

**DIVISION OF THE MARITAL ESTATE UPON
DIVORCE**

**SPLITTING THE SHEETS – WHO GETS
WHAT AND WHY**

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LEGAL ASSISTANT UNIVERSITY
State Bar of Texas, Legal Assistants Division
October 1-3, 2003
San Antonio, Texas

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DIVISION OF THE MARITAL ESTATE UPON DIVORCE
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I. INTRODUCTION

This article includes a summary of the laws in the state of Texas that are relevant to the division of marital property. The major sources of authority concerning the division of property will be addressed. The primary focus of this article is to address those factors that the courts rely upon in an equitable division of the marital estate.

While the Texas Family Code provides that the division of the estate of the parties should be ordered in a manner that the Court deems “just and right,” (*see* Tex. Fam. Code §7.001), family law practitioners are advocates who are responsible for aiding the court in its determination of what is “just and right”. All of us who practice family law present our cases in an effort to have our client awarded as many net community assets as possible. Likewise, the opposing party’s legal team is working hard not only to counter your request for division, but to enhance the chances that their client is awarded the assets the client desires. Rarely, there is enough wealth balanced with temperament of personalities that allow a quick, easy, settlement to be reached. Inevitably, by our legal training or perhaps by human nature, each party typically postures in an effort to be awarded what that party deems to be “fair.”

In most marriages, the lifestyle of the married couple parallels the amount of available resources. Thus, when a divorce is initiated, the parties are often shocked by the reality of drastic changes to their lifestyle caused by no longer sharing the expenses of shelter, transportation, and care of children. The Texas Constitution, Texas Family Code, and case law present advocates with guidelines within which we develop our strategies. It is within these guidelines and with our own creative strategies that we attempt to fight for the best outcome of our client’s welfare. All of us who are dedicated to being competent practitioners of family law seek to present the Court with compelling evidence in order to allow it to make a “just and right” division - hopefully, to the benefit of our client. Therefore, we must have a thorough understanding of the guidelines that influence the division of the assets from the initial interview of the client. When clients come in for initial interviews, they always want to know what they will likely receive in a division of the marital estate. While it is impossible to guarantee or to promise any results, the experienced and knowledgeable practitioner should be able to present a general prognosis of the outcome, if presented with material and accurate information by the client.

II. WHO SPLITS THE SHEETS – JURISDICTION

Pursuant to the Texas Constitution, district courts have “exclusive, appellate, and original jurisdiction in all cases except where exclusive, appellate, or original jurisdiction may be conferred by the Constitution or other law in some other court, tribunal or administrative body. Vernon’s Ann. Tex. Const. art. V., §8. No other courts have been granted jurisdiction of divorce cases – therefore, the district courts have jurisdiction to hear all divorce cases. *Williams v. Scanlan*, 714 S.W. 2d 38, 40 (Tex. App. – Houston [14th Dist.] 1986, no writ).

In 1985, the Texas Legislature established “family” district courts in many Texas counties. *See* Tex. Gov. Code §24.601 *et. seq.* These family district courts have jurisdiction concurrent with other district courts, but have primary responsibility for matters involving family

law. Tex. Gov. Code §24.601. Family district courts have been established in Brazoria, Dallas, Galveston, Gregg, Harris, Hutchinson, Jefferson, Midland, Nueces, Potter, Smith, Tarrant, Taylor, El Paso, Fort Bend, and Wharton counties. See Tex. Gov. Code §§24.608 - 24.639.

The legislature has also conferred family law jurisdiction on a number of statutory county courts. See Tex. Gov. Code §25.0041 *et. seq.* Thus, when filing a divorce case in an unfamiliar jurisdiction, the practitioner must inquire as to the appropriate court that has family law jurisdiction, be it a district court, a family district court, or a statutory county court at law.

III. WHAT SHEETS ARE THERE TO SPLIT? – THE MARITAL ESTATE

Section 7.001 of the Texas Family Code states that “[i]n a decree of divorce or annulment, the court shall order a division of the estate of the parties...”. The marital estate includes all of the assets in which either spouse has an interest (whether separate property or community property) and all liabilities owed by either spouse.

A. Separate property

A spouse’s separate property consists of:

1. The property owned or claimed by the spouse before marriage;
2. The property acquired by the spouse by gift, devise, or descent; and
3. Recovery for personal injury sustained by a spouse during marriage, except any recovery for loss of earning capacity during marriage.

Tex. Fam. Code, §3.001. Ownership interests are determined according to the inception of title rule. Tex. Fam. Code §3.006. This means that whenever a spouse takes title to separate property, the property remains that spouse’s separate property.

B. Community Property

Community property consists of the property, other than separate property, acquired by either spouse during marriage. Tex. Fam. Code §3.002. All property possessed by either spouse during or on dissolution of marriage is presumed to be community property. Tex. Fam. Code §3.003(a).

C. Separate property not subject to division upon divorce

Only community property may be divided upon divorce. A court cannot divest a spouse of any property that is proven to be that spouse’s separate property. In the landmark case, *Eggemeyer v. Eggemeyer*, the Texas Supreme Court held that the marital estate subject to division only encompasses the community estate. *Eggemeyer v. Eggemeyer*, 554 S.W. 2d 137, 139. The Court stated that:

trial courts have a broad latitude in the division of the marital community property, but that discretion does not extend to the taking of the fee to the separate property of the one in its donation to the other.

Id. at 142. The Court further held that even if the legislature purported to allow the division of separate property, such a divestiture would be unconstitutional. *Id.* While the *Eggemeyer* case applied to the division of separate *realty*, the *Cameron* case made it clear that separate *personal property* is also not subject to division upon divorce. *Cameron v. Cameron*, 641 S.W.2d 210, 220 (Tex. 1982). Taken together, these cases prohibit courts from awarding a spouse's separate property interest in any property to the other spouse. *See also Langston v. Langston*, 82 S.W. 3d 686, 688 (Tex. App. – Eastland 2002, no writ)(court cannot divest spouse of interest in separate property).

All property possessed by either spouse during or on dissolution of a marriage is presumed to be community property. Tex. Fam. Code §3.003(a). A spouse who claims to own a separate property interest in any asset must establish through clear and convincing evidence that the property is separate property. Tex. Fam. Code §3.003(b). If the judge or jury finds by clear and convincing evidence that an asset is the separate property of one spouse, the Court may not divest the owner-spouse of that property.

D. Other non-divisible property

Other categories of property are not divisible by Texas courts in a divorce, because of the dictates of the United State Constitution, the Texas Constitution, or public policy. In addition, Texas courts have found that some “assets” are too speculative in order to be subjected to a just and right division. Examples of some of these non-divisible properties are:

- Social Security benefits; *Richard v. Richard*, 659 S.W.2d 746, 749 (Tex. App. - Tyler 1983, no writ);
- Veteran's Administration benefits; *Ex Parte Johnson*, 591 S.W.2d 453, 454 (Tex. 1979);
- National Service Life Insurance policy issued by Veteran's Administration; *Kamel v. Kamel*, 721 S.W.2d 450, 453 (Tex. App.-Tyler 1986, no writ);
- A professional degree earned during the marriage; *Frausto v. Frausto*, 611 S.W.2d 656, 659 (Tex. Civ. App. – San Antonio 1980, writ dism'd); and
- Personal or professional good will; *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972).

E. Claim for economic contribution or claim for reimbursement

In a decree of divorce, the court must determine the rights of both parties in a claim for economic contribution and a claim for reimbursement. Tex. Fam. Code §7.007.

1. Economic contribution

A marital estate that makes an “economic contribution” to another marital estate has a claim with respect to the benefited estate. Tex. Fam. Code §3.403(a). “Economic contribution”, generally, is a contribution that creates equity in real property, defined as the dollar amount of the reduction of the principal amount of any debts that are secured solely by liens on real property, and the dollar amount of capital improvements made to real property. *See* Tex. Fam. Code §3.402. “Economic contribution” does not include the dollar amount of (1) payments for

maintenance, taxes, interest, or insurance, or (2) the contribution by a spouse of toil, talent, or efforts during the marriage. Tex. Fam. Code §3.402(b).

There are potentially three categories of claims for economic contribution:

1. Claim by the community estate for contributions made for the benefit of one spouse's separate estate;
2. Claim by one spouse's separate estate for contributions made for the benefit of the community estate; and
3. Claim by one spouse's separate estate for contributions made for the benefit of the other spouse's separate estate.

The amount of the claim for economic contribution is a formula that determines the amount of the equity in the benefited estate as of the date of divorce that is due to the contribution by the other marital estate, depicted as follows:

$$\begin{array}{c}
 \boxed{\text{Claim for economic contribution}} \\
 = \\
 \boxed{\text{Equity in the benefited property on date of divorce}}
 \end{array}
 \times
 \frac{
 \boxed{\begin{array}{c} \text{Amount of economic contribution to the property owned by the benefited marital estate by the contributing estate} \end{array}}
 }{
 \boxed{\begin{array}{c} \text{Amount of economic contribution to the property owned by the benefited marital estate by the contributing estate} \\ + \\ \text{Contribution by the benefited estate to the equity in the property owned by the benefited estate*} \end{array}}
 }$$

Tex. Fam. Code §3.403(b).

*The amount of the contribution by the benefited marital estate is measured as follows:

- **Contributions to community property estates:**

If the benefited estate is the community property estate, the amount of the contribution is the net equity of the community property estate in the property owned by the community property estate as of the date of the first economic contribution to

the property by the contributing separate property estate, and any additional contributions subsequently made by the benefited community property estate.

- **Contributions to separate property estates:**

If the benefited estate is a separate property estate, the amount of the contribution is the net equity of the separate property estate in the property owned by the separate property estate as of the date of the first economic contribution to the property by the contributing community or separate property estate, and any additional contributions subsequently made by the benefited separate property estate.

Tex. Fam. Code §3.403(b-1).

The use and enjoyment of property during a marriage for which a claim for economic contribution to the property exists does not create a claim of an offsetting benefit against the claim. Tex. Fam. Code §3.403(e).

Economic contribution by one marital estate to the property owned by another marital estate does not alter ownership of the property. Ownership is determined upon inception of title, and is not affected by the later economic contribution of another marital estate. Tex. Fam. Code §3.404. Thus, for example, if the husband's earnings during marriage, which are community property, are used to retire debt on separate property owned by the husband, the property remains the husband's separate property, but his separate estate may be liable for a claim of economic contribution. *See Langston*, 82 S.W. 3d at 689. On the dissolution of the marriage, the court imposes an equitable lien upon the marital estate to secure the claim for contribution by the other contribution, subject to homestead rights. Tex. Fam. Code §3.406(a). In the decree of divorce, the court shall divide a claim for economic contribution by the community estate to the separate marital estate of one of the spouses. Tex. Fam. Code §7.007(a)(1). A claim of economic contribution by one separate marital estate to the community estate or by one separate estate to another separate estate is awarded to the owner of the contributing separate marital estate. Tex. Fam. Code §7.007(a)(2) – (3).

2. Equitable reimbursement

A claim for reimbursement arises when the funds of one marital estate are expended for the benefit of another. The claim includes (1) payment by one marital estate of the unsecured liabilities of another marital estate; and (2) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse. Tex. Fam. Code §3.408(b). Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate on property that does not involve a claim for economic contribution to the property. Tex. Fam. Code §3.408(d).

In an equitable claim for reimbursement, the party claiming entitlement to reimbursement bears the burden of establishing the net benefit to the payee estate. *Zeptner v. Zeptner*, 2003 WL 1345342 (Tex. App. – Fort Worth 2003). The trial court has broad discretion in determining whether the claim is appropriate. *Beard v. Beard*, 49 S.W. 3d 40, 56 (Tex. App. – Waco 2001,

pet. den'd.) A spouse is entitled to spend a reasonable amount of talent and labor to manage and preserve the separate estate; however, a right of reimbursement to the community estate arises when community time, talent and labor are used to benefit and enhance the spouse's separate estate, beyond what is necessary for maintenance and preservation, without adequate benefit to the community. *Lifshultz v. Lifshultz*, 61 S.W. 3d 511, 516, fn. 2 (Tex. App. – San Antonio 2001, pet. den'd.)

In the decree of divorce, the court determines the rights of both parties in a claim for reimbursement, and applying equitable principles, decides whether to (1) recognize the claim after taking into account all the relative circumstances of the spouses; and (2) orders a division of the claim for reimbursement, if appropriate, in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage. Tex. Fam. Code §7.007(b).

The court may not recognize a marital estate's claim for reimbursement for:

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

Tex. Fam. Code §3.409.

IV. HOW THE SHEETS ARE SPLIT - AUTHORITY FOR DIVISION OF THE MARITAL PROPERTY – CHAPER 7, TEXAS FAMILY CODE

A. General rule – Section 7.001

Chapter 7 of the Texas Family Code includes the general rule of property division set forth in Section 7.001, which states:

In a decree of divorce or annulment, the Court shall order a division of the estate of the parties in a manner that the Court deems just and right, having due regard for the rights of each party and any children of the marriage.

Tex. Fam. Code §7.001.

B. Special circumstances – property acquired in different state – Section 7.002

Section 7.002 applies to property acquired by either spouse during marriage while domiciled in another state. This section gives the court authority to divide the property if the property would have been considered community property had the spouse been domiciled in

Texas. Tex. Fam. Code §7.002(a). This “quasi-community property” statute thus provides that the just and right division standard applies to property acquired by either spouse while domiciled in another state that would have been community property if the acquiring spouse were domiciled in Texas at the time of acquisition. Thus, for example, a child’s educational account acquired by one spouse while living in New York was divisible by a Texas court upon divorce because the educational account would have been community property if acquired by the spouse while living in Texas. *Zorilla v. Wahid*, 83 S.W. 3d 247, 251 (Tex. App. – Corpus Christi 2002, no pet.).

The statute was amended during the 2003 regular session of the legislature to add that property acquired by either spouse while domiciled in another state that would be considered that spouse’s separate property if acquired in Texas, shall be awarded to the spouse as that spouse’s separate property. Tex. Fam. Code §7.002(b).

C. Disposition of Retirement and Employment Benefits and Other Plans - Section 7.003

This section specifically confers upon the respective Court the power to determine the disposition of retirement and any employment benefits and other plans acquired by a spouse, whether employed or self-employed, and the power to determine the rights of both spouses in a claim for economic contribution or claim for reimbursement. Tex. Fam. Code § 7.003.

D. Disposition of interests in insurance – Section 7.004

This section provides that the Court shall divide the parties’ interests in insurance policies. Tex. Fam. Code §7.004.

E. Agreement in settlement of property division – Section 7.006

Chapter 7 also includes a section to promote the amicable settlement of disputes in a suit for divorce or annulment, providing that the spouses may enter into a written agreement concerning a division of the property and liabilities of the spouses and the maintenance of either spouse. Tex. Fam. Code §7.006. The appropriate court reserves the right to review the written agreement and determine whether it is just and right. Upon approval of the agreement, the terms of the agreement are enforceable in a final decree and may also be enforced as a contract. Tex. Fam. Code, § 7.006. Neither the parties nor the Court are required to divide each asset equally, or even to divide each asset at all, so long as the division is just and right. *Conroy v. Conroy*, 706 S.W.2d 745, 747 (Tex. App. — El Paso 1986, no writ). If the parties do reach an agreement for a division of assets and liabilities of the community estate, the parties may recite the terms of the agreement in the divorce decree for court approval or incorporate the agreement by reference. Under any circumstances, the agreement of the parties is enforceable as a judgment. *Keim v. Anderson*, 943 S.W.2d 938, 945 (Tex. App. – El Paso 1997, no writ); *Clanin v. Clanin*, 918 S.W.2d 673, 676-77 (Tex. App. – Ft. Worth 1996, no writ); *Soto v. Soto*, 936 S.W.2d 338, 341 (Tex. App. – El Paso 1996, no writ); *Rivera v. Office of the Atty. Gen.*, 960 S.W.2d 280, 282-83 (Tex. App. – Houston [1st Dist.] 1997, no pet.).

VI. FACTORS CONSIDERED BY THE COURTS WHEN SPLITTING THE SHEETS

A. Discretion of the Court

Courts have wide discretionary powers in the division of community property, and a Court's decision will not be overturned absent a clear abuse of discretion. *Winkle v. Winkle*, 951 S.W.2d 80, 90 (Tex. App. – Corpus Christi 1997, pet. denied); *Dankowsky v. Dankowsky*, 922 S.W.2d 298, 304 (Tex. App. – Ft. Worth 1996, writ dismissed); *Ryder v. Ryder*, 887 S.W.2d 255 (Tex. App. – Beaumont 1984, no writ); *Massey v. Massey*, 807 S.W.2d 391, 398 (Tex. App. – Houston [1st Dist.] 1991, writ denied). The division of the marital estate does not have to be equal; the Court may order an unequal division where a reasonable basis exists. *Williams v. Williams*, 160 Tex. 99; 325 S.W.2d 682, 684 (1959); *Tenery v. Tenery*, 935 S.W.2d 430, 432 (Tex. App. – San Antonio 1995, aff'd in part, rev'd in part on other grounds); 932 S.W.2d 29 (Tex. 1996). Although it is not required that the property be divided equally, the Court must divide the estate in an equitable manner. The Court's discretion is not unlimited and, a division of property can be overturned by appellate review if it is so unjust and unfair as to constitute an abuse of discretion. *Zieba v. Martin*, 928 S.W.2d 782, 786-87 (Tex. App. – Houston [14th Dist] 1996, no writ). Every case must be reviewed on its own merits to determine whether an unequal distribution is justified.

The Texas Supreme Court, in the often-cited *Murff v. Murff* case, addressed the Court's discretion and flexibility in dividing the marital estate. The Court stated:

The trial court in a divorce case has the opportunity to observe the parties on the witness stand, determine their credibility, evaluate their needs and potential, both social and economic. As the trier of the fact, the Court is empowered to use its legal knowledge and its human understanding and experience. Although many divorce cases have similarities, no two of them are exactly alike. Mathematical precision in dividing property in a divorce is usually not possible. Wide latitude and discretion rest in these trial courts, and that discretion should only be disturbed in a case of clear abuse.

Murff v. Murff, 615 S.W.2d 696, 700 (Tex. 1981).

B. Factors considered in division of property

The Supreme Court in *Murff v. Murff* and many intermediate appellate courts have cited a number of factors that can be specifically considered by the Court in making an unequal division of the marital estate. See e.g. *Wilson v. Wilson*, 44 S.W. 3d 597 (Tex. App. – Fort Worth 2001, no pet.); *Farley v. Farley*; 930 S.W.2d 208 (Tex. App. – Eastland 1996, no writ); *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App. – Houston [14th Dist] 1996, no writ); *Panozzo v. Panozzo*, 904 S.W.2d 780 (Tex. App. – Corpus Christi, 1985, no writ); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App. – Fort Worth 1995, no writ).

The Supreme Court has held that the circumstances of each marriage dictate what factors the trial court will consider in dividing the community property. *Young v. Young*, 609 S.W. 2d 758, 761 (Tex. 1980). The existence of one or more of these factors must be proven by a preponderance of the evidence in order to support a disproportionate division. The following list

includes some of the factors which have been cited by the Texas courts as appropriate factors to be considered in the order of importance to the Court's evaluation of the varying equities in the determination of the division of the marital estate, based upon my experience:

- 1) The parties' probable need for future support;
- 2) Disparity in the parties' income and earning abilities;
- 3) The parties' respective business and employment opportunities;
- 4) Differences in the education of the parties;
- 5) Each spouse's financial condition and obligations;
- 6) Fault in the break-up of the marriage;
- 7) The benefits the innocent spouse would have received had the marriage continued;
- 8) Physical health;
- 9) Award of custody of the parties' children;
- 10) Relative sizes of the parties' separate estates and any expected inheritance;
- 11) Waste of community assets, including excessive gifts to others, or constructive fraud against the community;
- 12) Disparity in the parties' ages;
- 13) Length of the marriage.

In any given case, any of these factors, or perhaps others, may rise to the most important factor for the Court to consider, and often, the Court will consider and cite a combination of factors to support an unequal division of property. In most cases, however, the need for future support is the factor which is most often cited as the basis for a disproportionate division of the estate. *See Pickett v. Pickett*, 401 S.W. 2d 846, 848 (Tex. Civ. App. – Tyler 1966, no writ)(probable future need for support seems to be the most important factor in determining the court's exercise of its discretion in dividing the community estate of the parties).

1. Future need for support

The Court in *Goren v. Goren*,² affirmed the trial court's disproportionate division of community property based primarily upon the respective future need of support for the parties. The Court in *Goren*, stated:

In a case at bar, as in the case relied upon by appellant, the trial court was entitled to consider not only the tangible assets and liabilities of the community estate, but other factors such as relative conditions, circumstances, capabilities and experiences of the parties. (citations omitted) The court was not, of course, required to make an equal division of the community estate. (citations omitted) *In making this determination, the trial court was justified in*

considering the parties' respective financial obligations and future earning capacity and their probable respective needs for support. An important factor, if not the most important factor, is the parties' probable respective need for future support. (emphasis added)

Goren v. Goren, 531 S.W.2d 897, 899-900 (Tex. Civ. App. – Houston [1st Dist.] 1975, writ dismissed). The Court addressed evidence supporting the disproportionate division of the estate by the trial court, citing child care costs, indebtedness of the parties, primary custody of the children, disparity in income earning capacity, and some of the specific assets that necessarily had to be awarded to one of the spouses, such as medical equipment for a dental practice.

2. Disparity in income and earning capacity

As cited by the Court in *Murff v. Muff*,² supra, the Court may consider the disparity of earning capacity between the spouses. See also *Baccus v. Baccus*, 808 S.W. 2d 694, 700 (Tex. App. – Beaumont 1991, no writ); *Rafidi v. Rafidi*, 718 S.W. 2d 43, 44 (Tex. App. – Dallas 1986, no writ); *Zuniga v. Zuniga*, 664 S.W. 2d 810, 815 (Tex. App. – Corpus Christi 1984, no writ).

When the Court makes an unequal division, the relative weight of any of these factors can be seen in a type of balancing act. One Court in a case which there was a large disparity of income earning capacity stated as follows:

However, we cannot say that a large disparity in earning capacity requires the trial court to award substantially more than half the estate to the spouse with the lesser earning capacity. This is especially true in the circumstances of this cause where Appellant has received property of substantial value, reasonable child support, and there is no showing that Appellant had financial needs in excess of the property awarded to her. Although the disparity in earning capacity between the parties may have justified awarding Appellant a larger portion of the parties' estate, we hold that the trial court's approximately equal division of the estate, is not manifestly unfair and fell within the bounds of its discretion.

Hanson v. Hanson, 672 S.W.2d 274, 277-78 (Tex. App. – Houston [Houston 14th Dist.] 1984, writ dismissed w.o.j.)

3. Respective business and employment opportunities

The capacities, abilities, and business opportunities of a party may be considered by the Court. This economic factor is also associated with earning capacities. The Court does have discretion to award an unequal division based on these business and employment opportunities. *Rutledge v. Rutledge*, 709 S.W.2d 389, 391 (Tex. App. – Fort Worth 1986, writ refused n.r.e.); *Rafidi v. Rafidi*,² 718 S.W.2d 43, 44 (Tex. App. – Dallas 1986, no writ).

4. Education of the parties

The Courts may divide the community property in a disproportionate fashion based on the educational differences of the parties. *Rafidi v. Rafidi*, supra. This factor is related to the future earning capacity of the spouses.

5. Physical health of the parties

The physical health of the parties is a relevant factor, related to future earning capacity and future need for support. In one case that further demonstrates the trial court's balancing of

interests, the appellate court affirmed an unequal division based, in part, on the physical infirmities of one spouse. The trial court in that case was quoted as stating:

It's an unequal position. I told you I was going to have to make an unequal division. I want you to know why. We have a doctor who is a professional man. Mrs. McCartney is not trained. She is going to have a tough go of it. I recognize that; so, there is an unequal division because it is going to be harder for her to get out there and make a living. I told you that. It's based not upon her physical ability but the fact that she is not a trained person.

The appellate court further stated:

Although the wife in this case at bar received a 6.16% advantage in the value of the property awarded to her under the trial court's decree, the husband's future earning potential was shown to be much greater than the wife's. The wife's physical disability and her lack of training will likely require her to deplete the estate awarded to her in the decree, while the husband's future earnings will likely increase the overall value of the estate awarded to him.

McCartney v. McCartney, 548 S.W.2d 435, 439 (Tex. Civ. App.—Houston [1st Dist] 1976, no writ).

In a case that possibly combines more than one factor, the court awarded a disproportionate share to the wife, who suffered from injuries she received as the result of an attack upon her by her husband. The wife's testimony as to her disability resulting from her injuries, and her present inability to do tasks that she previously could have performed, supported the award of a disproportionate share of the marital property. *Cravens v. Cravens*, 533 S.W. 2d 372, 376 (Tex. Civ. App. – El Paso 1975, no writ).

In another case, where the wife was a quadriplegic, the court awarded to her 85% of the community estate. *Huls v. Huls*, 616 S.W. 2d 312, 317 (Tex. Civ. App. – Houston (1st Dist.) 1981, writ ref'd n.r.e.). Also, where the husband was unable to work due to a heart condition, the court upheld an award of more than 50% of the community property. *Gaston v. Gaston*, 608 S.W. 2d 556, 557-78 (Tex. Civ. App. – El Paso 1981, no writ).

6. Relative size of the parties' separate estates

The Courts often take into consideration the relative size of the separate property estates. In *Dewey v. Dewey*, the Court specifically distinguished the separate estates of the parties by pointing out the fact that the husband was a radiologist with a separate property professional association generating \$336,000.00 per year and offering numerous fringe benefits. The Court further noted that the doctor had a separate estate which was extremely large and included, among other things, a separate property residence, bank accounts, pension plan benefits accrued prior to marriage, and an IRA. The Court contrasted the size of the husband's separate estate with the wife's disparity in income and poor health. See *Dewey v. Dewey*, 745 S.W.2d 514, 520 (Tex. Civ. App. - Corpus Christi 1988, writ denied).

7. Disparity in age

The Court of Appeals has held that age may well have been considered in awarding approximately 150 acres of land to the wife, when she was 20 years older than her husband. The Court found that the unequal division was fair, just, and right, and there was no abuse of discretion. *Roberts v. Roberts*, 535 S.W.2d 373, 374 (Tex. Civ. App. – Tyler 1976, no writ).

8. Length of the marriage

The court may take into consideration the length of a marriage; in fact, at least one appellate court has taken into consideration that the marriage was brief in duration. *Trevino v. Trevino*, 555 S.W. 2d 792, 802-03 (Tex. Civ. App. – Corpus Christi, 1977, no writ).

9. Fraud

Fraud on the community is a wrong by one spouse that the court may consider in its division of the estate of the parties and that may justify an unequal division of the property. *Schleuter v. Schleuter*, 975 S.W.2d 584, 588 (Tex. 1988). Generally, it involves one spouse wrongfully depriving the other spouse's share of the community assets, such as by making gifts to persons outside the community. In *Schleuter*, the Supreme Court confirmed that the remedy for fraud on the community relates to the division of the marital property, and is not a recovery of damages.

In that case, the husband had transferred various community assets to his father shortly before he filed for divorce. The wife counterclaimed for divorce and brought independent tort claims against her husband and father-in-law seeking damages for fraud, breach of fiduciary, and conspiracy. The trial court awarded a disproportionate division of the community estate favoring the wife and also rendered judgment for the wife against the husband and his father for actual and exemplary damages and attorney's fees. The court of appeals affirmed the trial court's judgment.

The Supreme Court reversed the trial court's award of actual and exemplary damages and attorney's fees and remanded to the cause back to the trial court for a new property division. The Court did not deny the injured spouse a remedy for fraud on the community, but rather defined the nature of the remedy that could be awarded. The Court cited *Belz v. Belz*, 667 S.W. 2d 240, 247 (Tex. App. – Dallas 1984, writ ref'd n.r.e.) as follows:

a claim of fraud on the community is a means to an end, either to recover specific property wrongfully conveyed . . . or . . . to obtain a greater share of community estate upon divorce, in order to compensate the wronged spouse for his or her interest in the community estate.

The Court did not deny the possibility that the trial court can award a money judgment to one spouse, but the judgment is limited to recouping the defrauded spouse's share of the community property lost as a result of the wrong-doing spouse's breach of the trust relationship.

It would logically appear that although one could seek a jury finding on the existence of fraud and perhaps the damages sustained by the community estate, the ultimate remedy is left with the trial court to determine a just and right division, including consideration of the jury finding.

10. Fault

In making its determination of a just and right division, the trial court may consider fault in the break up of the marriage and award the party not at fault a greater percentage of the property because of such conduct. *Velasco v. Haberman*, 700 S.W.2d 729, 730 (Tex. App. – San Antonio 1985, no writ). The consideration of fault includes physical abuse. *Faram v. Gervitz-Faram*, 895 S.W.2d 839, 844 (Tex. App. – Fort Worth 1995, no writ). In order for the court to consider fault, however, it must be pleaded and proven as a ground for divorce. *Phillips v. Phillips*, 75 S.W.3d 564, 572 (Tex. App. – Beaumont 2002, no writ).

C. Presence of factors does not mandate unequal division

Even where equities may favor one spouse, the equal division of the community property is not necessarily an abuse of discretion. *Rafferty v. Finstaid*, 903 S.W.2d 374, 377 (Tex. App. – Houston [1st Dist] writ den'd); *Humble v. Humble*, 805 S.W. 2d 558, 563 (Tex. App. – Beaumont 1991, writ den'd).

D. Methods of property division

Courts have wide latitude in structuring a division of the community estate in a manner the court determines to be “just and right”. The court may order property to be sold, and the proceeds distributed to the parties. *See Laster v. First Huntsville Properties Co.*, 826 S.W. 2d 125, 129-32 (Tex. 1991). Or, the court may order that the proceeds be used to pay community debts. *See Mallou v. Payne & Vendig*, 750 S.W. 2d 251, 257 (Tex. App. – Dallas 1988, writ den'd).

The court may also award one party a money judgment to balance a disproportionate award of assets to the other party. This generally occurs when (1) most of the community assets are impractical to divide, such as a professional business, *see Mullins v. Mullins*, 785 S.W. 2d 5, 10 (Tex. App. – Fort Worth 1990, no writ), (2) when the court awards a claim for reimbursement, *see Hanson v. Hanson*, 672 S.W. 2d 274, 278 (Tex. App. – Houston [1st Dist.] 1992, no writ), or (3) when a spouse has wasted community property. *See Falor v. Falor*, 840 S.W. 2d 683, 688 (Tex. App. – San Antonio 1992, no writ).

VII. OFF THE MENU – PRACTICAL TIPS RELATING TO PREPARING AND PRESENTING THE CASE

Following are some practical issues that arise in the course of representing clients in divorce cases. All members of the legal team, including attorneys, legal assistants, and other staff members, should be cognizant of these issues, so that the client receives effective legal representation.

A. PRE-MEDIATION AND PRE-TRIAL

1. Create Realistic Expectations with Your Client

Do not give yourself the impossible task of having to “create wealth.” That is, as painful as it may be on occasion, you must give your client the realistic picture of the financial situation after divorce. A key way of doing this, of course, is to prepare a budget not only for the purposes of temporary orders and trial, but also to show the client the economic resources that

may be available depending on the outcome. In a case where you have a large community estate, you still will want to create a budget and, in addition, you may refer your client to an estate planning attorney for purposes of drafting a new will and exploring estate planning tools.

2. Your Client Needs a Shoulder to Cry On.

An attorney or legal assistant cannot provide all of the personal counseling that a client may need in the traumatic events of a divorce. There is a danger of succumbing to the emotional turmoil which may affect your judgment or by failing to tell the client difficult facts. Encourage your client to seek a professional counselor, and, if desired, to include a friend, family member, or other confidant in meetings, so long as you safeguard the attorney-client privilege.

3. The Legal Team Must Communicate the Same Message

The attorneys, legal assistants, other staff members must communicate the same message to the client. A precarious situation may arise if the attorney is informing the client to expect a dramatic alteration of lifestyle, while, simultaneously, another member of the legal team is stating that the attorney can work miracles and that the client should not worry about the future.

4. You Must Count the Sheets Before you Divide Them

The legal team must identify and evaluate the assets and liabilities of the marital estate. The most common tool for this procedure, of course, is the pursuit of the discovery procedures that are provided for in the Texas Rules of Civil Procedure, including interrogatories, requests for production, requests for admission, requests for disclosure, and depositions. Another key event that must take place in a case is to require in the temporary orders that the opposing party provide a sworn inventory from the opposing party pursuant to Tex. Fam. Code §6.502(a)(1).

You must identify all tangible as well as intangible property. Intangible intellectual property can be one of the greatest assets that can be held in the estate. These intellectual properties include such things as patents and copyrights.

5. Familiarization with financial reports

The legal team must have a command of financial statements, tax returns, and portfolio statements. There are numerous publications of great aid provided by organizations such as the American Institute of Certified Public Accountants (website <http://www.aicpa.org>). These financial source documents reveal information that the opposing party may not freely share with you. For example, careful examination of tax returns can demonstrate entries for income that signify income-producing assets which may or may not be disclosed on the inventory of the opposing party. Careful examination of the schedules attached to tax returns often will disclose extraordinary expenses and closely-held businesses, or very vague disclosures of business expenses. If discovery is pressed, often the extraordinary or vague descriptions of expenses lead forward to third-parties or hidden accounts.

Often parties perform “self-help” property division before divorce; that is, make numerous or extraordinary deposits and withdrawals and ATM activities and such are seen occurring weeks, if not months before the filing of a divorce. As an example, in a case I had this year, the opposing party was traveling on business in New York City just prior to September 11, 2001, and was forced to spend an entire week there before he could fly back to San Antonio. Careful examination of his bank records showed that he miraculously made numerous ATM withdrawals in San Antonio while he was in New York City. This, plus additional discovery, led

to the disclosure that he had a girlfriend in San Antonio who had the privilege of using an ATM card on his account.

The existence of a closely-held business solely managed by one party leads to more complex problems. You must evaluate the financial transactions within a closely-held business to determine whether there has been any internal fraud. In a case that I tried to a jury approximately three years ago, it was discovered through a review of the financial records that the husband-ophthalmologist had reduced his salary during the course of the months leading up to the filing of the divorce, as well as the following year of the pending divorce. The husband's medical practice was his separate property since he started the practice prior to his marriage. His retained cash in the separate property business grew from \$100,000.00 to approximately \$800,000.00 at the time of trial. We concluded that he had committed fraud in his fiduciary capacity by intentionally underpaying himself for his community property time, talent, and labor. We were successful in getting the \$700,000.00 constructively included in the estate for division.

Another area you need to be careful in looking for is prepayment of expenses and overpayment of future income taxes.

6. Obtain professional forensic assistance, if possible.

It is very difficult for the legal team to provide legal services, as well as be the accountant, business evaluator, and financial sleuth. The optimal team includes the attorney and legal assistant, secretary, and other staff, but also includes the utilization of a forensic accountant. I have also found that there are other people who provide ample assistance at a lower rate. For example, I have used the services of a retired IRS auditor. He was excellent at retrieving information upon reviewing thousands of pages of documents and provided his services at a rate of one-third of what a CPA would charge.

In one of my recent cases, discovery revealed that the opposing party husband had paid in cash one year's rent in advance for his girlfriend and that he had taken numerous trips across the country. We obtained photographs of him and his girlfriend at Notre Dame stadium.

In another case, although the party accurately denied purchasing gifts for a girlfriend, continued questioning of the party in a deposition disclosed that he had created numerous pieces of jewelry worth thousands of dollars. Probably most of you have experienced, and will experience, that careful economic sleuthing often pays off in more dividends than private-eye investigations.

B. MEDIATION AND TRIAL

1. Choose an effective mediator

All of your work is useless unless a mediator is experienced enough to appreciate the strength of your case and smart enough to finesse a settlement. You must understand your mediator and what influences his opinion. In San Antonio we have a presiding court system, and you have no idea which of the thirteen judges you may get so it is impossible to advise your client concerning any particular biases of the judge. On the other hand, we often choose mediators in San Antonio and thus can predict their biases to some degree.

2. Opening Statement

In mediation, an opening statement is the most critical aspect of the process. It is the legal team's opportunity to speak to the opposing party and to tell him why he should settle the division of the estate in a manner that you deem is just and right. In other words, this is your opportunity to either frighten him or encourage him for purposes of settlement. In a trial environment, there is also the opportunity to present your wish list to the court and your expectations on what you believe you will present that will satisfy the Court in terms of the equitable factors which should be considered in favor of your client.

3. Offers at mediation

In mediation, plan at least three offers in advance. It has been my experience that there are at least five exchanges between the parties in a mediation before the case can settle. Huge amounts of time are wasted in mediation by parties who fail to "walk through" the mediation process prior to the day of mediation. There is no excuse for not having at least three offers and counter-offers prepared and anticipate the responses of the opposing party. I often have 3 to 5 offers prepared and typed; however, I obviously don't disclose this to the mediator. Prior to mediation you should understand from your client what their bottom line is.

4. Bring a crucial witness to mediation

The "crucial witness" may be a forensic accountant or may be a witness to physical abuse. The impact of an accountant or a key-fact witness on the mediator can be huge. Mediators grow accustomed to the advocacy of the legal team, but often seem to accept the credibility of non-lawyer witnesses. The same is true in a courtroom trial.

5. Share Crucial Information and Organization for Trial with the Mediator

Prepare important exhibits and shortened renditions of testimony for reference during the mediation. Have an updated inventory and spreadsheet or program. Provide exhibits including graphics of future income and wealth disparity.

Prepare your client.

Control your client.

Prepare yourself. Be appropriately motivated and prepared with opening statement and outline of presentation.

6. Trial Presentation

The first thing I tell a client with regard to winning or losing a trial is to make the judge or jury your friend. If you can make the judge or jury your friend through your client's testimony and the trial team's demeanor, the jury or judge will find a way to configure the facts and law to provide a division of the estate that is just and right from your prospective. I personally prescribe to a presentation that is aggressive, but dignified.

Other important points are:

- Dress in a dignified and professional manner.

- Be punctual.
- Rise when the Judge enters the Court.
- Rarely make side-bar remarks, with a few exceptions.
- Address all persons by surnames.
- Treat all persons in the court with courtesy.
- Be the first one in the courtroom to get the closest counsel table to the jury.
- Sit at the table closest to the jury in a jury trial.
- Sit at the table closest to the testifying witness in a non-jury trial.
- Have an organized counsel table with exhibits and notebooks premarked.
- Instruct the witnesses and party to be polite to all, answer directly, and simply to stay within their natural character.

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