

Keeping Separate Property Separate Isn't Always Easy

With second marriages and later in life marriages, the issue of what is mine and what is yours often comes to the forefront of families' concerns. Separate property is property owned before marriage, property acquired by gift or property inherited during marriage as well as some personal injury damages received during marriage. Many elderly clients entering into a second marriage wish to ensure, that upon their death, their children receive the separate property they brought into the marriage. Maintaining an asset's separate property status becomes key.

When a marriage ends by death or by divorce, as all marriages do, all property owned by husband and wife is presumed to be community property, unless it can be proven to be the separate property of one spouse by clear and convincing evidence. The standard to prove clear and convincing is the degree of proof that will produce in the mind of the trier of fact a firm belief as to the truth of the allegations sought to be established. In other words, it is a burden of proof that is higher than a preponderance of evidence but not as high as beyond a shadow of a doubt. Unless one of the spouses (or their estates) is able to prove by clear and convincing evidence that the asset is his or her separate property then assets are presumed to be community property and subject to division.

For example, if the husband owned a vehicle prior to marriage, and the marriage lasted five years with the original car intact at the time the marriage was dissolved, then as long as he can prove that the car was his before marriage, the car will be found to be his separate property. The title or bill of sale documentation showing proof of purchase would be sufficient.

Another common example of separate property involves bank accounts. If the wife had \$100,000 in an account prior to marriage and never touched the money, she (or her estate) will likely want to prove that it is her separate property. The best way to clearly and convincingly prove the account is hers is to obtain all of the account statements for the account beginning with the month prior to the marriage and continuing up to the date of dissolution of marriage. If each statement shows no deposits of community property, then there will be little doubt that the funds are her separate property.

These two examples are simple but life rarely is. If the original separate property car was sold and a replacement procured, it becomes more difficult to trace the husband's separate property interest in the car. If the wife made deposits into her separate property account during the marriage or allowed community property interest to accrue, proving that it was her separate property becomes more complicated.

Many people are surprised to learn that income from separate property is community property but capital gain from the sale of a separate property investment remains separate. Cash dividends from separate property stock investments are community; however, if a stock splits, that is separate property.

If an owner of a separate property bank account wishes to maintain its pure separate property status, then every time interest or income is paid, it should be withdrawn and deposited into an account that is not separate property. Checks, deposit slips and bank statements should be kept to prove the transfer. Clearly titling the account as separate property is also advised. However, when community and separate

property are commingled, it is presumed that the entire asset is community, even if the account is marked separate property.

To keep separate property separate, it is an understatement to say you must be a good record-keeper and manage your separate property actively and on a continual basis. Maintaining documentation such as account statements, stock certificates, deeds, titles and probate inventories is a must.

This simple guide might be a start to maintaining separate property status, but as always it is best to seek the advice of an experienced estate planning attorney to discuss a plan tailored for you.

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