

Plano Area Enrolled Agents Association

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TEXAS COMMUNITY PROPERTY ESSENTIALS

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TEXAS COMMUNITY PROPERTY ESSENTIALS

I. COMMUNITY PROPERTY IN TEXAS

A. Introduction

- * Community Property is a form of joint ownership between spouses
- * Nine community property states; Two non-community property states allow community property to be created by written agreement (Texas, Louisiana, New Mexico, Arizona, California, Washington, Idaho, Nevada, Wisconsin - - Alaska, Tennessee)
- * Community property rules aren't identical (ex. Texas vs. California)
- * Title is not the end of the analysis

Examples	
1	Car is titled in only H's name Could be community property, could be separate property
OR	
2	Car is titled in the name of H & W Could be community property, could be separate property

B. Texas: Community Property or Separate Property – How to Know (Guidance)

- * Texas Constitution, Art. XVI, §15
Separate Property and Community Property – All property, both real and personal, of a spouse owned or claimed before marriage, and that is acquired afterward by gift, devise or descent, shall be the separate property of that spouse...
- * Texas Family Code

§3.001 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 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

§3.002 Community Property
Community property consists of the property, other than separate property, acquired by either spouse during marriage

C. Community Property or Separate Property: Why Does It Matter?

- * Divorce
- * Probate (Focus on Intestacy)
- * Estate Planning
- * Tax Basis
- * Creditors

C1. DIVORCE

- * Only CP is subject to division in divorce (i.e., SP will not be divided)
- * Texas Family Code §7.001
General Rule of Property Division
...the court shall order...JUST and RIGHT
- * Presumption of CP
- * Texas Family Code §3.003
(a) – during or on dissolution, presumed to be CP
(b) – clear and convincing evidence (challenger has burden)
- * Commonly used to “attack” the presumption
 - * Inception of title
 - * Tracing

Examples	
1	<p>H owns 20 acres of land when he marries W H and W get married; get divorced five years later Land is presumed to be CP – but is it really CP?</p> <p>Result:</p> <hr/> <hr/>
2	<p>H owns 20 acres of land when he marries W While married, H sells the land H uses the proceeds and nothing else to buy a houseboat H & W get divorced, houseboat is presumed to be CP but is it really?</p> <p>Result:</p> <hr/> <hr/>

C2. PROBATE (FOCUS ON INTESTACY)

- * Intestate Distribution of Community Property
- * Texas Estates Code §201.003

KEY: Does the Decedent have any surviving descendants who are not descendants of the surviving spouse?

Examples	
1	<p>H & W, they have child C H dies intestate survived by W and C H has no other descendants</p> <hr/> <p>Result:</p> <hr/> <hr/>
2	<p>H & W, H has child C from his prior marriage H dies intestate survived by W and his child C</p> <hr/> <p>Result:</p> <hr/> <hr/>
3	<p>H & W H has child C from a prior marriage, H and W have child D H has no other descendants, H dies intestate Survived by W, C, and D</p> <hr/> <p>Result:</p> <hr/> <hr/>
<p>Separate Property is distributed according to a different set of rules</p> <ul style="list-style-type: none"> * Who are the survivors? * Real or personal property? * Texas Estates Code §201.001 and §201.002 	

C3. ESTATE PLANNING

H & W They have community property and each has some separate property	
Example	
1	H dies survived by W and H's brother H has a Will, leaves all of his property to his brother
	Result: _____ _____

C4. TAX BASIS: COMMUNITY PROPERTY vs. SEPARATE PROPERTY

Examples	
1	<p>H buys 20 unimproved acres for \$50,000.00, then marries W Land is SP, it is never converted into CP H dies survived by W FMV of land when H dies is \$200,000.00 H has a Will, leaves land to W What is W's basis in the land?</p> <p>Result:</p> <hr/>
Instead:	
2	<p>W dies before H FMV of land when W dies is \$200,000.00 (it is still SP) W has a Will and leaves her estate to H What is H's basis in the land?</p> <p>Result:</p> <hr/>
Compare:	
3	<p>H buys 20 unimproved acres for \$50,000.00, then marries W H & W execute a valid agreement to convert the land into CP W dies first, FMV of land is \$200,000.00 W has a Will and leaves her estate to H What is H's basis in the land?</p> <p>Result:</p> <hr/>

C5. CREDITORS

H & W (married)

H is a physician, W is a school teacher

Each has SP

They have Joint Management CP

Each has Sole Management CP

(Texas Family Code §3.102; examples of Sole Management CP include personal earnings and revenue from separate property; Joint Management CP is subject to the joint management, control and disposition of the spouses)

Examples	
1	H (while married) is sued for medical malpractice, loses What can the judgment creditor take? (tort claim)
	Result: _____ _____ _____
2	H (while married) signs a contract to buy an office building H defaults, H is sued and loses What can the judgment creditor take? (breach of contract, not a tort)
	Result: _____ _____ _____

II. ALEX'S QUESTIONS

How to protect SP from Texas CP rules?	
Common Solutions:	

Unexpected Consequences of Texas CP	
1	Homer has a \$100,000 CD when he marries Marge When they get divorced, the CD has increased to \$110,000 What happens to the CD as a result of the divorce?
	Result: _____ _____ _____
2	Norm and Cliff are friends, they decide to go into business together Norm is married to Vera, Cliff is not married Norm and Cliff decide to form NC, LLC to operate the business Norm and Cliff are the only members listed in the operating agreement of the LLC Vera does not participate in the business in any way Norm and Vera get divorced; Does Vera have a CP interest in Norm's membership interest in the LLC?
	Result: _____ _____ _____

Unexpected Consequences of Texas CP

Nick & Nora (H & W); CP residence in Texas
Deed in both names; They were married when the property was acquired; The property was their homestead
Nick dies – survived by Nora
Nick had a Will leaving everything to Nora
Nora does not file the Will for probate because she believes it's not needed

15 years after Nick's death, Nora decides to sell the residence

Result:

3

What if Nick died intestate survived only by Nora?

Result:

What if Nick died intestate survived by Nora and Nick's child (previous marriage)?

Result:

Texas Constitution Article XVI, Section 15

Sec. 15. SEPARATE AND COMMUNITY PROPERTY. 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 also may 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 the income or property which might arise from that gift of property; spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse; 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.

(Amended Nov. 2, 1948, Nov. 4, 1980, Nov. 3, 1987, and Nov. 2, 1999.)

United States Code

- United States Code
- TITLE 26 — INTERNAL REVENUE CODE
- SUBTITLE A — Income Taxes
- CHAPTER 1 — NORMAL TAXES AND SURTAXES
- SUBCHAPTER O — Gain or Loss on Disposition of Property
- PART II — BASIS RULES OF GENERAL APPLICATION

26 U.S.C. § 1014. Basis of property acquired from a decedent

(a) In general — Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be —

(1) the fair market value of the property at the date of the decedent's death,

(2) in the case of an election under section 2032, its value at the applicable valuation date prescribed by such section,

(3) in the case of an election under section 2032A, its value determined under such section, or

(4) to the extent of the applicability of the exclusion described in section 2031(c), the basis in the hands of the decedent.

(b) Property acquired from the decedent — For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

(1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;

(2) Property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent, with the right reserved to the decedent at all times before his death to revoke the trust;

(3) In the case of decedents dying after December 31, 1951, property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent with the right reserved to the decedent at all times before his death to make any change in the enjoyment thereof through the exercise of a power to alter, amend, or terminate the trust;

(4) Property passing without full and adequate consideration under a general power of appointment exercised by the decedent by will;

(5) In the case of decedents dying after August 26, 1937, and before January 1, 2005, property acquired by bequest, devise, or inheritance or by the decedent's estate from the decedent, if the property consists of stock or securities of a foreign corporation, which with respect to its taxable year next preceding the date of the decedent's death was, under the law applicable to such year, a foreign personal holding company. In such case, the basis shall be the fair market value of such property at the date of the decedent's death or the basis in the hands of the decedent, whichever is lower;

(6) In the case of decedents dying after December 31, 1947, property which represents the surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate under chapter 11 of subtitle B (section 2001 and following, relating to estate tax) or section 811 of the Internal Revenue Code of 1939;

(7) Repealed. Pub.L. 113-295, div. A, title II, Sec. 221(a)(74)(B), Dec. 19, 2014, 128 Stat. 4049

(8) Repealed. Pub.L. 113-295, div. A, title II, Sec. 221(a)(74)(B), Dec. 19, 2014, 128 Stat. 4049

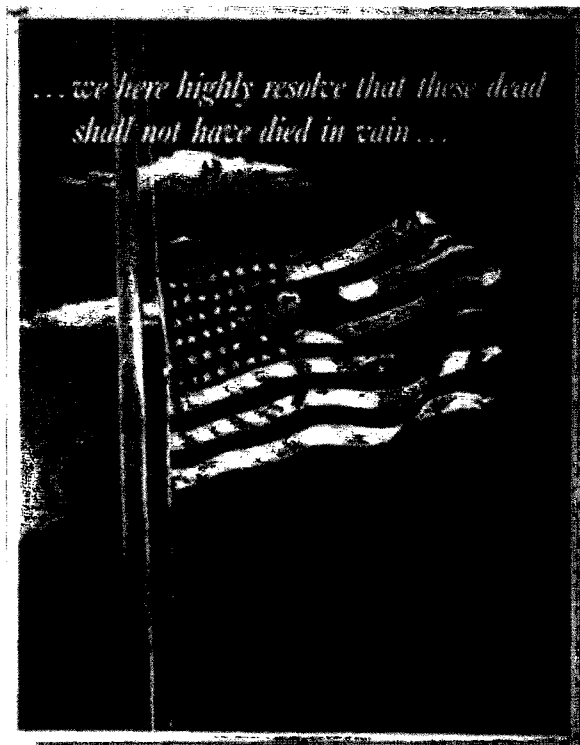
(9) In the case of decedents dying after December 31, 1953, property

REMEMBER PEARL HARBOR

On December 7, 1941, over 2,000 brave Americans were killed when the Imperial Japanese Navy attacked the United States Naval Base at Pearl Harbor, Hawaii. President Franklin Roosevelt said it was “a date which will live in infamy.”

It is important not to forget what happened that day or the people who were killed.

On December 7, 2015, fly your American flag in honor of those who lost their lives serving our country.



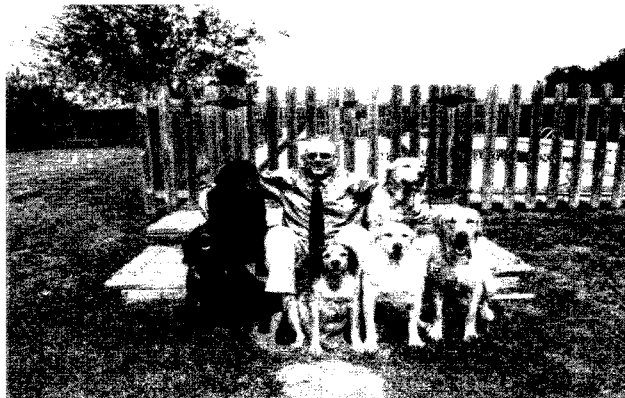
ABOUT THE AUTHOR

Matt Sullivan graduated with highest honors from Texas Wesleyan University School of Law. He earned a Master of Laws (LL.M.) in Taxation from Southern Methodist University School of Law and a Master of Laws (LL.M.) in Elder Law from Stetson University College of Law. He has also earned a Graduate Certificate in Finance from the Edwin L. Cox School of Business at SMU and a Graduate Certificate in Dispute Resolution from SMU.

Mr. Sullivan has been an adjunct instructor for Texas Wesleyan University School of Law and the College for Financial Planning. He has been approved as an Accredited Attorney by the Department of Veterans Affairs.

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Matt Sullivan (wearing the tie)
with his “assistants”
Front row: Boz, Bogey, Babe, Blaze
Back row: Boomer, Bevo