitation schedule or allows other informal modification of visitation.**
    - **Speculative Expenses/ “All appropriate expenses”: is NOT specific enough to be enforced.**
    - **Statute of Limitations:**
      * **A suit to enforce division of property must be filed (Tex. Fam. Code 9.003):**
        + **For property in existence at time of decree, by 2 years after date decree was signed or became final after appeal;**
        + **For future property not in existence at time of decree, by 2 years after date the right to property matures.**
      * For property not covered by 9.003, suit to enforce division of property must be filed by 2 years after date former spouse unequivocally repudiates existence of ownership. (Tex. Fam. Code 9.202).
    - The party to be held in contempt has a right to counsel – they must be advised of their right to counsel. (Ex parte Aarons).
  + **Bankruptcy:**
    - **Basic Rule: Parties cannot discharge any family support obligation, whether by divorce or separation, in bankruptcy.**
  + **Dividing the Community Estate at Death**
    - **Basic Rule: If a spouse does not have a will, the decedent’s property passes by the TX intestacy rules.**
    - **Calculate: Community estate, separate estate, and any necessary reimbursement.**
    - **If there is a will:**
      * **Basic Rules:**
        + **A spouse has the right to devise a ½ interest in each item of community property, and all their separate property owned at death.**
        + **If a spouse attempts to devise more than ½ any item, the other spouse has the option to either (Wright v. Wright):**

**Take the benefits under the will OR**

**ELECT to reject the benefits under the will and take 50% of each item of community property.**

* + - * **TX is an item state –A spouse may not, without the consent of the other spouse, devise a 100% interest in one community property item, even if all community property devised has an aggregate value of less than ½ the value of the community estate.**
    - **TX Intestacy Rules (Defaults):**
      * **Married Man/Woman with No Child or Children**
        + **1. Separate Property**

**Real Estate: ¼ father, ¼ mother, ½ to surviving spouse**

**All Other Property: All to surviving spouse**

If only one parent survives, he takes ¼ of the separate property real estate and ¼ is equally divided between brothers and sisters of the deceased and their descendents. If there are no surviving brothers/sisters, then the surviving parent takes ½ of the real estate. If neither parent survives, ½ of the estate is divided equally amongst brothers and sisters. If no parents and no brothers or sisters or their descendents survive the deceased, then all the real estate is taken by the surviving husband or wife.

* + - * + 2. **Community Property**

**All community property, real or personal, is taken by the surviving husband or wife. Tex. Prob. Code Sect. 45.**

* + - * **Married Man or Woman with Child or Children**
        + **1. Separate Property**

**Real Estate: equally to all children, subject to spouse’s life estate in 1/3**

**All other property: 2/3 equally to all children, 1/3 to surviving spouse**

The surviving husband or wife only inherits an estate for life in 1/3 of the land of the deceased. When such surviving husband or wife dies, all of the real estate is owned by the deceased’s child or children.

* + - * + **2. Community Property**

**Real estate: ½ equally to all children, ½ already owned by surviving spouse**

**All other property: ½ equally to all children, ½ already owned by surviving spouse**

The inheritance rights of a surviving child to community property of the decedent via intestacy depend upon:

Whether the decedent and the surviving spouse executed a survivorship community property agreement and

Whether the surviving child is a child of both the decedent and the surviving spouse.

If the spouses did not execute a survivorship community property agreement and the child is not the child of both spouses, the chart above is accurate. If the spouses signed a survivorship community property agreement, the property covered by that agreement descends to the surviving spouse.

If the surviving child is the child of both spouses, the surviving spouse inherits all the community estate of the decedent.

The drafters apparently assume that the surviving spouse will at his or her death leave any remaining property to the children, as long as the surviving spouse is not a stepparent. Tex. Prob. Code Sect. 45.

* + MISCELLANEOUS
    - Fault and/or No Fault Divorce – possible in Texas
    - Clean Hands Doctrine:
      * = To get an equitable remedy from the court, the seeking party must have clean hands.
    - **Challenging a property division:**
      * **Very difficult to challenge a property division on appeal. The appellate court must find that the trial court abused its discretion in dividing the community estate. (LeBlanc v. LeBlanc)**
      * **BUT, Texas divorce courts (trial courts) divide only the community estate. This means (McElwee v. McElwee)…**
        + **If a court mischaracterizes separate property as community property and divides it, this automatically is reversible error.**
        + **If the court merely mischaracterizes property but decrees it to its rightful owner, no reversible error.**
        + **If a wrong division of property is not appealed, the judgment becomes final and enforceable.**
      * **If there has been abuse of discretion or reversible error affecting the division of the community estate, the court of appeals must remand the entire community estate for a new division 🡪 only the trial court can make a just and right division of community property. (McElwee v. McElwee)**
      * **An improper property division must be appealed directly – it cannot be challenged by collateral attack. (Putegnat v. Putegnat)**
      * **A final property division decree may not be modified. However, an ambiguous decree may be clarified under Tex. Fam. Code 9.008.**
    - “Fraud on the Community”
      * = an allegation made in connection with the dissolution of a marriage that a spouse has violated his management duties relating to the community estate.
      * If the judge determines there has been fraud on the community, the guilty spouse has to reimburse the community for its losses.
      * There is NO separate tort claim for “fraud on the community” that could give rise to a claim for punitive damages.
    - Two different types of marriage:
      * Ceremonial marriage – where two adults, after they obtain a marriage license, participate in a marriage ceremony conducted by a person authorized by the statute to conduct such a ceremony.
      * Common law marriage -
        + Three elements:

An agreement presently to be husband and wife;

Living together as husband and wife; and

Holding each other out to the public as such (both parties doing this).

* + - * + Circumstantial Evidence:

Living together is more than just being a frequent overnight guest or storing property 🡪 must actually LIVE together.

Declarations of marital status in official documents, such as in real estate transactions, can be significant evidence.

Introducing each other as husband and wife, recognizing their children, using the same last name, etc, can all be evidence.

Evidence of behavior in other states CANNOT establish a Texas common law marriage.

Parties must have the capacity to be married – each spouse must be legally “single” to have a common law marriage.

No set time required for a common law marriage to come about – what matters is that the elements exist when status is challenged. (Consolidated Underwriters v. Kelly)

* + - * + There is no common law divorce – common law marriage dissolves like a regular marriage (by death, court decree or presumption of death).
        + There is a rebuttable presumption that if divorce suit is not filed within two years of the relationship breaking up, the two parties DID NOT have a common law marriage.
    - Putative Spouse:
      * Def = A person who marries in good faith is regarded as a “putative spouse,” even if one of the spouses who participated in the marriage ceremony was already married to another.
        + GOOD FAITH = “rests on facts that would cause a reasonable person to harbor a good faith belief in the existence of a valid marriage”🡪 must be subjectively and objectively reasonable (Vryonis v. Vryonis)
        + A future spouse has no duty to investigate his future spouse’s capacity to marry (Estate of Vargas), UNLESS the future spouse has many previous marriages.
        + Putative marriage ends as soon as the innocent spouse learns of the other marriage 🡪 benefits cut off at this point. (Garduno v. Garduno).
        + Parties must live together for putative spouse status to arise.
      * Remedies (Estate of Vargas):
        + The later attempted “marriage” is void, but the person unaware of the marriage is generally treated as a lawful spouse for remedies.
        + Types:

Innocent spouse may have an action in damages for deceit against the other spouse in cases where fraud or misrepresentation was used to induce the marriage relationship.

The de facto spouse may be entitled to the same property rights in the quasi-community estate as a lawful spouse. This means that if the void marriage is discovered after death, then the lawful spouse gets 50% of the estate and the de facto spouse gets the other 50%.

The innocent spouse may recover for the reasonable value of their services to the other spouse over and above the amount of support and maintenance furnished by her supposed spouse.

* + - Premarital Expenditures:
      * Basic Rule: If one spouse conveys separate property for purpose of depriving their intended spouse of benefits arising from marriage, equity will void the conveyance or compel the transferee to hold property in trust for/subject to the rights of the defrauded spouse.
      * How much time passed between conveyance and marriage matters.
      * Two possible claims for equitable recovery of premarital expenses:
        + Resulting trust – A party that furnishes consideration for property should receive equitable title

Note: no claim if legal title already vested in claimant.

* + - * + Constructive trust – When legal title was obtained through fraud, misrepresentation, concealment, duress, etc (anything that makes it unconscionable for legal title holder to retain), then the claimant should get title.
    - **Engagement/Return of Property (In re Marriage of Heinzman):**
      * **Breach of promise to marry:**
        + **TX LAW: A promise or agreement made on consideration of marriage is NOT enforceable UNLESS the promise or agreement is IN WRITING and SIGNED BY THE PERSON OBLIGATED by the promise or agreement. (Tex. Fam. Code 1.108).**
        + Most other states: Have abolished this cause of action.
      * **If the engaged couple does not have a written agreement as to the fate of any engagement ring (or other engagement gift) should their wedding be called off, ownership of the ring is subject to the fault-based conditional gift rule.** 
        + Rule = ring must be returned to the donor if gift is considered to be made in contemplation of marriage + the donee is at fault in terminating the agreement.
    - Disputes between Cohabitants
      * Cohabitation = two people are not validly married to each other, live together, share a sexual relationship and neither believes that a marriage exists.
      * “Old” law:
        + Unmarried cohabitation was considered morally offensive 🡪 In general, no remedies for unmarried cohabitants;
        + Claims related to the relationship were considered barred;
        + Any contract between the parties was unenforceable UNLESS it could be severed from the cohabitation relationship.
      * “NEW” LAW in TX:
        + Enforcement of Contracts – Implied Contract to Share:

RULE: A WRITTEN CONTRACTUAL AGREEMENT AS TO PROPERTY DIVISION WILL BE ENFORCED BETWEEN UNMARRIED COHABITANTS WITH A STABLE AND SIGNIFICANT RELATIONSHIP. (Marvin v. Marvin)

But, to the extent the contract explicitly rests upon consideration of sexual services, that part of the contract will fail 🡪 SEVERABILITY. (Alderson v. Alderson).

Ex. Promising to “bear a man’s children” will be unenforceable v. “companion, homemaker, housekeeper and cook” promise is enforceable.

Exceptions where a writing is not required (possible remedies):

If there is part-performance;

If there is a partnership agreement (think business organizations; ask: Are the cohabiting partners “an association of two or more persons to carry on as co-owners of a business for profit”?)

Constructive Trust/ Resulting Trust/ Quantum Meruit.

* + - * CA APPROACH:
        + The courts may employ principles of constructive/resulting trust and the non-marital partner may recover in QUANTUM MERUIT for the reasonable value of household services rendered less the reasonable value of support received, but the portion of the agreement based on meretricious sexual services will be unenforceable.
        + Claiming person must show some sort of actual or implied contract.
      * NY APPROACH:
        + Express contracts not based on sex are okay, implied contracts are not. (Marone).
      * WASHINGTON APPROACH:
        + Parties will have shared property, regardless of the existence of any agreement, provided cohabitation has existed for a significant period of time.
      * ILLINOIS APPROACH:
        + Completely rejects other jurisdictions – says it is against public policy for the court to grant marriage-like protection to unmarried cohabitants. (Hewitt v. Hewitt).
      * Tort claims:
        + Fraud/Wrongful Birth:

Man Sues - No fraud remedy for man that falsely believed partner was on birth control; details of consensual sexual relationship should be left free of government interference. (Stephen K v. Roni L).

Woman Sues – If man claims to be sterile and woman gets pregnant, woman may recover on fraud claim, but not wrongful birth. (Barbara A case).

* + - * + Fraud/Wrongful Transmission of STD

If in pre-marital relationship – If partner either knowingly or negligently transfers an STD, valid claim 🡪 the parties right to privacy and government’s desire to stay out of relationships is subordinate to the state’s right to enact laws that promote public health, welfare, safety, etc. when there is physical injury to one party (ex. STD) (Kathleen K. v. Robert B.).

If during marriage – No claim. (Zysk case).

* + - * + Fraud/Wrongful Promise to Impregnate

No claim – right to privacy trumps fraud claim. (Perry case).

* + - Other Lawsuits Between Spouses
      * INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
        + One spouse can sue another for IIED.
        + Elements of IIED:

The defendant acted intentionally or recklessly;

The conduct was extreme and outrageous;

*Note: What is outrageous is determined after considering the context and relationship of the parties.*

The actions of the defendant caused the plaintiff emotional distress; and

The emotional distress suffered by the plaintiff was severe.

* + - * + When IIED claim is brought with divorce:

TX RULE: Interspousal immunity has been abolished – Spouse can use other spouse for IIED outside of a divorce proceeding. (Twyman v. Twyman).

In general, court may consider the “fault” of a spouse in connection with a property division. Court must avoid awarding a double recovery. A spouse should not be allowed to recover tort damages for IIED and a disproportionate division of the community estate based on the same conduct.

*Strategy to get around this: Want to bring the divorce action first and divide the property. After the decree is order and the case finalized, bring tort claim for IIED. This may avoid family jury reluctance to give one spouse unequal amount in the divorce proceeding. BUT, res judicata may bar later IIED cause of action if evidence of IIED was introduced in the divorce proceeding.*

* + - Effect if death on divorce action:
      * Basic Rule: If a spouse dies while the divorce action is pending, death normally abates the divorce action, and the decedent’s property passes according to the rules governing marriage dissolution by death.
    - Child Support
      * Basic Rule: Each parent has the duty to support his or her minor children. (Tex. Fam. Code Sect. 4.02). In order to enforce this duty, the court may order either one or both parents to make periodic or lump sum payments, or both, for the child’s support until the child reaches 18. (Hourigan v. Hourigan).
      * Any court-ordered increase in child support paid over time must be supported by evidence that the circumstances of the child or the payor or payee have materially and substantially changed since the entry of the order. (Abrams v. Abrams). The parties can however, by agreement, incorporate automatic adjustments to child support in the decree.
      * Factors to be considered by the court in determining child support:
        + Ability of the parent to pay;

*But, just because one spouse can afford to care for children on their own doesn’t relieve the other spouse of their obligation to support the child.*

* + - * + Needs of the child;
        + Best interest of the child.
    - **Alimony**
      * Old TX law: NO court-ordered alimony; only temporary support permitted until the divorce became final; BUT parties may agree by separate contractual agreement, incorporated by reference into the court’s order, for one spouse to pay alimony. (Klise v. Klise)
      * **NEW TX LAW:**
        + Purpose: To provide spousal maintenance primarily as a temporary rehabilitative measure for a divorced spouse whose ability for self-support is lacking or has deteriorated through the passage of time while the spouse was engaged in homemaking activities and whose capital assets would be insufficient to provide support.
        + **Guidelines:**

**Spousal support should be terminated in the shortest possible time, not to exceed THREE YEARS;**

**Only in circumstances in which the former spouse cannot become self-supporting by reason of incapacitating physical or mental disability should maintenance be extended beyond this period;**

**Cannot be awarded unless THE MARRIAGE LASTED TEN YEARS or THE PAYOR HAS BEEN CONVICTED OF FAMILY VIOLAENCE;**

**MAX ALIMONY = LESSER OF $2,500 OR 20% OF PAYOR SPOUSE’S MONTHLY INCOME.**

**Spouses may agree on contractual alimony, so long as it is in a separate contract and referenced in the decree, but not directly ordered by the divorce decree. (Kline v. Kline).**

* + - * + TX is much more restrictive on alimony than other states.
        + TX Court may enforce alimony with contempt order. (Tex. Fam. Code 8.059).
    - Tax Consequences of Divorce
      * Alimony v. Child Support
        + Basic Rule: Alimony paid after divorce is deductible by the payor and income to the payee (but no tax effect if payments made before divorce 🡪 just transfer of community property), and child support is neither deductible nor income.
        + Payments to a former spouse are alimony if:

Made under a divorce and separation instrument,

Are in cash,

Will terminate upon the death of the recipient,

Are not referred to as child support and are not fixed to any minor child of the spouses, and

The spouses are not the members of the same household when the payment is made.

* + - * + An award will be considered child support if it is FIXED TO A CHILD (if it ends within 6 months before or after the child reaches majority).
      * Dependency Exemption: The custodial spouse is entitled to the dependency exemption, unless both spouses agree in writing that the other spouse will get the deduction.
        + *Form 8332 – Filed with IRS; Gives non-custodial parent dependency exemption for a certain period.*
      * Medical expenses for children – Either spouse may deduct medical expenses incurred on behalf of the children.
      * Divorce Property Division:
        + Basic Rule: No taxable event in connection with a property divorce division, as long as the spouse’s property is merely divided between the two spouses.
        + The property received by a spouse retains its prior basis.

This means that low basis appreciated is worth less than high basis property, since low basis property has greater hidden tax liability associated with it.

So lawyers should consider tax consequences when dividing property.

* + - * + Should prefer receiving cash from the marital estate, instead of property, to avoid tax consequence of selling property (taxable income = FMV – Basis).
      * Income Tax Planning
        + A spouse’s marital status for income tax purposes is determined by his or her legal status on December 31st.
        + In a community property state, spouses are deemed to each earn ½ of the aggregate income earned by the couple during marriage. This means that if spouses divorce during the year, each spouse will have to pay taxes at the end of the year on ½ the couple’s aggregate earnings through the date of divorce + spouse’s post-divorce earnings through end of year.
        + If only one spouse works outside the home, it is advantageous for tax reasons to stay married (marriage bonus). If both spouses work, it frequently is advantageous from a tax standpoint to be single (marriage penalty).
    - Creating survivorship property – can be done in two ways:
      * Joint tenancy w/ right of survivorship can be created with SP or previously-partitioned CP; or
      * By written agreement creating survivorship CP.
        + *Probate code: it must say “with right of survivorship,” and “will become the property of the survivor.”*
    - Recognition of gay marriage:
      * A state will recognize a gay union if:
        + The union was valid where the two got married; and
        + Recognition wouldn’t violate public policy.
      * TX LAW: NO RECOGNITION OF GAY MARRIAGE.