**Arizona Marital Property Laws: Designation of Assets in Divorce**
***-- Community Property and Separate Property***

By Scott David Stewart

In any divorce proceeding, the issue of how to divide assets and debts must be resolved. This article provides a framework for understanding Arizona marital property law and determining whether an asset is separate property or community property.

## Community Property and Separate Property.

*Community property is marital property.* It includes all assets accumulated during the marriage, regardless of whether the asset is in one spouse's name or the other. *A.R.S. § 25-211.* Although assets acquired during the marriage will likely be community property and subject to equal division between the spouses, there are exceptions: the asset was owned prior to the marriage, or was acquired by gift, or acquired by inheritance during the marriage. *A.R.S. § 25-213.*

An asset that is separate property is not a part of the marital estate and will not be subject to division in a divorce. If an asset was acquired before the marriage, it may remain the separate property of one spouse at the time of dissolution. This is not a hard and fast rule. The characterization of property depends in great part on how the asset was used during the marriage, usage can change the asset's character from separate to community property. Furthermore, a portion of the asset's value may remain separate property, while a portion becomes marital property. All of this depends on the facts of each individual case.

The parties are always free to agree on the designation of an asset as the separate property of one spouse or the community property of both spouses—this is a part of the *negotiation of a divorce*.

## Acquisition Determines the Character of Real Property.

An asset is characterized as either separate property or community property at the time of purchase or acquisition. *Separate property, followed by marriage, is still separate property.* Generally, when community money is used to pay a mortgage or used to make improvements to the separate real property of one spouse, however, the non-owning spouse is entitled to reimbursement. That is, reimbursement for the community money spent on the other spouse's separate property.

Here's an example: *Husband owned a home prior to the marriage, his separate property. During the marriage, marital funds were used to pay down his mortgage thereby reducing the principal owed. The reduction in principal may be a community asset subject to division. If marital funds were used to improve Husband's property which resulted in an increased property value, then that increase in value is a community asset, too.*

## Transmutation of Separate Property into Community Property.

Transmutation of separate property means the ownership has changed -- what started as separate property was converted into marital property. The *methods of transmutation* are straightforward: transmutation by agreement between the spouses, transmutation by gift from the owning spouse to the community, or transmutation by commingling the separate property with marital property so much so that it loses its prior separate character.

**Transmutation by Gifting Real Property – Creating Joint Tenancies.**

When one spouse conveys his or her separate real property interest to both spouses as joint tenants, *the law presumes it was a gift to the community*. This legal presumption can be rebutted, but only with clear and convincing evidence. When a party owns a home prior to the marriage and subsequently conveys title in joint tenancy to both spouses, he or she has gifted the value of the home to the marriage -- it becomes a community asset.

***Donative intent is required for a valid gift to the community.***

The only way to defeat this legal presumption that a joint tenancy conveyance is a gift to the community is to convince the court, by a burden of clear and convincing evidence, that no gift to the community was ever intended – that is, there was no donative intent.

***Case #1. Sloane v. Sloane -- Yes donative intent.***

If the alleged transmutation of property occurs by gift, then the usual rules as to sufficiency of evidence apply. One of the first requirements of a valid gift is donative intent. In one case, the husband asserted that, although he transferred his property (acquired before the marriage) from his name to jointly titled property with his wife (during the marriage), the property should not be considered community property because he lacked donative intent. He conveyed the property into joint tenancy not to gift it to the community, but as a testamentary device to avoid a future probate proceeding. The court found husband's argument insufficient and held the property had been transmuted from separate property into community property. The point from this case? *There is a presumption created by a joint tenancy that cannot be overcome by the hidden intentions of one spouse.* The legal presumption that the joint tenancy creates a gift to the community can only be overcome by evidence proving a common understanding or agreement between both spouses that the character of the property was to be something other than a joint tenancy.

***Case #2. Nationwide v. Massabni -- No donative intent.***

In another case, there was sufficient evidence to show husband never intended a gift of his separate property to the community. The real property deed was in husband's name only, as his separate property. To avoid garnishment of his separate property by a creditor, he claimed it was really community property. Because only husband was liable on the debt, community property was out-of-reach for this creditor. Husband's evidence in support of his donative intent to gift his separate real property to the community included a promissory note payable to both spouses over the subject property. *The court rejected husband's claim of community property because, in part, his wife wasn't added to the promissory note until after his creditor had filed the lawsuit against him.* Consequently, the court ruled that there was no donative intent, no gift to the community, and the asset remained husband's separate property.

**Joint Tenancy and a Co-Tenant's Right to Reimbursement.**

In a dissolution of marriage, the court may consider the expenditure of separate funds for the purpose of fulfilling existing joint obligations. When property is held in joint tenancy, *the law of joint tenancy permits reimbursement to the contributing co-tenant*. The court cannot, however, order a substantially unequal division of property held in joint tenancy for the purpose of reimbursing the spouse who used separate funds to acquire that property. A substantially unequal division of property held in joint tenancy can only be agreed upon by the parties.

Here's a case in point. In *Whitmore v. Mitchell* the court recognized that spending separate monies after the joint tenancy was created may entitle the contributing spouse to reimbursement. Absent an agreement to the contrary, a court may *not* order a substantially unequal division of jointly held property solely to reimburse one of the spouses for spending his or her separate funds to acquire the property. This court made an important distinction on the reimbursement of separate funds. First, a joint tenant has a right to reimbursement for separate funds used to improve the jointly held property. When property is acquired with separate funds after the marriage and put in joint tenancy, there is no reimbursement for the separate funds used to buy the property—that was a gift to the community. If after the property is purchased the spouses hold in joint tenancy, then the contributing co-tenant may be reimbursed for separate monies used to benefit the other co-tenant. *"[T]here can only be a right to reimbursement when a joint obligation exists. The obligation does not come into existence until the property is purchased [and placed in joint tenancy]."* Second, if the asset is community property and separate funds were used to make improvements to it, then the contributing spouse has no right to reimbursement.

*(There was one rather extreme case when the Arizona Supreme Court allowed a substantially unequal division of joint tenancy property. The marriage was of extremely short duration, in only two weeks the parties had physically separated and, in another two weeks, had filed for an annulment.* Toth v. Toth*)*

The same rule applies to community property -- the court cannot order a substantially unequal division of community property for the purpose of reimbursing the spouse who used separate funds to acquire the asset. There is no reimbursement for subsequent expenditures on community property in a divorce either, unless, once again, there is an agreement to reimburse between the parties.