# Inventories as Evidence and Admissions, Summary Judgment and Decree Language Traps – 2024

by Greg Enos

## 1. Inventories as Evidence

Attorneys at trial should mark their clients' sworn inventories and appraisals as exhibits and admit them into evidence. Appellate cases have held that an inventory filed with the court but not admitted into evidence cannot be considered as evidence of a property's value or character. *Barnard v. Barnard*, 133 S.W.3d 782, 789 (Tex. App.—Fort Worth 2004, pet. denied) and *Tschirhart v. Tschirhart,* 876 S.W.2d 507, 509 (Tex. App.—Austin 1994, no writ). However, one older case held that the court can take judicial notice of a sworn inventory that is filed but not admitted into evidence. *Vannerson v. Vannerson*, 857 S.W.2d 659, 670-1(Tex. App.—Houston [1st Dist.] 1993, writ denied). An inventory that is admitted into evidence can be relied on by the court as evidence of a property's value. *McKamie v. McKamie*, No. 01-05-00941-CV 9 Tex. App.—Houston [ 1st Dist.] 2006, no pet.)(10/5/2006).

## 2. Inventories as Admissions

A sworn inventory and appraisal filed in court by the other side can be a very offensive weapon at trial. Assume the wife files a sworn inventory listing six head of cattle, born during the marriage to cows he owned prior to the marriage, as husband's separate property but then just before trial her attorney realizes that calves born during the marriage to separate property cows are actually community property.[1] At trial, the husband's lawyer objects when the wife is asked about her new contention that the cattle are community and he says the wife's sworn inventory is a judicial admission she cannot contradict at trial. The judge should shut the wife down and not let her contradict her sworn inventory because an inventory filed with the court and admitted into evidence is a judicial admission by the party who filed the inventory. *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. App.—El Paso 1985, writ dism'd). In *Roosevel*t, the wife, prior to trial, filed a sworn inventory which listed twenty-nine items of jewelry with a value of $15,174.00 as her separate property and eighteen items of jewelry with a value of $32,875.00 as community property. The trial court found that all of the jewelry was the wife's separate property. The court of appeals reversed that finding as to the jewelry the wife had listed as community and held, "It would appear

[1]Offspring from separate property livestock born during the marriage are community property. *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 664-5 (Tex. App.— San Antonio 1990, no writ).

that as to those items which were listed as community property in the sworn inventory and appraisement was a judicial admission as to the characterization of that property which would be accepted as true by the court and binding upon the party making it." *Roosevelt*, 699 S.W.2d at 374.

A judicially admitted fact is established as a matter of law and the admitting party may not dispute it or introduce evidence contrary to it. *Peck v. Peck*, 172 S.W.3d 26, 31 (Tex. App.—Dallas 2005, pet. denied). This means that if a sworn inventory is a judicial admission under Roosevelt, then the party who filed the sworn inventory at trial cannot offer any evidence to contradict the inventory. In Peck, the husband's attorney did not realize that disability insurance benefits can be separate property even if the policy was purchased during the marriage.[2] Among other things, the husband introduced his sworn inventory and proposed property division, which both listed the disability policy benefits as community property. It was only after the divorce decree equally dividing the disability benefits was entered that the husband realized his mistake and filed a motion for new trial and then an appeal. The court of appeals said," Because Husband had judicially admitted the policies were community property during trial in his testimony, exhibits, opening statement, and closing argument, as well as in his post-trial brief on the issue of the disability policies, this issue was conclusively proven, and Husband was barred from asserting otherwise." *Peck*, 172 S.W.3d at 32.

### 3. Summary Judgment in Property Cases

Texas allows two types of motions for summary judgment. A traditional summary judgment under TRCP 166a(c) requires a motion and summary judgment evidence, which are usually affidavits and admissible business records. The party filing a traditional motion for summary judgment has the burden to show it is entitled to judgment as a matter of law and that there is no genuine issue of material fact. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991).

The other type of summary judgment is the "no evidence" summary judgment under TRCP 166a(I), which does not rely on summary judgment evidence presented by the movant. A no evidence summary judgment motion simply says there is no evidence to support a claim or defense alleged by the opposing party and then the opposing party has the burden to present summary judgment evidence showing there is a genuine issue of material fact about the claim or defense under attach. *Praytor v. Ford Motor Co*., 97 S.W.3d 237, 241 (Tex. App.—Houston [14th Dist.] 2002, no pet.). A no evidence summary judgment motion is not supposed to be filed until the nonmovant has had an "adequate time for discovery." TRCP 166a(I). A no evidence motion for summary

[2] Workers compensation insurance benefits which replace earnings that will be lost after the marriage have been held to be separate property. *Lewis v. Lewis,* 944 S.W.2d 630 (Tex. 1997). However, see *Andrle v. Andrle*, 751 S.W.2d 955, 956 (Tex. App.—Easltand 1988, writ denied)(community estate paid for insurance premiums so all disability insurance payments would be community property).

judgment is presumed to be timely if it is filed after the discover period ends. See comments to TRCP 166a(I). If the motion is filed before the discovery period ends, the trial court has broad discretion to find that the nonmovant has had adequate time to conduct discovery. For example, the loser of a no evidence summary judgment motion was found to have had adequate time for discovery in a case that had been on file for seven months where the nonmovant had never sent discovery requests. *Restaurant Teams Int'l v. MG Secs. Corp.*, 95 S.W.3d 336, 339-41 (Tex. App.—Dallas 2002, no pet.).

Summary judgment motions are uncommon in divorce cases, but there quite a few situations involving property where such motions might be helpful to either win a case or at least force a party to focus on the case and get more realistic about settlement.

Examples of when a summary judgment motion could be used in a divorce property division case include:

- Husband claims his ranch is separate property but the wife will not stipulate to that. The husband files a traditional summary judgment motion and attaches his affidavit, the affidavit of the executor of his mother's estate and a certified copy of the deed to the ranch.

- Wife asserts a reimbursement claim based on community payments on the mortgage secured by the husband's separate property house. The husband files a no evidence motion for summary judgment after the case has been pending for eight months and forces the wife to gather and file admissible summary judgment evidence proving how much was paid on the mortgage and how much the principle was reduced.

- Husband files a traditional motion for summary judgment on his separate property claim based on tracing by his accountant. The husband attaches the accountant's affidavit and tracing report and bank records accompanied by business record affidavits.

- Wife alleges that husband has wasted community assets on his girlfriends. Husband files a traditional motion for summary judgment and attaches his affidavit and the affidavits of his two girlfriends that he never gave them gifts or spent money on them other than dinners and movies. The husband also files for a no evidence summary judgment on the same issue.

## 4. Mediation Agreement and Decree Language Traps

A. What does the Mediated Settlement Agreement Mean?

Many mediated settlement agreements regarding property division simply say, "As set forth in Exhibit A," where the exhibit is an attached spreadsheet.

What if the attached spreadsheet contains this line?

| Asset | Value | Husband | Wife |
|---|---|---|---|
| Acme Toys 401k | $122,310.00 | $22,310.00 | $100,000.00 |

After mediation, the stock market tanks and by the time the divorce decree is entered, the 401k is worth only $97,500. How much will each spouse get from the 401k? The wife will argue that she agreed to get $100,000 and she will take no less. The husband will probably argue that she should get 81.76% of the new balance since she was given 81.76% of the $122,310 balance as of mediation. The mediated settlement agreement needs to address this issue for all financial accounts and should say either:

> *The amounts in an account awarded may change by the time the account is actually divided and if the balance does change, then each spouse is awarded the percentage of the total account balance shown on Exhibit A calculated by dividing the amount awarded that spouse on Exhibit A by the total value of the account shown on Exhibit A.*
>
> or
>
> *Wife is awarded the amount of $100,000 from the Acme Toys 401k, no more or no less, regardless of whether the account balance changes.*

B. Debts To Be Sure To Award...

Each party should be responsible for specific listed debts [list each loan and credit card with the last digits of the account number], all debts solely in the party's name not listed above, all debts secured by property awarded to the party and all debts incurred by the party since the separation.

C. Awarding "Any and All" or Just Certain Listed Items...

Consider the differences in the wording of these property division portions of two drafts of the same divorce decree:

**Version #1** Wife is awarded: ....

*W-4. All sums of cash in the possession of the wife or subject to her sole control, including funds on deposit, together with accrued but unpaid interest, in banks, savings institutions, or other financial institutions, which accounts stand in the wife's sole name or from which the wife has the sole right to withdraw funds or which are subject to the wife's sole control, including but not limited to the following:*

*a. Johnson Space Center, FCU, Account number ending in 647;*

*b. Johnson Space Center, Savings, Account number ending in 390;*

**Version #2** Wife is awarded: ....

*W-4. All funds on deposit, together with accrued but unpaid interest, in the following accounts:*

*a. Johnson Space Center, FCU, Account number ending in 647;*

*b. Johnson Space Center, Savings, Account number ending in 390;*

Version #1 awards the wife <u>all</u> accounts, so if it turns out there is a big account she never disclosed, the husband cannot say it was undivided property because <u>all</u> accounts were awarded to her. Version #2 is the language the husband should insist on.