

Till Death Do Us Part?

Splitting up can be difficult, especially if you don't know the truth about family law in Texas.

BY JUDITH E. BRYANT



Lawyers who specialize in handling divorces often have clients who are certain of how their divorce case will unfold, usually because they have received “legal” advice from divorced friends or the Internet. Despite the overwhelming amount of information out there—or, perhaps, because of it—certain myths about divorce-related law in Texas seem to persist.

Myth #1: “If I get the kids 50 percent of the time, I won’t have to pay child support.”

Truth: You may have to pay child support anyway.

If one parent makes significantly more money than the other, the party with the greater income will likely be ordered to pay child support, even if they have the kids half of the time. The court will always care more about the welfare of the kids than what either party thinks is fair. Judges in Travis County, for example, have indicated that they would consider looking at both parties’ incomes and calculating what each would owe under the child support guidelines. The party with the greater income could then be ordered to pay the difference to the lesser-earning party. This is just one way to handle child

support in a truly 50-50 possession schedule.

Myth #2: “Texas has a no-fault divorce system, so my affair is irrelevant.”

Truth: Your affair is relevant, and it may lead to a disproportionate division of the marital estate favoring your spouse.

“No-fault” divorce means that neither party has to prove fault of the other party in order to get divorced. The fact that one party is to blame for the breakup of a marriage, however, is still relevant in terms of how the marital property is divided. The Texas Supreme Court has held that guilt in

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the breakup of a marriage is one of many factors a court can look to when deciding whether to make a disproportionate division of the marital estate.¹ Thus, fault-based grounds for divorce, such as adultery and cruel treatment, are still relevant and admissible in a divorce case. The extent to which such allegations will affect the outcome of a property division can vary depending on the county and the circumstances alleged.

Myth #3: “Texas doesn’t have alimony.”

Truth: Texas does have alimony—we just call it “spousal maintenance” instead.

Under Chapter 8 of the Texas Family Code, courts have the discretion to award “spousal maintenance” in a divorce case. If a spouse is eligible for spousal maintenance, the court can award up to 20 percent of the other spouse’s gross monthly income, or \$5,000, whichever is less. A party is eligible for spousal maintenance if: (1) that party is unable to earn sufficient income to provide for his/her minimum reasonable needs because of a disability; or (2) the couple has been married for 10 years or more and that party lacks the ability to earn sufficient income to provide for his/her minimum reasonable needs. Victims of family violence may also be eligible without regard to length of marriage. Significantly, spousal maintenance is another area where an affair or other marital misconduct may turn out to be relevant.² In addition to marital misconduct, the court can also consider a spouse’s contribution as homemaker, relative education and employment skills, and contributions to the education of the other spouse.

Myth #4: “If the property is in my name only, it’s my separate property.”

Truth: Just putting your name on something does not make it yours.

All property possessed by either party at the time of divorce is presumed to be community property, and the party claiming otherwise must prove it by clear and convincing evidence. Under Texas law, separate property is defined as: (1) property owned before marriage; (2) property acquired during marriage by gift or inheritance; and (3) recovery for personal injuries sustained during marriage (except loss of earnings). Thus, it is when and how a party received property that determines whether it is separate or community—not whose name is on it.

Nevertheless, keeping separate property in your name only can be beneficial for identifying and proving separate property. If you put your spouse’s name on an account or title to real property, the law will presume that it was a gift to your spouse. It will be up to you to prove that no gift was intended. Likewise, when community and separate funds are commingled, it’s much harder to prove what is separate. This task can be done by tracing the separate funds, but it is expensive and often requires expert testimony to establish which portion of an account or other property is still separate versus community property.

Myth #5: “I earned it, so it’s mine.”

Truth: If you earned it during marriage, it’s community property.

Income earned during marriage by either party is community property. And that includes retirement. Contributions to a 401(k) or IRA during marriage—whether made by you or your employer—belong to the community estate. The same is true of your pension or other benefits plan; if the benefits accrued because of your work during the marriage, those benefits—even if not received until some point in the future—belong to the community estate.

Myth #6: “I bought it with my earnings, so it’s mine.”

Truth: Again, the opposite is true.

Because income earned during the marriage belongs to the community estate, anything you purchase with those earnings also belongs to the community estate. **TBJ**

NOTES

1. See *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981).
2. See TFC §8.052(10).



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