

# **PROVING SEPARATE PROPERTY**

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State Bar of Texas

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Austin College, Sherman, Texas, BA 1977

South Texas College of Law, Houston, Texas, JD 1981

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2007 New Frontiers in Marital Property, Memphis, TN

2002 Advanced Family Law Course, Dallas, TX

2000 Marriage Dissolution Institute, Fort Worth, TX

Texas Academy of Family Law Specialists 13<sup>th</sup> Annual Trial Institute (1999), Las Vegas, NV

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1995 to Current

*Abuse, It's Not Just Physical*, 2012 Innovations—Breaking Boundaries in Custody Litigation, Houston, TX  
*How to Fix Your Screw-ups*, 2011 Marriage Dissolution Institute, Austin TX  
*Representing the Unsophisticated Client with Assets*, 2010 Advanced Family Law Course, San Antonio, TX  
*Managing Client Expectations*, 2010 Marriage Dissolution Institute Boot Camp, San Antonio, TX  
*Effective Presentation of Evidence*, Panel Discussion, 2009 Advanced Family Law Course, Dallas, TX  
*Managing Client Expectations*, 2009 Family Law Basic Training, Dallas, TX  
*Managing Client Expectations*, 2009 Am. Academy of Matrimonial Lawyers Mid-Year Meeting, Kauai, HI  
*Spoliation*, 2008 Advanced Family Law Course, San Antonio, TX  
*Possession Orders*, 2007 Advanced Family Law Course, San Antonio, TX  
*Negotiation: You Can't Try Them All*, 2007 Marriage Dissolution Institute, El Paso, TX  
*Managing Client Expectations; Trying the Property Case on a Shoestring; Top Ten Trial Tips*, 2007 Nevada State Bar Family Law Course, Ely, NV  
*International Child Issues and the Hague Convention*, 2006 Advanced Family Law Course, San Antonio, TX  
*When the Texas SPO Won't Work*, 2006 Texas Advanced Paralegal Seminar, Addison, TX  
*Direct and Cross Examination*, 2005 Family Law Basic Training, Dallas, TX  
*Legislative Update*, 2005 Associate Judge's Conference, Austin, TX  
*Temporary Orders*, 2005 Poverty Law Conference, Austin, TX  
*Reforming Your Client's Expectations*, 2004 Legal Assistant's University, Fort Worth, TX  
*Life of a Grievance*, 2004 Advanced Family Law Course, San Antonio, TX  
*Managing Client Expectations*, 2004 Marriage Dissolution Institute, Fort Worth, TX  
*Dealing With the Client From Hell*, 2003 Advanced Family Law Course, San Antonio, TX  
*Setting and Getting Fees*, 2003 Marriage Dissolution Institute, Houston, TX  
*Spoliation*, 2001 Advanced Family Law Course, San Antonio, TX  
*Closing the File*, 2001 Marriage Dissolution Institute, Corpus Christi, TX  
*Getting the Most Out of Your Discovery*, The Ultimate Trial Notebook: Family Law (2000), New Orleans, LA  
*Top Ten Things in a Family Law Practice*, 2000 Advanced Family Law Course, San Antonio, TX  
*Bankruptcy In Divorce*, 1999 Advanced Family Law Course, Dallas, TX  
*Bankruptcy Meets Family Law*, Univ. of TX School of Law 2<sup>nd</sup> Annual TX Marital Property Inst. (1998), Austin, TX  
*Working as an Expert in Family Law Cases*, 1998 Divorce Conference (Dallas Chapter, TX Society of CPA's)  
*Divorce vs. Bankruptcy--When Worlds Collide*, 1998 Farm, Ranch and Agri-business Bankruptcy Inst., Lubbock, TX  
*Jurisdiction*, 1998 Advanced Family Law Course, San Antonio, TX  
*Parent-Child Third Party Practice*, 1998 Marriage Dissolution Institute, Austin, TX  
*Recent Federal Legislation*, 1998 Am. Academy of Matrimonial Lawyers Mid-Year Meeting, San Juan, PR  
*Creative Divisions of Property*, 1997 Advanced Family Course, San Antonio, TX  
*Trying a Property Case on a Shoestring*, 1997 Marriage Dissolution Institute, Dallas, TX  
*Recent Interesting Cases*, 1997 College of Advanced Judicial Studies, Houston, TX  
*Modification of Rights and Powers of a Joint Managing Conservator*, 1996 Adv. Fam. Law Course, San Antonio  
*Enforcement Workshop*, 1996 Marriage Dissolution Institute, Corpus Christi, TX  
*Direct Examination in a Property Case*, TX Academy of Fam. Law Specialists 9<sup>th</sup> Trial Inst. (1995), New Orleans

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2009 American Academy of Matrimonial Lawyers Fellow of the Year  
2009 Texas Academy of Family Law Specialists *Judge Sam Emison Award*, "For Significant Contributions to the Practice of Family Law in the State of Texas"  
2008 Dan R. Price Award; State Bar of Texas Family Law Section Outstanding Family Lawyer  
2008 State Bar of Texas Presidential Citation for Service to the Bar  
Named in 2003, 2004, 2005, 2007, 2008, 2009, 2010, 2011 *Texas Monthly* as a "SuperLawyer"  
Named in *The Best Lawyers in America* 1993 to current  
Named 1993 Southwest High School (Fort Worth, Texas) Distinguished Graduate  
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## TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ACKNOWLEDGMENTS.....	1
III. WHAT IS SEPARATE PROPERTY?.....	1
A. Constitutionally Recognized Separate Property.....	1
B. Other Sources of Separate Property.....	1
C. Warning about the Constitutional Definition.....	1
D. Community Property.....	1
E. Summary of Separate Property.....	2
IV. RULES FOR PROVING THAT PROPERTY IS SEPARATE.....	2
A. The Basic Rules.....	2
B. Evidence Needed to Prove that Property is Separate.....	3
1. Testimony of a Spouse.....	3
2. Documentary Evidence.....	4
a. Real Estate.....	5
b. Bank or Brokerage Accounts.....	5
c. Stocks.....	5
d. Oil and Gas Properties or Interests.....	5
e. Gifts.....	6
f. Inherited Property.....	6
g. Separate Debt Advances.....	6
h. Mutations.....	8
3. Tracing Rules.....	8
a. Community Out First.....	9
b. Separate Out First.....	9
c. Pro Rata.....	10
d. Intent.....	10
e. Clearing House and Identical Sum Inference.....	10
f. Minimum Sum Balance.....	10
g. Exhaustion Method/Family Expense Method.....	11
h. Maximum Community.....	11
4. Rules Regarding Bank Accounts and Assets Purchased with Funds from Bank Accounts.....	11



## PROVING SEPARATE PROPERTY

### I. INTRODUCTION

The purpose of this paper is to discuss the basics about how to prove that property is separate. The authors believe that summary judgment should be more frequently used by practitioners and more frequently accepted by courts to eliminate unmeritorious characterization disputes and to therefore promote the rapid resolution of divorce cases by streamlining the issues for trial or encouraging settlement over the remaining issues. For a complete discussion of the use of summary judgment to prove separate property see *Proving Separate Property: An Argument For More use of Summary Judgment Practice in Family Law Cases* written by Chris Nickelson for the 2010 Advanced Family Law Course.

### II. ACKNOWLEDGMENTS

The author would like to thank Patrice L. Ferguson and Cynthia P. Nguyen, for granting their permission to use portions of their paper titled, *Selected Issues Regarding Tracing and Characterization*, which was presented at the 33<sup>rd</sup> Annual Marriage Dissolution Course in May 2010.

### III. WHAT IS SEPARATE PROPERTY?

#### A. Constitutionally Recognized Separate Property.

Texas recognizes two types of marital property: separate and community property. The Texas Constitution defines the separate property of a spouse as all property, both real and personal . . . owned or claimed before marriage, and that acquired afterward by gift, devise or descent. *See* Tex. Const. Art. 16, 15; *see also*, Tex. Fam. Code 3.001 (OConnors 2009-10). In addition, the Texas Constitution provides that a spouses separate property may include property and income from property that is partitioned and/or exchanged by written agreement before or after marriage. *See* Tex. Const. Art. 16, 15.

#### B. Other Sources of Separate Property.

The Texas Legislature has added on to the definition of separate property set forth in the Texas Constitution. *See* Tex. Fam. Code 3.001(3). The Texas Family Code states that a spouses separate property also includes the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity. *See Id.*

Case law and statutory authority explain that separate property remains separate if it can be traced from its origin as separate property through mutation into its another form. *See Norris v. Vaughn*, 152 Tex. 491, 260 S.W.2d 676, 501 (1953); *see also* Tex. Fam.

Code 3.003(b) (OConnors 2009-10).

Further, case law explains that if an asset is acquired through a debt transaction in which the creditor agrees to look solely to the debtors separate estate for repayment, then the asset purchased with debt is characterized as separate property of the debtor spouse who purchased it. *See Broussard v. Tian*, 156 Tex. 376, 295 S.W.2d 405 (1956), *cert. denied*, 353 U.S. 941, 77 S.Ct. 811, 1 L.Ed.2d 758 (1957); *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881, 886 (1937); *see also Jones*, 890 S.W.2d at 475; *Welder*, 794 S.W.2d at 427; *Holloway v. Holloway*, 671 S.W.2d 51, 56-57 (Tex.App.Dallas 1983, writ dismd); *Price v. Service Bureau, Inc.*, 165 S.W.2d 794, 796 (Tex.Civ.App.Amarillo1942, writ refd w.o.m.).

#### C. Warning about the Constitutional Definition.

In the past, the Texas Supreme Court has held that the constitutional definition of separate property was enacted in order to remove the Texas Legislatures power to alter the character of separate property and thereby enlarge or diminish what is characterized as the spouse's community property. *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799, 803 (1925). According to the Court, the constitutional definition of separate property is exclusive and cannot be altered by legislative action. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977); *Arnold*, 273 S.W. at 803. Thus, any Legislative attempt to expand or diminish the definition of separate property is likely unconstitutional.

That being said, the Texas Supreme Court has overlooked the exclusive definition of separate property set forth in the Texas Constitution on occasion. In *Graham v. Franco*, the Texas Supreme Court considered the Legislatures addition of personal injury recoveries to the definition of separate property. *Id.*, 488 S.W.2d 390, 39-95 (Tex. 1972). The Court concluded that the common law and Spanish law traditions considered personal injury recoveries as separate property at the time the that Article 16, 15 of the Texas Constitution was adopted. The Court also concluded that the term property as used in Article 16, 15 did not include lawsuits for personal injuries when the Constitution was adopted. As a consequence, the Court concluded that the people of Texas did not intend to alter the common law or Spanish law by adopting Article 16, 15. Thus, the Constitutional definition of separate property did not prohibit the Legislature from passing a statute which expressly stated what the framers of the Constitution had assumed all along.

#### D. Community Property.

Since Texas recognizes only two forms of marital property, the definition of separate property is not complete without a discussion of what constitutes

community property. The Texas Constitution acknowledges the existence of community property but does not expressly define community property. *See* Tex. Const. Art. 16, 15. This is so because the definition of community property pre-dates the Texas Constitution. Before Texas gained its independence from Mexico, and before any of Texas Constitutions were enacted, Spanish law governed the marital property rights of people living in Texas. Under the Spanish law tradition, community property consisted of all property acquired by the spouses during marriage exclusive of what the Spanish law tradition considered was separate property. Thus, the Texas Constitution relies upon the long-standing definition of community property as being all property acquired during marriage and the constitutional definition of separate property to define what is community property in Texas. Following the lead of the Texas Constitution, the Texas Family Code defines community property in a negative fashion, defining it as the property, other than separate property, acquired by either spouse during marriage. Tex. Fam. Code 3.002 (O'Connors 2009-10).

Through case law the courts of Texas have defined community property as: all property and pecuniary rights obtained by, or in the name of, either spouse after marriage, by toil, talent, thrift, energy, industry, or other productive faculty, and all the rents, issues, profits, fruits, and revenues of separate property. *See Cartwright v. Cartwright*, 18 Tex. 626, 1857 WL 5017 (1857); *De Blaine*, 23 Tex. 25, 1859 WL 5017 (1859); *Norris v. Vaughn*, 152 Tex. 491, 260 S.W.2d 676, 501 (1953); *Logan v. Logan*, 112 S.W.2d 515, 525 (Tex.Civ.App.Amarillo 1938, no writ); *see also Alsenz v. Alsenz*, 101 S.W.3d 648, 654 (Tex.App.Houston [1<sup>st</sup> Dist.] 2003, pet denied).

The foregoing definition of community property can be broken down into two basic principles. First, the community estate owns all property and rights acquired by the spouses time, toil, and talent during the marriage. *De Blaine*, 23 Tex. 25, 1859 WL 5017 (1859)(holding that law conclusively presumes each spouse contributes in some way to the common acquisitions of the marital estate); *Norris v. Vaughn*, 152 Tex. 491, 260 S.W.2d 676, 501 (1953)(concluding that the community estate owns the time, toil, and talent of the spouses and is entitled to reimbursement when a spouses time, toil, and talent is used to enhance a spouses separate estate); *Logan v. Logan*, 112 S.W.2d 515, 525 (Tex.Civ.App.Amarillo 1938, no writ)(concluding that husband and wifes time, toil, and talent expended in running a hotel business was community property).

Second, the community estate holds a usufructory right to all of the rents, issues, profits, fruits, and revenues produced by each spouses separate property during the marriage. *See Cartwright v. Cartwright*, 18 Tex. 626, 1857 WL 5017 at \* 2 (1857)(explaining that

a usufruct is the right to use and enjoy, and receive the profits of, property which belongs to another, and the community estates usufruct includes all fruits produced by a spouses separate estate during marriage including such things as timber, herbs, fruits, wool, milk, and the young of cattle . . .); *Blum v. Light*, 81 Tex. 414, 16 S.W. 1090, 1092 (1891)(ruling that the offspring of separate property cattle were community property); *Avery v. Popper*, 48 S.W. 572 (Tex. 1898)(concluding that the offspring of separate property horses were community property). *McElwee v. McElwee*, 911 S.W.2d 182, 188-89 (Tex.App.Houston [1<sup>st</sup> Dist.] 1995, writ denied)(holding that proceeds from the sale of timber cut off separate property lands were community property). *U.S. Fid. & Guar. Co. v. Milk Prod. Assoc. of San Antonio*, 383 S.W.2d 181, 182-83 (Tex.Civ.App.San Antonio 1964, writ refd n.r.e.)(holding that milk produced by a spouse running a separate property dairy business, and using a separate property cows, was community property). *Meshwert v. Meshwert*, 543 S.W.2d 877, 879 (Tex.Civ.App.Beaumont 1976)(concluding that revenue earned by a separate property business was community property), *affd*, 549 S.W.2d 383 (Tex. 1977).

#### E. Summary of Separate Property

Pulling all of the foregoing law together, assets that are characterized as a spouses separate property include, but may not be limited to:

- Assets owned or claimed prior to marriage.
- Gifts.
- Property acquired by devise or descent.
- Partitioned property/income.
- Personal injuries sustained during marriage, except loss of earning capacity during marriage.
- Assets acquired from advances of separate debt.
- Mutations or exchanges of separate property.

### IV. RULES FOR PROVING THAT PROPERTY IS SEPARATE

#### A. The Basic Rules

All property possessed by either spouse during or on dissolution of marriage is presumed to be community property. *See* Tex. Fam. Code 3.003(a). The party seeking to rebut the presumption bears the burden of proof and must establish by clear and convincing evidence that the property in question meets the definition of separate property. *See* Tex. Fam. Code 3.003(b); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965). The clear and convincing standard is something greater than the preponderance of evidence standard, but less than beyond a reasonable doubt. *Clear and convincing* is the degree of evidence necessary to produce in the mind of the trier of fact a firm belief or conviction about the allegations sought

to be established. *Tarver*, 394 S.W.2d at 783. The requirement of clear and convincing evidence is way of stating that the assertion(s) must be supported by factually sufficient evidence. *Carter v. Carter*, 736 S.W.2d 775 (Tex. App. - Houston [14<sup>th</sup> Dist.], 1987, no writ) citing *Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975).

The characterization of property as community or separate is determined by the inception of title to the property. *Barnett v. Barnett*, 67 S.W.3d 107, 111 (Tex. 2001); *Smith v. Buss*, 144 S.W.2d 529, 532 (Tex. 1940). Inception of title occurs when a party first has the right of claim to the property. *Strong v. Garrett*, 148 Tex. 265, 224 S.W.2d 471 (1949); *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 731 (Tex.Civ.App.Houston [1<sup>st</sup> Dist.] 1981, no writ). For example, if title is acquired before marriage, then the property is separate. See Tex. Const. Art. 16, 15; Tex. Fam. Code 3.001. If title is acquired after marriage, then the property is community unless it was acquired through gift, devise or descent. *Id.*

Any attempt to characterize property as separate or community begins with identifying the legal basis for claiming that property is separate, i.e., it was owned before marriage, or it was acquired during marriage by gift. Once you have identified the source of separate property, you must trace the separate property. Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. *Smith v. Smith*, 22 S.W.3d 140, 144 (Tex.App.Houston [14<sup>th</sup> Dist.] 2000, no pet.). In the marital dissolution context, tracing the property means that you must follow the separate property asset from the time it is identified (at the date of marriage or when received if during marriage) through the date of divorce.

For example, Mom gifted W cash which was deposited in a bank account; a portion of the cash gift was used to acquire stock; the stock was then sold and the sales proceeds were expended to acquire the parties current residence. W has the burden to prove that the funds used to acquire the residence stemmed from the original cash gift.

## **B. Evidence Needed to Prove that Property is Separate**

Whether an asset is separate or community property is determined by the facts which, according to the rules of law, give character to the asset. *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565, 568 (Tex. 1961).

### 1. Testimony of a Spouse

In Texas, a spouse is competent to testify as to the source of property. See *Burgess v. Burgess*, 2007

WL 1501117 (Tex. App. - Beaumont, 2007) citing *Barh v. Korh*, 980 S.W.2d 723, 730 (Tex. App. - San Antonio 1998, no pet); *Pace v. Pace*, 160 S.W.2d 3d 706, 714 (Tex. App. - Dallas 2005, pet. denied); *Holloway v. Holloway*, 671 S.W.2d 51, 56 (Tex.Civ.App.-Dallas 1983, writ dismissed); *Newland v. Newland*, 529 S.W.2d 105, 107-08 (Tex.Civ.App.-Fort Worth 1975, writ dismissed).

The open question is whether a spouse's uncorroborated testimony, which is not contradicted by the other spouse, is sufficient to meet the clear and convincing evidence test.

There are several cases which hold that a spouse's uncorroborated testimony is sufficient to rebut the community property presumption if it is uncontroverted. *Vannerson v. Vannerson*, 857 S.W.2d 659, 670 (Tex.App.-Houston [1<sup>st</sup> Dist.] 1993, writ denied); *Holloway v. Holloway*, 671 S.W.2d 51, 56 (Tex.Civ.App.-Dallas 1983, writ dismissed); *Newland v. Newland*, 529 S.W.2d 105, 107-08 (Tex.Civ.App.-Fort Worth 1975, writ dismissed).

In *Vannerson v. Vannerson*, a post-answer default judgment was entered against husband when he failed to appear for trial. *Vannerson*, 857 S.W.2d at 663. The trial court's property division was based on the testimony and trial exhibits of wife. *Id.* at 667-70. Wife's trial exhibits were summaries of the evidence regarding her characterization of the parties' separate and community property and her proposed division of the parties' property. *Id.* at 667-68. On appeal, husband claimed that this evidence was insufficient to support the trial court's property division. *Id.* at 667-70. The court of appeals affirmed, concluding that wife's uncorroborated testimony and trial exhibits were legally and factually sufficient to support the trial court's judgment. *Id.*

In *Newland v. Newland*, the Fort Worth Court of Appeals addressed whether a spouse's uncorroborated, but uncontroverted, testimony was sufficient to meet the clear and convincing evidence test. *Newland*, 529 S.W.2d at 107-08. In that case, Mrs. Newland sought to overturn the adverse finding of separate property because Mr. Newland's testimony was not corroborated by independent documentation. *Id.* at 107. The court rejected her argument stating:

To adopt the rule for which Mrs. Newland contends would be to deny

justice in a great number of cases, indeed in nearly all where the facts are within the knowledge of only one spouse. Of course the fact finder would be entitled to disbelief and refuse to find for the spouse having knowledge and testifying, but in instances where he is believed and the finding made for him a judgment based thereupon should not be disturbed because of a lack of corroboration of his testimony.

*Id.* at 108. Thus, some courts have allowed a trial court to base a finding of separate property on a spouse's uncorroborated testimony when the testimony has not been contradicted.

However, the careful practitioner should not rely on the foregoing cases in preparing his or her case for trial or summary judgment because there are several cases decided by other courts of appeals, and even different panels of the same court of appeals, which reach an opposite result. *See Pace v. Pace*, 160 S.W.2d 3d 706, 714 (Tex. App. - Dallas 2005, pet. denied); *Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex.App.-Fort Worth 2004, no pet.); *Ganesan v. Vallabhaneni*, 96 S.W.3d 354, 354 (Tex.App.-Austin 2002, no pet.); *Bahr v. Kohr*, 980 S.W.2d 723, 728-730 (Tex.App.-San Antonio 1998, no pet.); *McElwee v. McElwee*, 911 S.W.2d 182, 188 (Tex.App.-Houston [1<sup>st</sup> Dist.] 1993, writ denied); *Hilliard v. Hilliard*, 725 S.W.2d 722, 723 (Tex.App.-Dallas 1985, no writ).

These cases generally hold that "mere testimony that property was purchased with separate property funds, without any tracing of the funds, is generally insufficient to rebut the [community property] presumption." *See McElwee*, 911 S.W.2d at 188, citing *Schmeltz v. Garey*, Tex. 49, 60-61 (Tex. 1878).

For example, *In re Marriage of Smith*, 2003 WL 22715581 (Tex. App. - Amarillo, 2003), documentation was provided which showed that H had brought separate property into the marriage, and his testimony showed that during marriage, he received gifts from his parents. In support of his separate property claims, H provided a December 1992 account statement, an account application dated May 1992, a request for the transfer of assets dated May 1992, and retirement statements marked "closed out June 1992." The documents were almost six years after the marriage and did not provide any information identifying the source

or origin of the property or when it was originally obtained. W challenged the trial court's finding that \$15,111 of an American Funds account and \$26,623 of the American Funds IRA account were H's separate property. The court stated that the testimony of the spouse claiming that the property was acquired with separate property funds, without any tracing of the funds, is generally insufficient to rebut the community presumption.

In *Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex.App.Fort Worth 2004, no pet.), Mr. Boyd offered several summaries of tracing and testified about real estate transactions concerning realty he owned prior to the marriage and his use of separate funds to reduce a community mortgage. None of his testimony was challenged and no contrary evidence was offered to dispute his testimony. Relying on *Newland* and its language "where he is believed and the finding made for him a judgment based thereupon should not be disturbed because of a lack of corroboration of his testimony" the trial court awarded the economic contribution he sought. The same Ft. Worth court found in this instance "the trial court was left to surmise or speculate, based on David's testimony alone, that the proceeds from the sale of David's separate property were the source of funds that created his claim for economic contribution.... Accordingly, we hold that the evidence in the record before us is factually insufficient to support David's claim that he contributed separate property to the Parker County residence." *Boyd* at 615, 616.

This holding in *Boyd* was later distinguished in *Bush v. Bush*, 336S.W.3<sup>rd</sup> 722 (Tex. App. Houston [1<sup>st</sup> Dist.] 2010). In *Bush* the proponent of separate property horses attempted to meet his burden without corroborating documentary evidence. His proof was found to be sufficient because "*Boyd ... dealt with purchases, not gifts.*" *Bush* at 743.

## 2. Documentary Evidence

To put your best foot forward, you must attempt to obtain documentation from third parties, acknowledged documents, or those filed under penalties of perjury (e.g., tax returns). The more objective the information, the more likely the trier of fact will view the separate property claims as credible and supportable. Sometimes, the client may have documents which will show when and how the separate property was acquired; other times, the information may need to be requested from third parties or reverse-engineered. Of course, do not overlook persons with knowledge that would be able to testify about the property of interest. Below are documents which will assist in the proof of separate property.

a. Real Estate

Realty is characterized based upon when the party's right to the acquire the property was established, i.e. when he signed the earnest money contract/paid the down payment. *Carter v. Carter*, 736 S.W.2d 775. However, if the earnest money contract was executed after the date of marriage, *Gleich vs Bongio*, 128 Tex. 606, 99 S.W.2d 881 (Tex. 1937) applies and the character of the property is determined based upon the dollars used to acquire the property.

Ownership can be shown via deed and/or settlement statement from the title company. Other records which may reflect ownership are property tax receipts or the ownership history from the county appraisal district website which assessed property taxes. The appraisal districts website will often allow you to search by address, property tax identification number, owner name, etc. After the property information has been accessed, some districts will provide ownership history for a number of owners or multiple years.

If not listed below, use your favorite search engines to locate the county appraisal district website. For example:

- \* Harris County Appraisal District (<http://www.hcad.org>) select ownership history on the top portion of the screen, it provides the ownership history for multiple years.
- \* Dallas Central Appraisal District (<http://www.dallascad.org>) click the history option at the bottom of the page and it provides the ownership history for multiple years.
- \* Tarrant Appraisal District (<http://www.tad.org>) after you access the property description, the site will provide you with the three prior owners.

b. Bank or Brokerage Accounts

Request copies of statement close-in-time to the date of marriage. Banks or brokerage houses will have limited time periods during which the information is available on line and on microfiche. See the bank account discussion below.

c. Stocks

Stocks owned prior to marriage are that spouses separate property. Characterization of stocks acquired after the date of marriage is based upon the consideration paid to acquire the shares. Texas community property law treats stock dividends and stock splits the same: shares received from stock splits or stock dividends are the same character as the underlying shares. *Tirado v. Tirado*, 357 S.W.2d 468 (Tex. Civ. App - Texarkana 1962, writ dismd)

If a company has a sizeable amount of retained earnings, the market value of its shares is likely to increase. The higher the price of stock, the less readily it can be purchased, i.e. reduces the company's ability to raise additional capital. A stock split is the result of a company's decision to increase the number of shares that are outstanding with the general goal of reducing the stock price in order to attract additional investors. For example, H had 1,000 shares of Company stock. Company had 5,000,000 shares outstanding which were priced at \$50 per share. Company decides to effect a 2:1 stock split, so H now owns 2,000 shares and Company has 10,000,000 shares outstanding and the share price is reduced to \$25 per share. Before the split, H's 1,000 shares were worth \$50,000; after the split, H's 2,000 shares are still worth \$50,000.

When a company wants to capitalize a portion of its earnings (reclassify retained earnings to contributed capital) and thereby allow the company to retain its earnings instead of paying out cash dividends, the company may issue stock dividends to its shareholders. As in the stock split, after the stock dividend, each shareholder retains his/her proportionate interest in the corporation.

To prove up the separate estate ownership, request organizational documents, corporate records, or minutes for closely-held entities which may report the number of shares owned by Spouse. If publicly-traded, look to brokerage statements or trade confirmations. If the shares are not certificated, or if the brokerage statements or trade confirmations are not available, you may be able to reverse engineer the number of shares a spouse owned at a particular time based upon the dividends received. For example, assume that Spouse owns shares of a publicly-traded stock and the stock pays dividends. The dividends will be evidenced by deposits, Form 1099-DIV which reports dividends paid to Spouse, and dividend income reported on Schedule B of Spouse's federal income tax return Form 1040. Divide the dividend income by the dividend paid-per-share to calculate the number of shares held at a particular time. The dividend history can be obtained online via Yahoo! Finance or other similar website, via investor reports of the company, financial statements issued by the company, or Standard & Poors Annual Dividend Records.

d. Oil and Gas Properties or Interests

Assuming that mineral interest is separate property:

- \* royalty income is separate property because the revenue from the extraction of oil or gas is equivalent to a piecemeal sale of the separate corpus. *Norris v. Vaughn* 152 Tex. 491, 260 S.W.2d 676, 679 (1983).
- \* delay rentals are community property

because they do not depend upon the finding or production of oil and gas and do not exhaust the separate corpus. *McGarraguh v. McGarraugh*, 177 S.W.2d 296, 301 (Tex. Civ. App. - Amarillo 1943, writ dismd).

Ownership may be shown via mineral deeds and division orders which may be obtained via the property records or, if the interest is significant, consider retaining a landman who will do a search for you. Royalties may also be reported on Form 1099-MISC and detail of the interests may be included on royalty checks issued by the operator. Expenses on interests for drilling/depreciation may be reported on income tax returns. The date that royalties were earned or expenditures were incurred may show the interests were acquired prior to marriage.

#### e. Gifts

A gift is a transfer of property made voluntarily and gratuitously, without consideration. *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565, 569 (Tex. 1961); *Ellebracht v. Ellebracht*, 735 S.W.2d 658, 659 (Tex. App. - Austin 1987, no writ). Keep in mind that the three elements necessary to have a gift: (i) intent to make a gift; (ii) delivery of property; and (iii) acceptance of the property. *Hayes v. Rinehart*, 65 S.W.3d 286, 289 (Tex. App. - Eastland 2001, no pet.).

Gifts may be evidenced by trust agreements, notes or cards written when the gifts were made, testimony, and they may be reflected in Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return. Gifts may not be reported on the returns because the gifted amount was valued below the exclusionary amount or the donor may not have filed the return.

#### f. Inherited Property

Generally, when a person dies the heirs/legatees/devisees interest in the estate of the deceased vests immediately, although their interest is subject to the debts of the testator or intestate. Texas Probate Code 37. Upon the issuance of letters testamentary or administration of the estate, the executor or administrator shall have the right to possess the estate. *Id.* The executor/administrator holds legal title and a superior right to possess estate property and to dispose of it as necessary to pay debts of the estate. *Gorham v. Gates ex rel. Estate of Baouh*, 82 S.W.3d 359, 365 (Tex. App. - Austin, 2002, pet. denied). Until the administrator pays all debts owned by the estate and distributes the property, beneficiaries do not actually hold legal title to the devised property. *Woodward v. Jaster*, 933 S.W.2d 777 (Tex. App. - Austin 1996, no writ). Thus, if the administrator exercises his power to dispose of estate property to pay debts of the estate, the sale of the property divests the beneficiary of his interests in the property. *Gorham v.*

*Gates ex rel. Estate of Baouh*, 82 S.W.3d 359, 365-366 (Tex. App. - Austin, 2002, pet. denied).

Inherited property may be evidenced by testamentary trusts, wills, other probate documents, Form 706 United States Estate (and Generation-Skipping Transfer) Tax Return, and testimony from persons with knowledge.

When a spouse claims that an asset is separate property because it was acquired during marriage by testamentary gift or devise, the spouse discharges his or her burden to trace the separate property character of the asset by introducing a copy of the last will and testament or trust document which makes the gift or devise, and then introducing evidence showing the transfer or conveyance of the asset from the testator or settlors estate to the inheriting spouse. *See, e.g., Orr v. Pope*, 400 S.W.2d 614, 616-18 (Tex. Civ. App. Amarillo 1966, no writ).

In *Orr v. Pope*, the heirs of husband brought suit against the heirs of wife seeking title to a piece of real property. During marriage, husband's mother and father died. At the time of his father's death, husband entered into an agreement with the other heirs of father to swap portions of each heir's inheritance in order to settle the estate. Several deeds were executed to settle the estate and husband received title to the surface and mineral estates of a piece of real property. Later, husband predeceased wife. After wife died, the heirs of husband and wife disputed whether the interests in real property belonged to husband's separate estate or the community estate. The heirs of husband moved for summary judgment. Copies of the last will and testament and deeds were attached to the motion, along with sworn testimony, in the form of affidavits and depositions transcripts, to prove the circumstances surrounding the execution of the deeds. The trial court granted summary judgment declaring that the real property belonged to husband's separate estate. Heirs of wife appealed. The court of appeals affirmed holding that the evidence conclusively established that the surface estate and mineral interests were acquired through devise or descent and were therefore husband's separate property. *Id.*, 400 S.W.2d at 616-18.

#### g. Separate Debt Advances

Debts contracted during marriage are presumed to be on the credit of the community, unless it is shown that the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975) citing *Broussard v. Tian*, 156 Tex. 371, 295 S.W.2d 405 (1956) and *Gleich vs Bongio*, 128 Tex. 606, 99 S.W.2d 881 (Tex. 1937).

In order to prove that an asset is separate property, because it was acquired with separate property credit during marriage, the purchasing spouse must prove that the lender agreed to look solely to the separate estate of

the purchasing spouse for satisfaction of the indebtedness. See *Broussard v. Tian*, 156 Tex. 376, 295 S.W.2d 405 (1956), cert. denied, 353 U.S. 941, 77 S.Ct. 811, 1 L.Ed.2d 758 (1957); *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881, 886 (1937); see also *Jones*, 890 S.W.2d at 475; *Welder v. Welder*, 794 S.W.2d 420, 427-28 (Tex.App.Corpus Christi, no writ); *Holloway v. Holloway*, 671 S.W.2d 51, 56-57 (Tex.App.Dallas 1983, writ dismd); *Price v. Service Bureau, Inc.*, 165 S.W.2d 794, 796 (Tex.Civ.App.Amarillo 1942, writ refd w.o.m.).

It is not enough for the purchasing spouse to claim that the down payment was made with separate property and the purchasing spouse intended all of the deferred payments to be paid with his or her separate property. *Welder*, 794 S.W.2d at 427-28. Rather, the purchasing spouse must prove that the down payment was made with separate property and that the lender agreed to look only to the purchasing spouses separate estate for the repayment of the loan. *Id.* As a result, any direct or circumstantial evidence tending to prove or disprove the lenders agreement to look solely to the separate estate of the purchasing spouse is the most important evidence to proving or disproving this type of separate property claim.

A few examples will help explain the type of documents you should gather to prove that an asset was purchased with separate property debt:

In *Jones v. Jones*, husband purchased three treasury notes with proceeds from a loan secured by a certificate of deposit. 890 S.W.2d at 474-76. Husband claimed that the notes, or part of them, were his separate property because the certificate of deposit was his separate property. The note and loan application were admitted into evidence, but they were silent as to whether the bank agreed to look only to the certificate of deposit and/or husbands separate estate for repayment. The jury found in favor of husband. Wife appealed. The court of appeals reversed because it found no evidence indicating that the bank had in anyway limited itself to looking solely to the certificate deposit or husbands separate estate for repayment of the loan. 890 S.W.2d at 474-76.

In *Glover v. Henry*, the decedent inherited a 1/14th interest in a piece of real estate. 749 S.W.2d 502, 503 (Tex.App.Eastland 1988, no writ). The decedent bought the remaining 13/14th interest from his mother and siblings, signing a note for \$1,500 to finance the purchase. The deed recited that the down payment was made from the decedents separate estate. A release was later executed which recited that the

decedent had paid the note, and that all payments were made from the decedents separate property. Plaintiffs sought to prove that the piece of real estate was community property, defendant sought to prove that the real estate was separate property. The jury found in favor of defendants. Plaintiffs appealed. The court of appeals concluded that the deed and release were sufficient evidence to allow the jury to infer that the lender agreed to look solely to the decedents separate estate for repayment of the loan. However, the case was reversed and remanded because the jury charge erroneously instructed the jury that the facts recited in ancient documents, such as the deed and release, were prima facie proof of the facts contained in those documents. 749 S.W.2d at 502.

In *Holloway v. Holloway*, husband asserted that the stock in a pipeline company was his separate property because he purchased the stock during marriage pursuant to a loan made to his separate estate. 671 S.W.2d at 56. The evidence showed that a bank loaned husband the sum of \$10,000 and placed it into an account called husbands separate property account. Husband testified that he used these funds to purchase the stock in question. The loan papers were admitted into evidence. Although the loan papers did not include an express agreement wherein the bank promised to look solely to husbands separate estate for repayment of the loan, the loan papers did include several pieces of evidence indicating that the bank agreed to look to the separate estate of husband for repayment of the loan. There was a promissory note and security agreement each signed [husband], Separate Property. There was a written statement of purpose for the loan which stated that the loan was made so that husband could invest in the pipeline venture, again signed by husband in his Separate Property capacity, and certified by the bank officer. Finally, there was an affidavit signed by husband which swore that the collateral listed in the security agreement was property he acquired before his marriage to wife and he acknowledged that the bank would be relying on his testimony in making the loan to husbands separate property account. The jury found that the stock was husbands separate property. Wife appealed. The court of appeals affirmed, holding that the foregoing evidence was sufficient to support a finding that the bank agreed to look solely to the husbands separate estate for repayment of the loan and therefore the stock purchased with the loan proceeds was husbands separate property. 671 S.W.2d at 57.

In *Beeler v. Beeler*, husband owned a ranch before marriage. 363 S.W.2d 305, 306-08 (Tex.Civ.App.Beaumont 1962, writ dismd). During the marriage, husband sold the ranch for \$50,000, \$16,000 of which was put up as a down payment, and the balance paid through a note for \$34,000 plus 5% interest. On the day the ranch was sold, husband

executed a loan with bank for \$15,000. The payments on the \$15,000 loan were timed so they were due on the exact day the payments on the \$34,000 ranch note were due to husband. Husband then used the \$15,000 loan proceeds, along with \$9,000 of the down payment from the sale of the ranch, to purchase a house and 18 acres of land. Husband and wife filed for divorce. Husband claimed the house and 18 acres as his separate property. The case was tried to the court. The trial court found that the community estate was secondarily liable on loan for the house and 18 acres, and that there was no reasonable possibility that a resort to the community estate would ever have been necessary to obtain repayment of the loan. Wife appealed. On appeal, the court of appeals concluded that there was no question that husband's separate estate owned 9/24 of the house and 18 acres due to fact that house and acreage was bought in part with \$9,000 from sale of husband's separate property ranch. However, the court of appeals disagreed with the trial court that the remainder of the interest in the house and acreage (i.e., 15/24) was husband's separate property. The court of appeals concluded that evidence showing that the community estate was only secondarily liable on the loan, or not likely to have ever been called upon to repay the loan, was not the same as evidence proving that the bank agreed to look solely to husband's separate estate for repayment of the loan. Thus, the court of appeals concluded that the community estate owned 15/24ths of the house and acreage. It should be noted, however, that the court of appeals eventually concluded that husband had a reimbursement claim for all payments made on the house and 18 acres because the payment schedule of the ranch and house loans, and course of conduct of the parties (i.e., taking payment from ranch note and depositing it into a joint account on the day the payment on house loan was due), proved that all payments on house and acreage were made by husband's separate estate. 363 S.W.2d at 306-08.

#### h. Mutations

To maintain the character of separate property, it is not necessary that the property be preserved *in specie* or in-kind; it may undergo mutations and changes and still remain separate property so long as it can be clearly and satisfactorily traced and identified to its separate origin, its distinctive character will remain.

Example: H owned a separate property house (House 1) which had an outstanding mortgage balance. W acknowledges that the property was owned by H prior to marriage. The home was insured, which was fortunate, because during marriage a flood occurred and damaged the home. Insurer pays funds to H. H sells the separate property house; he uses the sales proceeds along with a portion of the insurance

proceeds to purchase House 2. What is the character of House 2? House 2 would be H's separate property.

The court in *Burgess v. Burgess*, 2007 WL 1501117 (Tex. App. - Beaumont, 2007) dealt with this issue. There, the court found that the residence was separate property because the evidence was sufficient to demonstrate that the residence was H's separate property. *Burgess v. Burgess*, 2007 WL 1501117 (Tex. App. - Beaumont, 2007). Citing Texas Family Code 3.008(a), which provides that insurance proceeds paid or payable that arise from a casualty loss to property during marriage are characterized in the same manner as the property to which the claim is attributable, the court opined that the proceeds were also H's separate property because the proceeds from a casualty insurance payment takes on the character of the insured property. *Id.*

#### 3. Tracing Rules

If separate property funds were deposited in an account that also contains community property funds, is all lost for the spouse asserting separate property? No. A showing of community and separate funds deposited in the same account does not divest the separate funds of their identity and establish the amount as community when the separate funds may be traced. *Holloway v. Holloway*, 671 S.W.2d 51, 60 (Tex. App. - Dallas 1983, writ dismissed); *Harris v. Ventura*, 582 S.W.2d 853, 855 (Tex. Civ. App. - Beaumont 1979, no writ).

Fortunately for all of us, this does not mean that you or the client will have to track the serial number of each bill. One dollar has the same value as another and under the law there can be no commingling by the mixing of dollars when the number owned by each is known. *Welder v. Welder*, 794 S.W.2d 420 (Tex. App. - Corpus Christi, 1990) citing *Trawick v. Trawick*, 671 S.W.2d 105, 110 (Tex. App. - El Paso 1984, no writ) and *Farrow v. Farrow*, 238 S.W.2d 255, 257 (Tex. Civ. App. - Austin 1951, no writ). Cash is a fungible item but it can be traced, even though separate property cash is deposited in an account that also had community property funds. *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App. - Dallas 1995, writ dismissed, no pet.).

Experts can use various methods to trace the separate property cash. Generally, cash can be traced in a detailed approach, as in a *line item tracing*, or a more aggregate approach, as in *minimum sum balance*. Under the *line item tracing method*, the deposits and withdrawals reported on bank and brokerage statements are entered line-by-line, presented in date order, and deposits are usually shown before disbursement for transactions in a particular day. Transactions are entered based upon when cash clears the account or the reported settlement date.

Bank and brokerage statements are usually available online or may be requested from the bank or brokerage house if the client does not have those documents. Be aware that there are fees associated with requesting the information from the bank; we are noting that more and more institutions are shortening the amount of time documents are retained, so some of the statements for longer-term marriages may not be available. When statements are not available, check registers, check copies, deposit slips, wire transfer records and other records may be used to recreate the account activity.

Example: Assume a joint bank account contained \$50,000 community property on Day 1

- + On Day 2 \$100,000 of community property was deposited in the account.
- + On Day 3, \$125,000 cash gift (separate property) was transferred into the account.
- = At the end of Day 3, the account had a balance of \$275,000.
- On Day 4, \$100,000 was withdrawn from the account to purchase shares of ABC, Inc.
- = The balance in the account after the withdrawal is \$175,000.

What would be the character of the ABC, Inc. shares and the character of the \$175,000 remaining in the account after the withdrawal? The answers depends upon which method of tracing is used.

#### a. Community Out First

This is the most common method of tracing we encounter. *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App. Dallas 1955, writ dismd) (*per curiam*) is the often-cited case and viewed by some as the case which established the acceptability of such a method. In *Sibley*, H deposited Ws separate property cash in an account that contained community property funds. On October 11, a 160-acre farm was acquired with \$1,929.08 cash withdrawn from the account and a note for the balance. In determining the character of the farm, the court had to determine which funds were withdrawn. The court stated that [e]quity impresses a resulting trust on such funds in favor of the W and where a trustee [H] draws checks on a fund in which trust funds are mingled with those of the trustee, the trustee is presumed to have checked out his own money first,... *Sibley* at 659. The community moneys in joint bank account of the parties are therefore presumed to have been drawn out first, before the separate moneys are withdrawn. *Id.*

Under the hypothetical, if the *community out first* method is used, the ABC, Inc. shares would be 100% community property; the remaining balance is \$50,000 community property and \$125,000 separate property.

#### b. Separate Out First

In *Smith v. Smith*, 22 S.W.2d 140 (Tex. App. - Houston [14<sup>th</sup> District], 2000) the *separate out first* method was referenced. The court there appears to suggest that the party seeking to use a method other than *community out first* has the burden of citing evidence to apply another method. What evidence or factors would a court consider sufficient to justify using something other than *community out first* method? Would it matter to the court what the account was primarily used for, i.e. to pay living expenses? If *separate out first* is used, then the spouse loses his/her separate property if there is no reimbursement for living expenses.

In *Smith*, the court stated that evidence revealed that the account in dispute received both community funds and Hs separate funds. *Id.*, 22d S.W.3d at 145-146. In determining that the balance in the account was Hs separate property, the court stated:

[g]enerally, when separate property and community property are commingled in a single bank account, we presume that the community funds are drawn out first, before separate funds are withdrawn, and where there are sufficient funds at all times to cover the separate property balance in the account at the time of divorce, we presume that the balance remains separate property. The only requirement for tracing and the application of the community out first presumption is that the party attempting to overcome the community presumption is that the party attempting to overcome the community presumption produce clear evidence of the transactions affecting the commingled account.

*Id.*, citing *Welder v. Welder*, 794 S.W.2d 420, 433-434 (Tex.App. - Corpus Christi 1990, no writ); *Horlock v. Horlock*, 533 S.W.2d 52, 58 (Tex. Civ. App. - Houston [14<sup>th</sup> Dist.] 1975, writ dism'd w.o.j.; *but cf. Goodridge v. Goodridge*, 591 S.W.2d 571, 573 (Tex. Civ. App. - Dallas 1979, writ dism'd wo.o.j).

The court further stated that the *community out first* presumption is a rebuttable one; however, W did not cite evidence to rebut the presumption. *Smith*, 22d S.W.3d at 147. In a footnote, the court also stated:

...a blind application of the community out first presumption does not uphold the policy reason for the presumptions original application...In *Sibley*, the question involved the Husbands spending funds from an account in which community funds had been commingled with the Wifes separate funds. The application of the community out first

presumption thus preserved the Wife's separate estate. Here, however, mechanical application of the community out first presumption leads to the Husband preserving his separate estate at the expense of the community. Were we to view Husband as a trustee acting in the best interest of the beneficiary, we would apply not the community out first presumption, but a separate out first presumption. We would presume Husband spent his own funds before spending the community funds thus leaving community funds in the account for possible disbursement to the beneficiary the Wife upon dissolution of the marriage. Husband would have the burden of rebutting the separate out first presumption. We apply the community out first presumption because it seems to be established law.

*Id.*

Under the hypothetical, the ABC shares would be 100% separate property, and the remaining balance in the account would be \$150,000 community property and \$25,000 separate property.

c. Pro Rata

Under the *pro rata approach*, when an account contains both community funds and separate funds, the withdrawals are presumed to be made pro rata in proportion to the balance in the account. Shelly D. Merritt, *Planning for Community Property in Colorado*, 31 Jun Colaw 79,80 (2002).

In the hypothetical, the balance in the account prior to the withdrawal was 55% community property (\$150,000/\$275,000) and 45% separate property. The ABC shares would be a mixed character asset: 55% community property and 45% separate property; the percentages also apply to the remaining cash balance: \$95,455 community property and \$79,545 separate property. Assume also that the next deposit of \$25,000 was separate funds. After the deposit, the account balance is \$200,000, of which the community amount is still \$95,455 and the separate amount is \$104,545 (48% and 52%, respectively). The withdrawal that immediately follows the transaction would be in the same proportion, i.e. 48% community property and 52% separate property.

d. Intent

The best discussion of this method of tracing is Richard Orsinger's paper titled Different Ways to Trace Separate Property which was presented at the 35<sup>th</sup> Annual Advanced Family Law Course in August 2009.

Under this approach, the client and/or the expert would determine the characterization of the

withdrawals based upon the client's intent. To lend credibility to a spouse's testimony regarding intent, attempt to obtain supporting documents such as written notes around the time of the transaction, communications with third parties, or other evidence which supports the intent. The challenge in relying on intent is that the client or your expert will need to explain the story(ies) regarding the various types of withdrawals that occurred why the other withdrawals were intended or not intended to be funded with separate funds. In our simple hypothetical, it may be easy to explain the intent or the history of the account since it contains limited transactions; however, where there are thousands of transactions in a single account used for multiple purposes, the task is more challenging.

e. Clearing House and Identical Sum Inference

Under the *clearinghouse method*, after one or more identifiable sums of separate funds are temporarily deposited into one account and then those identifiable sums are withdrawn, the withdrawals (and whatever was acquired with those funds) are treated as separate property. Similar to the *clearinghouse method*, the *identical sum inference method* involves only one deposit rather than a group or series of deposits. Issues arise in this method when the *amounts* of the deposit or the withdrawal are not exact or when the deposit and the asserted related withdrawal do not occur *close in time*. In our example, the ABC shares would be entirely community property if the \$100,000 withdrawal is associated with the \$100,000 deposit on Day 2. What if the other spouse asserts instead that the \$125,000 deposit of separate funds on Day 3 was made in anticipation of, and was for the sole purpose of, the purchase of the shares on Day 4? Should the shares be characterized as separate property instead? Identical sum does not always mean exact amount.

f. Minimum Sum Balance

The *minimum sum balance method* would likely be the least expensive method of tracing cash (in terms of professional fees) because as long as the cash balance in the bank account does not fall below the separate property cash deposited into the account, the separate property funds are presumed to remain in the account. This method should result in the same characterization as the *community out first method* because the community funds are drawn out first, and as long as the balance remaining in the account is equal to or less than the separate fund deposited, the balance has to be the separate funds.

A disadvantage of using the *minimum sum balance method* is that if the separate property deposit(s) exceeded the remaining balance in the account, the separate property cash withdrawn is not accounted for. Additionally, if statements for the

relevant periods are missing or otherwise unavailable, the *minimum sum balance method* may not be successful in showing that the separate funds were not depleted during the missing period(s) and therefore the remaining separate funds may not be proven to the satisfaction of the trier of fact.

g. Exhaustion Method/Family Expense Method

This method is more fully explained in a paper by Joan F. Kessler, Allan R. Koritzinsky, and Marta T. Meyers, titled, *Tracing to Avoid Transmutations*, and found in 17 JAMAML 371, 375 (2001). See also Richard Orsingers paper titled Different Ways to Trace Separate Property which was presented at the 35<sup>th</sup> Annual Advanced Family Law Course in August 2009.

The approach assumes that all family living expense are to be charged against community funds. The separate characterization can be established by showing that on a particular date a withdrawal occurs, the community funds were already exhausted on payment of family living expenses. Under this method, the community money will be used to pay family expenses before separate money will be used for family expenses. Therefore, it is not necessary to document every deposit and every expenditure as it occurred no running balance is required. All of the family money that went into the account, up to the date in question, is calculated. Then all of the family expenses that were paid out of the account in the same time period are computed. If the family expenses are equal to, or greater than, the family income, what is left is separate property. Hence, the remainder of the account at the date or the asset purchased on that date with the leftover separate money is separate property.

In *Zagorski v. Zagorski*, 116 S.W.3d 309 (Tex. App. - Houston [14<sup>th</sup> Dist.] 2003, pet denied), W challenged the trial courts determination that H had separate funds in a disputed account, and she asserted that the funds should have been community property since the account was commingled. H provided evidence showing the separate balance prior to marriage, the interest income earned from the account during marriage of \$115,000, and a listing of withdrawals made for living expenses during the same period of \$366,000. *Zagorski*, 116 S.W.3d at 320. The court noted that W did not provide evidence rebutting the *community out first* presumption and decided that, because the withdrawals for community expenses depleted community funds in the account, H rebutted the statutory presumption that the account was a community asset. *Id.* at 321.

What is considered a living expense? Needs are arguably a living expense, but are wants or luxuries considered living expenses? Would there be a limit on the number of vehicles? Are charitable donations considered living expenses? Are there limits on

spending for clothing or other items does it vary with the size of the potential community estate?

h. Maximum Community

*Duncan v. United States*, 247 F.2d 845 (5<sup>th</sup> Cir. 1957) involved an action where co-executors sought recovery of a portion of the estate taxes paid. The Commissioner of the Internal Revenue Service determined that various assets were separate property. The estate asserted that the records did not indicate how the disputed assets were acquired and, therefore, the community presumption should apply and the disputed assets should be characterized as community property. It was acknowledged that H had significant separate property. The records reflected that for the period between 1947-1949, the total possible community sources of income totaled approximately \$17,000 after deductions for income taxes. Information regarding disbursements for living and household expenses was not established. The court stated that there was no other source whatever from which presumed community property funds were available to acquire the disputed assets; therefore, the total community interest in the disputed assets could not exceed the approximate \$17,000, assuming that all of the income available for spending was used to accumulate the assets in question.

4. Rules Regarding Bank Accounts and Assets Purchased with Funds from Bank Accounts

Most separate property assets, either when initially acquired or sometime later in the chain of exchanges, takes the form of cash, and almost inevitably the cash is deposited in a bank or brokerage account. A few issues to keep in mind regarding bank accounts and certificates of deposits:

- a. there is a presumption (though it may be rebutted) that when a spouse uses separate property to acquire an asset during marriage and takes title to that property in the names of both spouses, a presumption arises that the purchasing spouse intended to make a gift of one-half of the separate funds to the other spouse. *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975). The common law presumption of gift was applied to purchase of real estate and homesteads, though it was later broadened to other types of assets where there is a title or owner or record, i.e. bank accounts. *In re Marriage of Case*, 28 S.W.3d 154, 158 (Tex. App. - Texarkana 2000, no pet.). In 1979, the Nontestamentary Transfers Chapter of the Texas Probate Code was adopted and it had the effect of overriding the common law gift presumption on accounts: it provided that

money in joint accounts belongs to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. *Id* at 159, citing Texas Probate Code 438 (a).

- b. A pay on death (POD) account belongs to the original payee during his lifetime and not to the POD payee(s). Texas Probate Code 438 (b).
- c. The mere deposit of community funds in a joint account does not effectuate a partition of community funds. *Tuttle v. Simpson*, 735 S.W.d 2d 539 (Tex. App. - Texarkana 1987, no writ).