

Real Property & Divorce: Getting Disentangled

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Provider: Tiago Title, LLC
Provider No.: 9961
Instr.: Sean A. Clemmensen,
President &
General Counsel of
Tiago Title
Instr. No.: 1288



Come Visit Us!

Dallas

5950 Sherry Lane, Suite 300

Dallas, Texas 75225

214.389.5100

Plano/Frisco

5600 Tennyson Parkway, Suite 385

Plano, Texas 75024

972.473.0330

Sean@TiagoTX.com

281.923.5708 (Mobile)

Introduction

- Real estate transactions arising during a pending divorce often involve high emotions, strained communications, and unreliable cooperation between necessary parties.
- An agent's understanding of the resulting documentation requirements will help his or her clients know what to expect, thereby alleviating some anxiety as the transaction nears closing.

Introduction

- Whether buying or selling, a married person or couple finding themselves in the midst of a divorce are often besieged by unexpected issues and ramifications connected to the transaction.
- Problems arise due to Texas community property laws, homestead issues and recording requirements.

Characterization of Property - Separate Property

- Property that is owned by either spouse before the marriage; property that is acquired during the marriage by gift, will, or inheritance; and property that is purchased with separate property funds.
- Can be created by the spouses with a written agreement partitioning or exchanging community property.
- Texas Family Code Section 3.001

Characterization of Property - Community Property

- Defined by exclusion as all property other than separate property.
- Texas is a community property state.
- Most common types of community property include salary, wages, and income generated from both community property and separate property.
- Dividends and income earned on separate property investments are not separate property, but instead are community property.
- Texas Family Code Section 3.002

Characterization of Property - Community Property

- Presumption in Texas that all assets owned by a husband and wife are community property.
- All assets acquired during the marriage presumptively belong to the community.
- All assets on hand during the marriage, and on dissolution of the marriage by death or divorce, are presumptively community assets. Separate property must be proven to be separate by the spouse asserting that it is separate by clear and convincing evidence.

Inception of Title Doctrine

- In those cases where classifying the assets is required, Texas applies the inception of title rule.
- Under this rule, the character of the asset as separate or community property is determined at the time the asset is acquired.
- Subsequent events, such as the payment of a mortgage, do not change the character of the asset.
Consider the following example:

Inception of Title Doctrine

Example: A single man acquires a residence and agrees to pay a mortgage. Shortly thereafter, he marries and the mortgage payments are thereafter made from community property funds. The home will be the separate property of the husband. Upon death or divorce, the wife may have a claim for the expenditure of community funds to pay the principal portion of the mortgage, but that does not affect the separate property ownership by the husband. There is no claim by the community for the interest portion of the mortgage, because the community received the use of the residence.

Inception of Title Doctrine

- Under the inception of title doctrine, how title is held in Texas does not determine ownership.
- Thus, regardless of whose name appears on the title, the inception of title rule looks to the time and circumstance of the acquisition to determine whether the asset is a community asset or a separate asset.

Example 3: Husband buys a fancy sports car in his own name. Because it was acquired during the marriage, it is presumptively community property, even though only one name is on the car title.

The Texas Homestead

- Sec. 51. AMOUNT OF HOMESTEAD; USES. The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided, that the homestead in a city, town or village shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business, of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired; provided further that a release or refinance of an existing lien against a homestead as to a part of the homestead does not create an additional burden on the part of the homestead property that is unreleased or subject to the refinance, and a new lien is not invalid only for that reason.

The Texas Homestead

- Texas Family Code Sec. 5.001. SALE, CONVEYANCE, OR ENCUMBRANCE OF HOMESTEAD.

Whether the homestead is the separate property of either spouse or community property, neither spouse may sell, convey, or encumber the homestead without the joinder of the other spouse except as provided in this chapter or by other rules of law.

- Are there any exceptions to the requirement for the spouse's joinder?

Texas Family Code Sec. 5.002. SALE OF SEPARATE HOMESTEAD AFTER SPOUSE JUDICIALLY DECLARED INCAPACITATED. (applies only where property is that of the competent spouse)

Texas Family Code Sec. 5.003. SALE OF COMMUNITY HOMESTEAD AFTER SPOUSE JUDICIALLY DECLARED INCAPACITATED.

The Texas Homestead

- Are there any exceptions to the requirement for the spouse's joinder?

Sec. 5.101. SALE OF SEPARATE HOMESTEAD UNDER UNUSUAL CIRCUMSTANCES. (applies only where property is that of the present spouse)

Sec. 5.102. SALE OF COMMUNITY HOMESTEAD UNDER UNUSUAL CIRCUMSTANCES.

- What are “unusual circumstances”?
 - (1) Disappeared and location unknown
 - (2) Permanently abandoned the homestead and the spouse
 - (3) Permanently abandoned the homestead and the spouses are permanently separated
 - (4) Reported as a prisoner of war or missing on the public service of the United States

Most Common Scenarios

1. **One Spouse Wants to Purchase a Home Prior to Divorce Being Finalized**
2. **Selling Your Home**
3. **A Person Enters a Marriage Already Owning Real Property**

One Spouse Wants to Purchase a Home Prior to Divorce Being Finalized

- If one spouse desires to purchase a home prior to the finalization of his/her divorce, Texas community property rules come into play.
- Generally, a property purchased during marriage is presumed to be community property, owned by husband and wife.
- Since the divorce is not final, the new purchase would technically be owned by both spouses, even if the intent was for only one of the spouses to take title.
- Homestead Laws

One Spouse Wants to Purchase a Home Prior to Divorce Being Finalized

- While the ownership issue can be sorted out in the final divorce decree, until that time the buyer's lender often requires the non-purchasing spouse to join in the execution of the deed of trust mortgage, to ensure that the lien is valid against any community property claim.
- The injection of the non-purchasing spouse into the transaction often leads to some difficult communication and negotiations, but typically cannot be avoided.
- Perhaps the best strategy is for both spouses to wait until the divorce is finalized before purchasing a new property.

Selling Your Home

- Before a divorced person may sell their formerly jointly-owned home, they must first make sure that title to the property has been properly transferred from their ex-spouse.
- The first step is to ensure that the divorce decree contained proper language to divest the non-owning spouse from title.

Selling Your Home

- If the proper terms are included, then the divorce decree itself operates as a “muniment” of title; it passes title itself without the need for a deed from one spouse to another.
- However, even though the divorce decree has cleared up legal ownership, the real estate records must reflect the transfer to put the public on notice of the change.

Selling Your Home

- The owning spouse would have two choices; either file the divorce decree in the real property records, or obtain and file a separate deed from the ex-spouse to them.
- Obviously, since most folks would rather not have the terms of their divorce displayed so publicly, they would be much better served by having their ex-spouse convey title to them by deed.
- After the divorce is final, it may be extremely difficult to get any cooperation, so the parties should get the deed signed along with the other final divorce documents.
- A spouse should require a full warranty deed from their ex-spouse, not a quitclaim deed. A quitclaim does not contain the necessary conveyance language to avoid future title insurance problems.

Selling Your Home - Keep in Mind

- The court's power to make a just and right equitable division of property in a divorce applies to community property.
- Although each spouse has a one-half interest in the community, a court is not required to split the community assets equally.
- Courts may take into consideration factors such as the age and physical condition of the parties, the relative ability and earning power of the parties, the relative needs for future support, the overall size of the estate, the benefits one spouse would have received from a continuation of the marriage, and fault in breaking up the marriage.

A Person Enters a Marriage Already Owning Real Property

- If a person enters into a marriage already owning property, and subsequently gets divorced, that property would typically remain separate property during, and after, the marriage.
- But to the extent community funds (such as salary and other income earned during the marriage) are used to pay the mortgage, taxes, insurance and other expenses, the non-owning spouse would have a right to partial reimbursement of those expenditures upon dissolution of the marriage.
- As a result, the property must often be sold, with the proceeds split according to the judge's decision.

Owely of Partition – What is It?

- The Texas Constitution, Article XVI, Section 50 and the Texas Property Code, Section 41.001 both limit the liens that are enforceable against a Texas homestead to: purchase money, property taxes, owelty of partition liens, liens created in a contract for improvements, refinancing federal tax liens against both spouses, home equity loans, and reverse mortgages.
- An owelty of partition lien is a lien created when a fractional interest, such as a half interest, in a property is being conveyed to another owner. Normally a retained vendor's lien will only extend to the property being conveyed, and in the case of a fractional interest, only to that interest. Lenders aren't interested in loaning money on fractional interests in homes, they want all the collateral. An owelty lien is one in which the grantee acknowledges that the property is not subject to partition and agrees that that lien extends to the full fee interest in the property. It is a way to extend a purchase money lien on a fractional interest in a homestead to the full fee ownership.

Owelty of Partition – Why is It Used?

- Texas Constitution, Article XVI, Section 50(a) (3) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding.
- An Owelty Lien is used when one spouse needs to obtain a loan to buy out the other spouses equity, usually in connection with a divorce.
- The proper way to create an Owelty Lien is for it to be created simultaneously with the divorce through the language contained in the divorce decree.

Owelty of Partition – Why is It Used?

- However, if the divorce attorney fails to create an Owelty Lien in the decree, the lien may be created by written agreement filed of record after the divorce—ONLY IF BOTH SPOUSES REMAIN IN TITLE. Sometimes referred to as an Owelty of Partition.
- If no Owelty Lien was created in the divorce and one spouse is awarded the property, then we have problems. You can no longer create an Owelty Lien because there is nothing to partition.
- 1) Divested spouse executes an Owelty Deed (retaining an Owelty Lien) conveying his/her interest to Awarded Spouse.
- 2) Awarded spouse executes an Owelty Note & DOT payable to the divested spouse to evidence the “Loan” to buy out the divested spouse.

Owelty of Partition – Why is It Used?

- An owelty lien, secured by a owelty deed of trust can be refinanced by the awarded spouse through a standard rate and term refinance of the property. (Article 16, Section 50 (a) (3))
- If an owelty lien is not properly retained in the decree, or if the parties are unable to execute a written agreement for an owelty of partition after the divorce (because one was awarded the property), then the only way for the awarded spouse to “pay-off” the divested spouse is to obtain a home equity loan.

The End!

Please call and/or email us if you ever have any questions. We would love to help!