CHARACTERIZATION OF MARITAL PROPERTY RULES & PRESUMPTIONS – 2024

by Greg Enos

1. A premarital or marital property agreement can change all of the rules discussed below.

2. The importance of characterization: Community or Separate

A divorce court can divide community property but a judge cannot take away a person's separate property. A judge can in theory allow a spouse to live in the other spouse's separate property house, but this seldom happens. A judge can order a jointly owned separate property real estate to be sold in certain situations.

3. Inception of Title Rule

The character of the property, whether separate property or community property, is fixed at the time a person first acquires an ownership interest in the property. *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984); *Zagorski v. Zagorski*, 116 S.W.3d 309, 316 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Weird twist for real estate: ownership of real estate is traced back to the date an earnest money contract is signed. *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 732 (Tex. App.—Houston [1st Dist.] 1981, no writ)(guy signs earnest money contract, then gets married then closes on the house purchase during the marriage – house is his separate property!).

If a lot is separate property, but during the marriage the couple builds a house on the lot, then the house is separate property. In *re Marriage of Morris,* 12 S.W.3d 877, 881 (Tex. App. — Texarkana 2000, no pet.)(but there may be a reimbursement claim for the capital improvement!).

Wages earned during the marriage but paid after divorce are community. *Keller v. Keller*, 141 S.W.2d 308, 310 (Tex. 1940). Wages earned before marriage, but paid while married are separate. *Moore v. Moore*, 192 S.W.2d 929, 930 (Tex. App.—Fort Worth 1946, no writ).

4. Presumption of Community Property

<u>All</u> property possessed by the parties at the time of divorce is presumed to be community property. Tex. Fam. Code §3.003(a)

5. Community Property

Community property includes:

(1) Pay of spouses, employee benefits and retirement earned during the marriage, *Herring v. Blakeley*, 385 S.W.2d 843 (Tex. 1965)

(2) Earnings of children (and items purchased with these funds), *Insurance Company of Texas v. Stratton*, 287 S.W.2d 320 (Tex. Civ. App.—Waco 1956, writ ref-d n.r.e.)

(3) Income from separate property, *Arnold v. Leonard*, 273 S.W. 799 (Tex. 1925). Income received during marriage from a separate property patent issued prior to marriage is community property. *Alsenz v. Alsenz*, 101 S.W.3d 648, 654 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) .

There are two exceptions to the rule that income from separate property is community:

1. If a spouse gives the other spouse a gift, income from that gift is presumed to be separate. Tex. Fam Code §3.005
2. Royalties from a separate property mineral estate are still separate property.

Norris v. Vaughn, 260 S.W.2d 676, 679 (Tex. 1953).

(4) Property acquired with community credit is community property and property acquired with separate property is separate. *Whorrall v. Whorrall*, 691 S.W.2d 32, 35 (Tex. App.—Austin, writ dism'd).

(5) Money used for the purchase of properties during the marriage is presumed to have been community funds unless the evidence to the contrary is clear and convincing. *Cooke v. Cordray,* 333 S.W.2d 461 (Tex. Civ. App.—Beaumont 1960, no writ).

(6) A debt or loan acquired during the marriage is presumptively a community debt unless the lender agreed to look solely to the borrowing spouse's separate property for repayment. *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975).

6. Separate Property

(1) Separate property is defined in the Texas Family Code, §3.001 as:

- property owned or claimed by the spouse before marriage,
- property acquired by the spouse during the marriage by gift, devise or descent, and
- recovery for personal injuries sustained by spouse during marriage, except for recovery for loss of earning capacity during the marriage.[1]

(2) Property purchased during the marriage with separate funds is separate property. *Hilley v. Hilley*, 161 Tex. 569, 573, 342 S.W.2d 565, 567 (Tex.1961).

(3) Separate property is defined by the Texas Constitution as that acquired prior to the marriage or that acquired after by gift, devise, or descent, Tex. Const. Art. XVI, sec. 15.

(4) A trial court may not divest a party of his separate property by a divorce decree. *In re Marriage of Murray*, 15 S.W.3d 202, 205 (Tex.App.—Texarkana 2000, no pet.), *Eggemeyer v. Eggemeyer,* 554 S.W.2d 137 (Tex. 1977).

7. Proving Separate Property

The spouse attempting to prove that something is separate property has the burden to prove it is separate by "clear and convincing evidence" *McKinley v. McKinley*, 496 S.W.2d 540, 532 (Tex. 1973).

8. Evidence of Separate Property

Documents, admissions and the testimony of fact or expert witnesses can be used to prove an item is separate property. Some cases say the uncontradicted testimony of a spouse seeking to overcome the community property presumption does not have to be corroborated (by documents or other testimony) to meet the

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[1] The Court in *Thornhill v. Thornhill,* 666 S.W.3d 823, 827 (Tex. App.—Houston [14th Dist.] 2023, no pet.) stated:

> *Recovery for personal injuries to the body, including mental pain and anguish and physical disfigurement, sustained by a spouse during marriage is considered that spouse's separate property, but recovery for loss of earning capacity, medical expenses, and other expense associates with injury to the community estate are community property.*

Generally, if an injury case is settled and paid in a lump sum, the entire recovery is considered community property *Licata v. Licata,* 11 S.W.3d 269, 273 *(*Tex. App.—Houston [14th Dist.] 1999, pet. denied).

clear and convincing standard. *Holloway v. Holloway,* 671 S.W.2d 51, 56 (Tex. App.—Dallas 1983, writ dism'd); *Newland v. Newland,* 529 S.W.2d 105, 107 (Tex. Civ. App.—Fort Worth 1975, no writ).

The Beaumont Court of Appeals in *Burgess v. Burgess*, No. 09-06-301-CV (Tex. App.—Beaumont 2007, no pet.)(memo op.; 5-24-07) stated:

> *A spouse is competent to testify about the character of his property; however, his testimony usually must be corroborated by other testimonial or documentary evidence to rebut the community-property presumption. See Bahr v. Kohr, 980 S.W.2d 723, 730 (Tex. App.--San Antonio 1998, no pet.); Robles v. Robles, 965 S.W.2d 605, 620 (Tex. App.--Houston [1st Dist.] 1998, pet. denied). A spouse's uncorroborated testimony that is contradicted "may not meet the clear and convincing standard." Pace v. Pace, 160 S.W.3d 706, 714 (Tex. App.--Dallas 2005, pet. denied). A spouse's uncorroborated and uncontradicted testimony is sufficient to constitute clear and convincing evidence. See id.*

On the other hand, the Houston First Court of Appeals has said, "Mere testimony that property was purchased with separate funds, without tracing of the funds, is generally insufficient to rebut the [community property] presumption." *McElwee v. McElwee*, 911 S.W.2d 182, 188 (Tex. App.—Houston [1st Dist.] 1995, pet. denied). See also *Boyd v. Boyd*, 131 S.W.3d 605, 611 (Tex. App.—Fort Worth 2004, no pet.).

An uncontradicted inventory admitted into evidence can be sufficient evidence that property is separate. The Houston First Court of Appeals in *Nowzaradan v. Nowzaradan*, No. 01-05-00094-CV, (Tex. App.— Houston [1st Dist.] 2007, not pet.)(memo op. 2/8/07), stated:

> *[the husband's] contentions ignore that Delores identified the two accounts as her separate property in her sworn, second amended inventory and appraisement. Delores filed this document before trial, in compliance with the trial court's orders and local rules, and it was admitted into evidence at trial, but [the husband] did not file a sworn inventory and appraisement to controvert Delores's filing. Because the inventory and appraisement was both properly sworn and admitted into evidence, the document constituted probative evidence, sufficient to overcome the community-property presumption, that the two accounts were Delores's separate property.*

Another case from 2004 shows how not to prove separate property when inventories disagree:

> *Both parties argue that [the dog] Lucky is their separate property, and Lucky is listed in both appellant's and appellee's inventories as their separate property.*
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> ....
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> *Neither party presented any evidence to clarify the source of funds used to purchase Lucky. However, it is undisputed that appellee purchased Lucky prior to the marriage. Under the family code, a spouse's separate property consists of the property owned or claimed by the spouse before marriage. Tex. Fam. Code Ann. § 3.001(1). However, in this case the parties lived together prior to marriage, and commingled their funds in a joint bank account. Both appellant and appellee testified that the funds used to purchase Lucky were the commingled funds from the joint bank account. Therefore, because neither of the parties established by clear and convincing evidence that Lucky was purchased with the separate property funds of either appellant or appellee, the most the evidence shows is that they own Lucky as tenants in common. Thus, the trial court erred in confirming Lucky as appellee's separate property.*
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> ....
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> *Appellant listed the Kiwi laptop computer and accessories in his inventory as his separate property. In contrast, appellee listed the computer as community property and indicated it was "husband's." Neither party presented evidence to support the proposition that the computer was purchased prior to marriage or with separate funds. Consequently, we hold that the trial court abused its discretion with regard to its characterization of the Kiwi laptop computer and accessories because appellee did not establish by clear and convincing evidence that the computer was her separate property. However, appellant did not meet the burden of proving that the computer was his separate property either. Therefore, the trial court erred by mischaracterizing the computer as separate property when it should have been characterized as community property.*
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> *Schneider v. Schneider*, No. 02-02-00075-CV (Tex. App.—Fort Worth 2004)(citations omitted)

9. Presumption of Separate Property

- A spouse who purchases real estate during the marriage with her separate property, but takes title to the property in the names of both spouses is presumed to have made a gift to the other spouse of one-half interest in the

property. *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex.1975); *Whorrall v. Whorrall*, 691 S.W.2d 32, 35 (Tex. App.—Austin 1985, writ dism'd). This presumption may be rebutted by clear and convincing evidence that there was no intent to make a gift. *Cockerham*, 527 S.W.2d at 168; *Whorrall*, 691 S.W.2d at 35.

- When one spouse buys real property during the marriage with his separate funds, but takes title in the name of the other spouse, it is presumed that there was a gift and the real estate is the separate property of the other spouse. *Powell v. Jackson,* 320 S.W.2d 20, 23 (Tex. App.— Amarillo 1958, writ ref'd n.r.e.). This presumption can be rebutted by clear and convincing evidence that the purchasing spouse did not intend to make a gift to the other spouse. Id. At 23.

- A presumption of separate property arises if the deed contains a separate property recital. *In re Marriage of Moncey*, 404 S.W.3d 701, 712 (Tex. App.-Texarkana 2013, no pet.). A "separate property recital" is a recital in an instrument that, among other things, the property is transferred to a spouse as the spouse's separate property. Such a separate property recital negates the community property presumption and creates in its place a rebuttable presumption of separate property. *In re Marriage of Moncey*, 404 S.W.3d at 712-13; *Magness v. Magness*, 241 S.W.3d 910, 912- 13 (Tex. App.-Dallas 2007, pet. denied). When both spouses are party to the transaction, "there is good reason to presume the recitals in the deed to be true." Thus, a spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake." *Seitz v. Seitz*, 608 S.W.3d 272, 278 (Tex. App.-Houston [1st Dist.] 2020, no pet.). But, if one spouse is not a party to the purchase, the nonparticipating spouse is free of the parol evidence rule in proving the community nature of the transaction as against the separate property recitals in the deed. *Hodge*, 277 S.W.2d at 905. The court in *Weed v. Frost Bank*, 565 S.W.3d 397, 412 (Tex. App.-San Antonio 2018, pet. denied) said that the presumption created by a separate property recital is a "bursting bubble" presumption, meaning that "[a]ll a party 'must do to eliminate the presumption from the case is produce enough evidence so that a reasonable juror could find the non-existence of the presumed fact.'" At that point, the burden shifts back to the participating spouse to prove the separate nature of the property.

  In re Stallworth, No. 13-21-00251-CV, (Tex. App. – Corpus Christi, 2/2/2023, no pet. hist.)(mem. op.) is a recent example of these principles. During the marriage, the wife purchased a lot and the deed listed as the grantee "[wife], a married person as her separate property." The husband testified that he and his wife planned to purchase the lot together and he put funds in a joint account for that purpose. The husband also testified that he was not present during the deed's execution and he did never knew that the deed ultimately listed his wife as

the sole grantee. The wife testified that she bought the lot "all on [her] own," the deed is in her name only, and the deed states the property would be owned as her separate property. On cross-examination, the wife confirmed that her husband "was not a part of the transaction" but she testified that her husband had "seen all the paperwork." The court of appeals held that the husband was not a party to the transaction and was free of the parol evidence rule to prove the lot was community property despite the recital in the deed. The husband offered his testimony and bank records showing that he deposited money into the joint account used to buy the lot. There was no other testimony or evidence of where the funds to buy the lot came from. The court of appeals concluded:

> *Based on this evidence, we conclude that a reasonable factfinder could have determined that [the husband] rebutted the separate property presumption of Lot 205. Thus, the burden then shifted back to [the wife] to prove the separate nature of Lot 205-an issue that we analyze as we "would in any other case." And, as noted, [the wife] failed to provide sufficient evidence in that regard, as she failed to trace the relevant funds used to purchase the lot. Because [the wife] failed to provide sufficient evidence of Lot 205's separate nature, the trial court was without evidence on which to conclude the lot was [the wife's] separate property. The trial court thus erred by declaring Lot 205 [the wife's] separate property.*

10. Gifts

Gifts are separate property. Tex. Fam. Code 3.001(2). A party to a divorce who asserts that a property is his or her separate property because it is a gift must overcome the presumption that all property at divorce is community and prove that the item was a gift by clear and convincing evidence. Tex. Fam. Code Sec. § 3.003(a)(b). *McKinley v. McKinley*, 496 S.W.2d 540, 532 (Tex. 1973).

A gift is a voluntary transfer of property to another made gratuitously and without consideration. *Hilley v. Hilley*, 161 Tex. 569, 575, 342 S.W.2d 565, 569 (1961).

The elements of a gift are:

(1) the intent to make a gift;
(2) delivery of the property; and
(3) acceptance of the property.

Roberts v. Roberts, 999 S.W.2d 424, 432 (Tex. App.—El Paso 1999, no pet.).

The intent must exist at the time of the transfer, not at the time of a subsequent divorce. *Long v. Long*, 234 S.W.3d 34, 40 (Tex.App.—El Paso 2007, pet. denied).

A transfer of ownership from a parent to a child is presumed to be a gift, but the presumption is rebuttable. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)

In divorces, spouses frequently assert, "that property was given to me by my family as a gift and is my separate property." Such claims should be analyzed as follows:

1. A transfer of ownership from a parent to a child is presumed to be a gift, but the presumption is rebuttable. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

2. A gift made by a third party to both spouses creates jointly owned separate property. *Roosth v. Roosth*, 889 S.W.2d 445, 457 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (engagement and wedding gifts). A deed to a house or a title to a car may specify that a gift was made to both spouses, but how do you prove that a couch was gifted to both spouses as opposed to just one of them? Such an argument could only be resolved by the evidence, presumably the testimony of the person giving the gift ("I did not even know his wife and I clearly said I was giving the couch to Tom") and the spouses. It would be rare for there to be a letter, card or e-mail that confirms the gift was given to just one or both of the spouses.

3. If consideration was paid for the property, then it is not a gift.

4. The spouse asserting that an item is a gift has to present clear and convincing evidence to rebut the presumption that the item is community. Some cases say that the testimony of a spouse is enough (see below) and some say that the testimony of the spouse has to be corroborated. A spouse's uncorroborated testimony that is contradicted "may not meet the clear and convincing standard." *Pace v. Pace*, 160 S.W.3d 706, 714 (Tex. App.—Dallas 2005, pet. denied). A spouse's uncorroborated but uncontradicted testimony is sufficient to constitute clear and convincing evidence. See *id*.

An appeal from a Galveston County divorce involved the alleged family gifts of two automobiles and applied the above principles:

This dispute concerns a 1997 Oldsmobile and a 2001 Mercury Marquis that Joseph received from his parents. Joseph testified that the Oldsmobile was a gift from his parents. No other evidence regarding the Oldsmobile was offered. Joseph testified at trial that the Mercury "was partially a gift." He explained that

he agreed to pay his father $1,000 for the car and one of Joseph's sons agreed to pay another $1,000. Joseph valued the car at $4,500.

. . . .

The only testimony regarding the Oldsmobile was Joseph's testimony that it was a gift from his parents. We hold that this is sufficient to establish that the car was a gift. [Joseph's testimony was not corroborated but it was not contradicted, so it was good enough to overcome the community property presumption.]

The very fact that Joseph's father agreed to and received consideration in exchange for the Mercury, however, establishes that it was not given as a gift. We hold Joseph failed to establish by clear and convincing evidence that the Mercury was a gift.

Zoller v. Zoller, (Tex. App.—Houston [1st Dist.] 2011, no pet. hist.)(01-09-00992-CV)(April 21, 2011)

A spouse may make a gift to the other spouse during the marriage. *Roberts*, 999 S.W.2d at 432. However, spouses may not make a gift of their separate property to the community estate, *Tittle v. Tittle*, 148 Tex. 102, 220 S.W.2d 637, 642 (1949); Celso v. Celso, 864 S.W.2d 652, 655 (Tex. App.—Tyler 1993, no writ)

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11. Corporations Funded with Separate Property Funds

In determining the separate or community character of a corporation formed during a marriage, Texas courts "require the parties to clearly trace the separate and community property assets that were contributed during the formation of the corporation." *Allen v. Allen*, 704 S.W.2d 600, 604 (Tex. App.-Fort Worth 1986, no writ). "Corporations organized during marriage and capitalized entirely with traceable separate property of one spouse are characterized as the separate property of that spouse." *Holloway v. Holloway*, 671 S.W.2d 51, 56-57 (Tex. App.-Dallas 1983, writ dism'd). See also *Banister v. Banister*, 03-21-00517-CV (Tex. App. – Austin, Jun 13, 2023)(mem. op.).

12. Refinancing a Separate Property House

The court in *In re Marriage of Jordan*, 264 S.W.3d 850, 856 (Tex. App. —Waco 2008, no pet.) said:

> *The fact that the home was refinanced during the marriage does not change its character as separate property although the refinancing may give rise to a claim for economic contribution or reimbursement of any community funds paid toward the refinanced debt.*

Clients often insist that their spouse's separate property house is now community property because, "we refinanced and my name is on the deed." The client is almost certainly partially correct because his or her name is probably on the deed of trust which allows the mortgage company to foreclose, but that is required in almost all refinances because Texas is a community property state. However, the deed of trust does not transfer ownership like a general warranty deed, it just allows for foreclosure. In the typical refinance situation, the owner of the separate property real estate would testify he or she certainly did not intend to make a gift, it was just that the mortgage company requires both spouses to sign the deed of trust since we are in a community property state. Most importantly, the clear language of the deed of trust does not transfer ownership from one spouse to the other.

However, there might be a few unusual situations where a refinance does transfer ownership. A deed for property from one spouse as grantor to the other spouse as grantee creates a presumption the grantee spouse received the property as separate property by gift. *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Roberts*, 999 S.W.2d at 432. The presumption may be rebutted by proof the deed was procured by fraud, accident, or mistake. *Raymond*, 190 S.W.3d at 81. There are cases where these legal principles and the wording of deeds signed during the refinancing resulted in one spouse's separate property being converted into jointly owned separate property with the other spouse owning 50%!

In re Marriage of Skarda, 2011 WL 2502946 (Tex. App.—Amarillo 2011)(No. 07-09-00191-CV)(June 23, 2011) involved a husband who bought a property in 2002, got married in 2004 and refinanced in 2006. In addition to the usual joint deed of trust, the closing on this refinance also involved the husband and wife signing as grantees a warranty deed conveying the property to themselves as "joint tenants with right of survivorship." Despite that the fact that the wife at the time of refinancing apparently did not have any ownership of the property, the deed's granting clause identified the grantor as "Gregory Skarda, a married man and joined by his spouse Vicki Skarda," and its grantee as "Gregory Skarda and

Vicki Skarda, husband and wife as joint tenants with right of survivorship." The husband testified he did not intend to make a gift to his wife and the wife asserted the land was now community property.

The Amarillo Court of Appeals said:

> *Here, trial began with the presumption that the FM 1264 property was community property. Without dispute from Vicki, inception of title in Gregory before marriage was established. The January 17 deed created a joint tenancy in the FM 1264 property in Gregory and Vicki. Otherwise, evidence of characterization was meager. Gregory testified he intended only to refinance the property and not give a half interest to Vicki. Vicki agreed she received a one-half interest in the property by gift "or otherwise" but also agreed the property was community in which she owned a one-half interest by deed. There was no evidence the January 17 deed was procured by fraud, accident, or mistake. By its nature, the joint tenancy created in Vicki by the January 17 deed was her separate property. On this record, we are unable to say the trial court abused its discretion in finding Vicki received a one-half interest in the FM 1264 property by gift.*

Magness v. Magness, 241 S.W.3d 910 (Tex. App.—Dallas 2007, pet. denied) also involved a refinance, but this time it was the wife who owned the house prior to marriage. The house was refinanced five years into the marriage and the wife signed a deed showing both spouses as grantees transferring a one-half interest in the house to the husband. The wife testified that she signed the deed as a condition of the refinancing and she did not intend to make a gift. The husband never testified about the transaction. The trial court found that each spouse owned 50% of the house as his and her separate property and the court of appeals affirmed.

The cases on the refinancing of separate property homes during a marriage can be summarized as follows: the house is still separate property after a refinance unless more than just the usual deed of trust is signed by both spouses. Ownership changes only if the owner spouse signs a deed that transfers ownership to the other spouse and most refinances do not involve such a deed.

13. Family Loans

Divorces often involve the transfer of money to the spouses from the parents of one of the spouses. For example, Tom's parents provide $10,000 for Tom and his wife Sue to buy their first new car shortly after marriage. At the time, no one really cares how the $10,000 is characterized. But, a year later after Tom finds Sue cheating on him and he files for divorce. Tom is calling the $10,000 a loan

that is owed to his parents. Sue would presumably say the $10,000 was a gift to both of them. The reason for the disagreement is that Tom wants to show on his property spreadsheet that he owes his parents a debt of $10,000, which will mean that Sue will get less from his small 401k account.

If Tom's parents wrote a check to Tom for $10,000 and he deposited it into the joint checking account the day before the car was purchased, how is the court to analyze Tom's claim that the $10,000 is a loan owed to his parents?

A transfer of ownership from a parent to a child is presumed to be a gift, but the presumption is rebuttable. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). So, the $10,000 which was transferred from parents to their child is presumed to be a gift. How could Tom overcome that presumption if he really wants to show it was a loan? Tom and his parents could testify it was a loan. The check could be introduced into evidence if "loan for car" is written in the memo section of the check. Of course, if a promissory note was signed that would be great evidence. Proof that Tom and Sue made payments to the parents on the "loan" or an e-mail from Sue thanking the in-laws and promising to repay them would clearly help. Evidence showing that Tom's parents listed the $10,000 as a loan owed to them on their personal financial statement or a credit application would also help prove it really was a loan to their child.

Would Tom in this scenario be better off arguing that the $10,000 was a gift to him instead of a loan? He could not make that argument if the check from the parents was payable to both Tom and Sue. But, if the $10,00 check was payable to just Tom, he would then trace the $10,000 into the joint account and out the next day to purchase the new car. If the new car is solely in Tom's name, then he might argue that the car is his separate property because it was bought with separate funds. But if the car was financed with community debt, as it almost surely was, then Sue would say it is community property. Even if the car was Tom's separate property, Sue would assert a reimbursement claim for using community funds to pay on the car loan. If the car was bought in the names of both spouses with Tom's separate money, Sue would argue that Tom had gifted half of the car to her and then the community estate would have a reimbursement claim against both of them! All of this fancy analysis explains why the best bet for Tom is to try to prove the $10,000 was a loan owed to his parents and so Sue would get $5,000 less from his 401k.

My experience in court is that most judges will call money transferred from parents to their children a gift and then forget about it in the division of community property unless there is strong, preferably documentary evidence, that the transfer was really a loan.

14. Property and Casualty Insurance

Tex. Fam. Code §3.008(a) says, "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." So, if a house is separate property, the windstorm insurance claim on that house after a hurricane is separate property. However, if community funds were used to pay for the insurance, there might be a reimbursement claim (albeit a small one).

15. Gambling Winnings

Gambling winnings are considered income and income from either separate or community property is community (with two exceptions noted above), so if a spouse wins big at a poker tournament during the marriage, then the winnings will be community property (unless the buy-in was with funds gifted by the other spouse). However, a lottery ticket purchased the day after a divorce was orally granted was separate property. *In re Marriage of Joyner*, 196 S.W.3d 883, 892 (Tex. App.—Texarkana 2006, pet. denied).

16. Livestock

New born livestock are treated like income, so the new born foal from a separate property mare is community (income from separate property is community unless the separate property was a gift from the other spouse). *Bobbitt v. Bass*, 713 S.W.2d 217, 220 (Tex. App.—El Paso, writ dism'd).