

Divorce: What is separate property and what is community property?

Under the Texas Family Code, a spouses separate property consists of 1) the property owned or claimed by the spouse before marriage; 2) the property acquired by the spouse during marriage by gift, devise, or descent, and 3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

The terms “owned and claimed” as used in the Texas Family Code mean that where the right to the property accrued before marriage, the property would be separate. Inception of title occurs when a party first has a right of claim to the property by virtue of which title is finally vested. The existence or nonexistence of the marriage at the time of incipiency of the right of which title finally vests determines whether property is community or separate. Inception of title occurs when a party first has a right of claim to the property.

Under Texas Constitution, Art. XVI, Section 15, separate property is defined as all property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses may also from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other that gift is presumed to include all income or property which might arise from that gift of property; and spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses’ community property.

In 1917 the Legislature defined and income from separate property to be the separate property of the owner spouse. In *Arnold v. Leonard*, 114 Tex. 535,273 S.W. 799 (1925), the Supreme Court held that the Legislature did not have the constitutional authority to characterize the income from separate property as the owner’s separate property. The court explained that the Legislature’s authority was limited to enacting laws regulating the management and liability of marital property, not its separate or community character. This decision strengthened the constitutional principal that the Legislature may not define what is community and separate property in a manner inconsistent with Article 16, Section 15 of the Texas Constitution.

There are numerous means by which separate property may be acquired in defiance of Article 16, Section 15, a partial list includes mutations of separate property, increases in value of separate land and personality, recovery for personal injury not measured by loss of earning power, improvements of separate land with an unascertainable amount of community funds, and United States Securities purchased with community funds.

Although such property may undergo changes or mutations, as long as it is traced and properly identified it will remain separate property.

The Texas Family Code defines community property as follows: “community property consists of the property, other than separate property, acquired by either spouse during marriage.”

Texas Family Code, Section 3.003 states that all property possessed by either spouse during or at the dissolution of the marriage is presumed to be community property and that the degree of proof necessary to establish that property is separate property, rather than community property, is clear and convincing evidence. Clear and convincing evidence is defined as that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. If property cannot be proved to be separate property, then it is deemed to be community property.

The Texas Family Code, Section 7.002, deals with quasi-community property and requires a court divide property wherever the property is situated, if 1) the property was acquired by either spouse while domiciled in another state and the property would have been community property if the spouse who acquired the property had been domiciled in Texas at the time of acquisition; or 2) property was acquired by either spouse in exchange for real or personal property and that property would have been community property if the spouse who acquired the property so exchanged had been domiciled in Texas at the time of the acquisition.