

JUDGE'S OPTIONS IN DIVIDING COMMUNITY PROPERTY – 2024

by Greg Enos

For each item of community property, the judge can:

1. Award the entire item to one spouse or the other;
2. Divide the property and award part to each spouse;
3. Award joint ownership (this seldom happens); or
4. Order the property to be sold and order how the proceeds are to be divided.
An order to sell real estate should address the following – see attached form:
 - a. who has the use of the property until it is sold
 - b. who pays for expenses and repairs on the property before it is sold and whether the person paying for any such expenses and repairs is paid back from the sales proceeds
 - c. how the sale price is determined
 - d. if needed, who the broker will be or how that person will be selected
 - e. how the net proceeds will be divided
 - f. some mechanism for resolving disputes over the sale, such as arbitration

In some instances the judge can award a money judgment.

1. A money judgment awarded can be awarded:
 - a. To equitably divide property, such as when the husband is awarded his dental practice worth \$300,000, the court could award the wife a judgment of \$150,000 (since the dental practice cannot be divided or, as a practical matter, ordered to be sold.)
 - b. To satisfy a claim for reimbursement.
 - c. To satisfy a claim for fraud on the community estate.
2. How to award a money judgment:
 - a. Use judgment language and specify the postjudgment interest rate, per Tex. Fin. Code Sec. 304.2 – see attached form
 - b. Specify the payment terms, if applicable.
 - c. Secure with liens
 - (1). Owelty lien - lien on the homestead awarded to one spouse to secure payment to the other spouse. This requires these documents:
 1. Special Warranty Deed with Encumbrance for Owelty of Partition (signed by both parties);
 2. Deed of Trust to Secure Owelty of Partition;
 3. Real Estate Lien Note;
 4. Deed of Trust to Secure Assumption (as to existing

- mortgage, if necessary).
- (2). Vendor's lien - a lien on a specific item of property that secures payment to the other spouse (e.g. a lien on husband's 2,500 shares of his business). This requires judgment language in the order, a note, and a deed of trust.
 - (3). Promissory note and security agreement – see attached forms.

The judge must confirm separate property of the spouses. Tex. Fam. Code Sec. 7.002(b),(c)

The court cannot take away a spouse's separate property, but the court can:

1. Order the sale of a property that is part separate and part community. *Mogford v. Mogford*, 616 S.W.2d 936, 945 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.).
2. Place a lien on separate property to secure a lien arising from a reimbursement claim against the spouse's separate estate. *Heggen v. Pemelton*, 836 S.W.2d 145, 146 (Tex. 1992). The court cannot place a lien against separate property to secure the division of community property. *Id*
3. Allow a spouse to live in a homestead that is the separate property of the other spouse. This seldom happens.

The judge cannot divide:

1. Social security benefits. *Richard v. Richard*, 659 S.W.2d 746, 749 (Tex. App.—Tyler 1983, no writ.), 42 U.S.C. 407(a).
2. V.A. disability benefits, 38 U.S.C. §1110, 1131, or Military disability benefits, 10 USC § 1408(a)(4)(c).

Provisions Dealing with Sale of Residence

IT IS FURTHER ORDERED AND DECREED that the property and all improvements located at _____ shall be sold under the following terms and conditions:

1. The property shall be listed for sale as follows:

___ The property is already listed for sale with _____ of _____ Realty Co.

___ The parties are ORDERED to list the property for sale with _____ of Realty Co. within ___ days of entry of this order and are ORDERED to sign any listing agreement or other documents needed to list the property for sale.

___ The parties are ORDERED to list the property for sale with a duly licensed real estate broker having sales experience in the area where the property is located, provided further that the real estate broker shall be an active member in the Multiple Listing Service that includes the area where the property is located. If the parties cannot agree on a realtor to list the property with, then _____ [husband or wife's name] shall provide the names of three brokers with the above qualifications to the other party, who shall select the broker to list the property from the list of three names provided.

2. The parties are ORDERED to timely sign any required extension of the listing agreement with that broker unless the parties agree in writing to use another broker to list the property.

3. Initial List Price:

___ The property shall be initially listed for sale for \$_____.

___ The initial list price of the property shall be determined by agreement of the parties. If the parties cannot agree on the initial list price, then the initial list price shall be determined by:

___ _____ [list a spouse]

___ The real estate broker described above shall conduct a market analysis regarding the property and shall make a recommendation for the initial list price, which shall be the list price if either party agrees with the recommendation.

4. Sales Price and Terms of Sale:

___ The property shall be sold for a price and according to terms that are mutually agreeable to the parties. If the parties cannot agree on reductions in list price or the sale price or terms of sale of the property, then:

___ _____ [list a party] shall make the final decision.

___ The real estate broker described above shall make a recommendation on the issue in dispute, which shall be followed if one of the parties agrees with the recommendation.

___ _____ shall be appointed arbitrator to determine the dispute over the list price or sales price or terms. Each party shall pay 50% of the arbitrator's fees.

___ A receiver shall be appointed by the court to conduct the sale of the property.

___ The property shall be sold for a price and according to terms determined by _____ [name the spouse] after consultation with the other party.

5. Duty to Cooperate With Showing, Upkeep and Sale of Property: The parties are ORDERED to sign all necessary documents and to do all steps necessary to facilitate the sale of the property, including but not limited to, keep the property well maintained and presentable for showings, cooperate with the Broker in scheduling showings of the property and promptly communicate with the Broker regarding efforts to market and sell the property.

6. Use of Property Pending Sale:

___ _____ [name the party] shall have the exclusive use of the property pending the sale.

___ The parties may both continue to reside by agreement in the property pending the sale; provided that if one party moves out of the property, then the other party still living at the property shall have the exclusive use of the property after the other party moves out.

___ The property shall remain vacant pending the sale unless the parties agree in writing otherwise.

___ The property shall be leased [continue to be leased] on terms determined by:

___ The parties by agreement

___ _____ [name a party].

[Describe how lease payments are used and accounted for]

7. Payments Related to Property Pending Sale:

___ _____ shall be responsible for the timely payment of the following payments related to the property: mortgage payments, taxes, insurance, homeowner association dues, utilities.

___ The parties shall each timely pay 50% of the following payments related to the property: mortgage payments, taxes, insurance, homeowner association dues, utilities.

8. Repairs, Maintenance and Upkeep of the Property

___ _____ shall pay for necessary repairs, maintenance and upkeep on the property [provided that any repair that shall cost over \$500.00 shall be paid 50% by _____ and 50% by _____ as long as they agree on the details and cost of the repair.]

___ The parties shall each pay 50% of the cost of necessary repairs, maintenance and upkeep of the property.

___ If the parties cannot agree on the need for repairs or maintenance or on the contractor to perform the work or on the cost of such work, then the broker described above shall make a recommendation and the broker's recommendation shall be followed if either party agrees with the recommendation.

9. Division of net sales proceeds from the sale of the property:

“Net proceeds” means the balance remaining after the title company pays off any loan or liens secured by the property, taxes, insurance, closing cost, broker commissions and fees related to the sale of the property.

The net sales proceeds from the sale of the property shall be distributed as follows:

___ First, the party who paid a mortgage or loan payment secured by the property and any taxes, insurance, or homeowner association dues related to the property shall be repaid for the amount of any such payments from the net proceeds of the sale of the property.

___ Any party who paid more than \$ _____ for a repair to the property necessary for the property to be sold or lived in pending sale shall be repaid for the amount of any such repair from the net proceeds of the sale of the property.

___ Any party who paid for a repair to the property agreed to by the other party in writing in advance shall be repaid for the amount of any such repair from the net proceeds of the sale of the property.

___ The remaining balance of the net proceeds of the sale of the property shall be divided Fifty percent (50%) to _____ and fifty percent (50%) to _____ [change percentages if needed]

___ _____ shall be appointed arbitrator to determine any dispute over the calculation of the net proceeds of the sale of the property or the division of the net proceeds between the parties. Each party shall pay 50% of the arbitrator's fees.

___ The net proceeds of the sale of the property shall be:

___ Paid directly to each party by the title company according to the calculations described above.

___ Held in trust by _____ [name one attorney] pending further written agreement of the parties or court order.

___ Deposited into a joint interest-bearing account at _____ bank established by the parties. The parties are ORDERED no to make any withdrawals from the account unless they agree in writing in advance or upon further court order.

10. Tax deductions related to the property pending the sale shall be utilized:

___ exclusively by _____ [name party]

___ 50% by each party.

Judgment And Lien To Equalize Division

Judgment

For the purpose of a just and right division of property made in this decree, IT IS FURTHER ORDERED AND DECREED that [Petitioner/Respondent], [name], is awarded judgment of [number] dollars (\$[amount]) against [Respondent/Petitioner], [name], payable in accordance with the terms of the closing documents ordered in this decree to be executed, with interest at [percent] percent per year compounded annually from the date of judgment, for which let execution issue.

This judgment is part of the division of community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony, or child support.

Lien

The Court finds that this decree is a partition of the community property of the parties. Because of the nature of the properties making up the estate, the property cannot be divided in a just and right manner without impairing the value of all portions. A vendor's lien note in the amount of [number] dollars (\$[amount]) is necessary to make a just and right partition of the property.

IT IS ORDERED AND DECREED that an equitable lien is created against the following property:

[Describe the property to be subject to the lien. Include the legal description of any real property. Additional collateral may be included and UCC filings required.]

This lien is in the nature of a purchase-money lien. The property described above is a part of this partition order. The entire interest in the property described above is subject to the lien.

[Respondent/Petitioner] IS ORDERED to sign a vendor's lien note for [number] dollars (\$[amount]) payable to [Petitioner/Respondent]. The note shall bear interest at [percent] percent per year, compounded annually, and [percent] percent per year on matured, unpaid amounts, compounded annually. It is to be payable according to the following terms: [describe the terms of the note].

[Respondent/Petitioner] is ORDERED to sign an owelty lien deed of trust [specify applicable security instruments, including UCC forms] to secure the note.

Lien for Reimbursement

IT IS DECREED that [the community/Petitioner's separate/Respondent's separate] estate is entitled to reimbursement from [Petitioner's separate/Respondent's separate/the community] estate for [basis of reimbursement claim] and that [name] is entitled to a judgment of [number] dollars (\$[amount]). IT IS THEREFORE ORDERED AND DECREED that [name] is awarded a judgment of [number] dollars (\$[amount]) against [name]. To secure payment of the judgment, [name] is granted an equitable lien on [describe property] until the entire judgment, plus accrued interest, is paid in full. The judgment shall bear interest at [percent] percent per year, compounded annually. The judgment and interest are payable according to the following terms: [describe the payment terms, including the effects of any default].

****Include the following if applicable.****

[Name] is ORDERED to sign a note for [number] dollars (\$[amount]) payable to [name]. The note shall bear interest at [percent] percent per year, compounded annually, and [percent] percent per year on matured, unpaid amounts, compounded annually. It is to be payable according to the following terms: [describe the terms of the note].

****Include the following if applicable.****

[Name] is ORDERED to sign [specify applicable security instruments, including UCC forms] to secure the note.

****Continue with the following.****

This award for reimbursement is part of the division of community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony, or child support.

Judgment And Lien For Fraud On Community

Judgment

In satisfaction of [name]'s claim for fraud on the community, IT IS FURTHER ORDERED AND DECREED that [Petitioner/Respondent], [name], is awarded judgment of [number] dollars (\$[amount]) against [Respondent/Petitioner], [name], with interest at [percent] percent per year compounded annually from the date of judgment, for which let execution issue.

This judgment is part of the division of community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony, or child support.

****Include the following if applicable.****

Lien

The Court finds that the judgment for fraud on the community should be secured. To secure payment of the judgment set out above, [name] is granted an equitable lien on [describe property] until the entire judgment, plus accrued interest, is paid in full. The judgment shall bear interest at [percent] percent per year, compounded annually, and [percent] percent per year on matured, unpaid amounts, compounded annually. The judgment and interest are payable according to the following terms: [describe the payment terms, including the effects of any default].

****Include the following if applicable.****

[Name] is ORDERED to sign a note for [number] dollars (\$[amount]) payable to [name]. The note shall bear interest at [percent] percent per year, compounded annually, and [percent] percent per year on matured, unpaid amounts, compounded annually. It is to be payable according to the following terms: [describe the terms of the note].

****Include the following if applicable.****

[Name] is ORDERED to sign [specify applicable security instruments, including UCC forms] to secure the note.

****Include the following if a party is awarded an interest in a future benefit.****

Promissory Note Secured by Security Agreement

Basic Information

Date:

Maker:

Maker's Mailing Address: [include county]

Payee:

Place for Payment: [include county]

Principal Amount:

Annual Interest Rate:

Maturity Date:

Annual Interest Rate on Matured, Unpaid Amounts:

Terms of Payment (principal and interest):

Security for Payment:

This note is secured by a security interest created in a security agreement that covers [type of collateral] and that is dated [date] and executed by [Maker/[name of debtor in security agreement]] as the debtor in favor of Payee as the secured party.

Other Security for Payment:

Promise to Pay

Maker promises to pay to the order of Payee the principal amount plus interest at the annual interest rate. This note is payable at the place for payment and according to the terms of payment. All unpaid amounts are due by the maturity date. If any amount is not paid either when due under the terms of payment or on acceleration of maturity, Maker promises to pay any unpaid amount plus interest from the date the payment was due to the date of payment at the annual interest rate on matured, unpaid amounts.

Prepayment Clause

Maker may prepay this note in any amount at any time before the maturity date without penalty or premium. Prepayments will be applied to installments on the last maturing principal, and interest on that prepaid principal will immediately cease to accrue.

Defaults and Remedies

If Maker defaults in the payment of this note or in the performance of any obligation in any instrument securing or collateral to this note, Payee may declare the unpaid principal balance, earned interest, and any other amounts owed on the note immediately due and may exercise all other rights and remedies available at law or in equity.

Waivers

Maker and each surety, endorser, and guarantor waive, to the extent permitted by law, all (1) demand for payment, (2) presentation for payment, (3) notice of intention to accelerate maturity, (4) notice of acceleration of maturity, (5) protest, and (6) notice of protest.

Attorney's Fees

Maker also promises to pay reasonable attorney's fees and court and other costs if an attorney is retained to collect or enforce the note. These expenses will bear interest from the date of advance at the annual interest rate on matured, unpaid amounts. Maker will pay Payee these expenses and interest on demand at the place for payment. These expenses and interest will become part of the debt evidenced by the note and will be secured by any security for payment.

Usury Savings

Interest on the debt evidenced by this note will not exceed the maximum rate or amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal amount or, if the principal amount has been paid, refunded. On any acceleration or required or permitted prepayment, any excess interest will be canceled automatically as of the acceleration or prepayment or, if the excess interest has already been paid, credited on the principal amount or, if the principal amount has been paid, refunded. This provision overrides any conflicting provisions in this note and all other instruments concerning the debt.

Other Clauses

Each Maker is responsible for all obligations represented by this note.

When the context requires, singular nouns and pronouns include the plural.

This note is given to evidence the indebtedness imposed on Maker by the Final Decree of Divorce rendered in Cause No. [number], styled "[style of case]," by the [designation] Court of [county] County, Texas.

[Name], Maker
[Address]