

Seven Keys to a Fair Property Division in Your Texas Divorce



My name is Scott Morgan. I am a board certified family law attorney that has represented Texas divorce clients since 1994. As a divorced father myself, I am focused on representing men who are going through divorce in Travis County, Texas. I strive to help each client reach a fair and reasonable resolution of their case as early in the process as possible.

My experience has shown that there are a number of things a person can do to improve their chances of receiving a favorable property division.

This report is designed to give some guidance to those individuals who are either going through a divorce or contemplating the possibility of divorce about how to best get prepared for the process. The more prepared and educated you are the better position you are in to get a fair result.

Please note that the information provided is for general guidance purposes only. It is not specific legal advice and I strongly recommend that anyone considering a divorce consult with an experienced divorce attorney for advice about their particular situation. There is no substitute for an experienced, quality attorney who is looking out for your best interest.

TIP #1: Collect as Much Information as Possible About Assets, Liabilities, and Incomes

In most marriages there is one spouse who handles the finances for the couple, while the other spouse is less knowledgeable about the details of their finances. Without question, the spouse with a superior knowledge of the finances has an advantage in negotiating the case and the spouse with limited knowledge has a significant handicap.

A lack of knowledge can be overcome by doing some homework and (with the assistance of a good attorney) getting a full and complete picture of the parties' finances. The first step in this process is to collect copies of all the most recent statements for any financial accounts.

This includes statements for bank accounts, 401(k) accounts, pension statements, IRA accounts, non-retirement investment accounts, credit card accounts, mortgage payoff statements, car loan payoff statements, and any other loan or debt accounts. Depending on your circumstances there may be many other assets or liabilities that have financial records you need to collect as well.

Once you have collected all of this information you can then prepare a balance sheet. Essentially, a balance sheet is a spreadsheet that identifies each of the assets and liabilities and gives a value for each. An accurate balance sheet is invaluable in evaluating and negotiating a property division. On the next page you will find a sample balance sheet for a relatively simple case.

Sample Balance Sheet

Community Assets	Total Value
Jt. ck acct.	\$4,500
W's ck acct	\$8,000
W's sav acct	\$12,000
H's 401k	\$214,000
W's IRA's	\$60,000
H's stock options	\$2,000
W's furniture	\$5,000
H's furniture	\$5,000
W's electronics	\$1,000
H's electronics	\$2,000
H's sporting Goods	\$500
W's jewelry	\$15,000
H's jewelry	\$2,000
Total Assets	\$331,000
Community Liabilities	
H's American Express	\$3,400
H's Chase Card	\$6,200
Total Liabilities	\$9,600
Net Estate	\$321,400

Ideally, you want to obtain copies of all the relevant records prior to separation. After you separate you may no longer have access to the records and obtaining them may require the use of discovery, a legal process through which you can request information and documents from the opposing party.

Since the discovery process can be slow and time consuming, it is nearly always preferable to have copies of the necessary records prior to separation.

The next step is to collect information about each party's income. You will want copies of each party's most recent paycheck statement, as well as copies of the tax returns for at least the last four years.

Once you and your lawyer are intimately familiar with the details of the financial circumstances you will be in a much better position to negotiate a favorable property division.

TIP #2: Do Not Attempt to “Hide” Assets

Divorce lawyers are sometimes asked how to hide assets so as to avoid division by the court. The answer is that you can't and if you try to do so you are likely to get caught and the punishment will be far more severe than any benefit you might have received had you succeeded in hiding the asset.

When it comes to property division, the old rule of “honesty is the best policy” applies.

Let's consider an example. Say wife wants to hide a \$50,000 bank certificate of deposit. The two year-old CD is in her name only, she is the one who has always handled the parties finances, and she is certain that husband is unaware of its existence. Plus, she believes that in a sizeable estate such as theirs (\$1,000,000 net estate) it won't be missed. Wife doesn't tell her lawyer about the account and on her court required Sworn Inventory (signed under oath) she does not list it as an asset.

Later, husband's attorney gets copies the last three years of bank statements for the parties joint bank account. Lo and behold, a two-year old statement reflects a \$50,000 check. After a bit of investigation the attorney determines that the check was used to purchase the CD held in wife's name.

Suddenly, wife is now in a horrible legal position. Not only will the CD be treated as community property subject to division by the court, but you can bet that husband's attorney will use wife's bad conduct to great advantage if the case goes to trial, arguing that husband should be awarded a significantly disproportionate share of the community property in order to punish wife for her

dishonest and arguably criminal behavior (perjury for falsely swearing to the accuracy of the Inventory).

Given how trial judges feel about party's lying and hiding assets (they don't like it) and how much discretion Texas judges have in dividing community property (they have tremendous latitude), wife is in a very, very bad position. All over trying to hide what was a relatively small portion of their estate.

Without a doubt, the better (and legally required) approach is to be honest and forthright about what assets exist. Then, aggressively use the existing facts and law to your advantage to obtain the best possible result in your case.

TIP #3: Hire the Best Family Law Attorney You Can Afford

If you own any property or have children of the marriage you should definitely retain an attorney to represent you in your divorce case.

For most people their divorce case will be the most significant financial and legal event of their life. You get only one opportunity to ensure that you are treated fairly and you need to take advantage of it.

I cannot tell you how many times I have been contacted by individuals (usually men) who were recently divorced in a case and are now second-guessing whether the result was fair. Invariably, they either did not hire an attorney or they hired the cheapest lawyer they could find and ultimately got what they paid for.

The question they usually ask is ‘what can I do to fix this horribly unfair result that occurred in my case?’

Most of the time the answer is that at this point in the case there is not much that can be done. Once a case is tried or a settlement is reached, there are only a few very limited reasons why a court would re-open the case. Basically, the rule is that once it is final, it is final.

Most of these people could have gotten a very different result if they had a qualified family law attorney represent them in their case. There is nothing wrong with being frugal when you are purchasing a commodity like gasoline or sugar, but legal

representation is not a commodity. The quality of representation, the experience and skill of the lawyer, and the amount of attention your case will be given can vary greatly among different attorneys.

You have spent a lifetime accumulating whatever you have. Since you only have one opportunity to get a fair result you want to make sure you have excellent representation from an experienced, qualified attorney who knows family law and is familiar with the local family courts.

TIP #4: Put Aside Your Emotions During Negotiations

Although I now practice exclusively in the field of family law, for the first two years of my practice I also handled other types of civil cases. Those cases covered a variety of issues, ranging from business disputes to personal injury to employment law.

The single biggest difference between the civil cases and the family law cases is the level of emotion. In most civil cases, at least one side (and often both) are business people (frequently insurance adjusters) who are in no way emotional about the case. Whether to go to trial or settle is purely a business decision for them.

Contrast this to family law where each party has a very long and involved history with the other party and often has very strong negative emotions towards that person. So it is understandable that in trying to resolve their divorce case their analysis and decisions can be extremely clouded by their emotions and feelings towards their spouse.

Even if you are fairly objective and not overly emotional about the situation, high level emotions could still be a problem in your case. If your spouse is overrun by emotion and hostility toward you it will be very difficult to negotiate with him or her. It is not uncommon in a divorce case for a spouse to turn down what an informed, objective person would consider a great offer, simply because they are angry and cannot bring themselves to agree with you about anything.

In situations like this you would probably not be able to get your spouse to agree that the sun sets in the West.

This kind of scenario is tailor-made for mediation. A mediation is essentially a settlement meeting with both parties, both lawyers, and a third-party mediator who attempts to convince the parties to enter a binding settlement of the case. The mediator has no authority to force either side to enter an agreement, but can only attempt to persuade the parties to do so voluntarily.

While different mediators conduct the process differently, a typical mediation is scheduled for a half-day or full day at the mediator's office. Each party and their lawyer are given a room and the mediator shuttles back and forth between the two sides throughout the mediation. Essentially the mediator acts as a devil's advocate, pointing out to each side the weaknesses in their case and the advantages of reaching an agreement.

When I have a case where the other spouse is too emotional to objectively negotiate, I aggressively push the case towards mediation. An effective mediator can often have a nearly miraculous effect on the emotional spouse. Since the mediator has no ongoing role in the case nor any vested interest in the outcome, the emotional client is more likely to consider the mediator's input and thus become more open to the idea of a reasonable settlement.

When I represent a client who is extremely emotional and having a hard time focusing on the financial issues of the case, my advice to them is quite simple. I explain that they must temporarily set aside their anger and hurt long enough to focus on their own best interest. While they are certainly entitled to feel any anger or hurt they are experiencing, they simply can't allow these feelings to cost them their only opportunity to get a

fair financial result from your divorce. Often it is a good idea for this kind of client to go to counseling to help them deal with the emotional issues in a way that does not negatively impact their case.

TIP #5: Carefully Evaluate Whether You Have Any Separate Property Claims

Under Texas law, there are three categories of separate property:

1. property you owned prior to marriage;
2. property you received as a gift or inheritance; and
3. certain kinds of personal injury recoveries.

Separate property is not subject to division by the Court. Obviously, it works to your advantage to be able to prove to the court that as much of the property as possible is your separate property.

While this seems pretty straightforward, there are a couple of complicated issues regarding separate property that make it an extremely confusing area and one where having an exceptional divorce attorney can pay great dividends.

First, the Family Code provides that all property is presumed to be community property. Second, the Code also sets the burden of proof for separate property at “clear and convincing.” This is a significantly higher burden than the usual “preponderance of evidence” standard. Finally, the Code states that all earnings from separate property are community property.

So what does all this mean if you are trying to prove a separate property claim?

Basically, you need to be prepared to prove with very compelling evidence how the specific asset is your separate property and that it has not been hopelessly commingled with community

property. In a very complicated case it may be necessary to have a financial expert (usually an accountant) prepare a tracing report and possibly testify on the details of the transactions and explain their findings.

Often an expert is unnecessary because the financial documents are sufficient to trace the asset and prove that it is separate property.

Let's consider a couple of hypothetical separate property claims, one that would be relatively easy to prove and another that would be much more challenging.

In the first example, at the time of marriage husband had \$50,000 in a savings account. At no point during the marriage were there any transfers in or out of the account, except for periodic interest deposits into the account. At the time of divorce the account has grown to \$60,000. Under these facts the account consists of \$50,000 of husband's separate property and \$10,000 of community property. This claim would be fairly easy to prove using the testimony of husband along with copies of his bank statements in admissible form.

In the second example, husband has a brokerage account he uses to buy and sell stock. At the time of marriage the account had 20 different stocks and a value of \$50,000. During the five-year marriage husband bought and sold stocks on a weekly basis. At the time of divorce the account has a value of \$75,000, although none of the original 20 stocks are still owned.

At first glance you might conclude that the account is \$50,000 separate and \$25,000 community. However, the actual analysis is much more complicated and involves many more variables. For example, a different result could occur if deposits of

community funds were made into the account. The more community funds that were deposited the more difficult the analysis becomes.

Also, the frequent trading makes it much more difficult to trace the individual stocks as separate property. While the final result would depend on the facts derived from the financial records, one thing is for sure. This fact scenario is much more complicated and complicated to prove.

All that being said, separate property is extremely important and should be claimed whenever there is a legitimate, factual argument in favor of it. A successful claim of separate property removes that asset from the community property pie that is being divvied up. Thus, it can be one of the most helpful and effective tools in your divorce attorney's toolbox.

TIP #6: Understand that Division of Community Property in Texas is not Automatically 50/50

Most Texans have heard that Texas is a community property state. However, most people mistakenly believe that this means that all community property is divided 50/50 between the parties.

The Texas Family Code says something quite different. The Family Code requires that the court divide the community estate “in a manner that the Court deems just and right.” Essentially, this means that the court has extremely broad discretion in deciding how to divide the community property.

Understand that what one judge may consider a “just and right” division in a particular case, might be significantly different from how another judge might rule on the same case.

Over the years the Texas appellate courts have given the trial courts quite a lot of guidance on what issues should be considered in deciding whether one spouse should get a bigger share of the community property. In practice the most common issues that get raised deal with either need or fault.

For example, one of the most frequent issues raised in arguing for a disproportionate division is disparity in earning capacity. A typical example would be a husband who is a highly compensated executive while the wife has been a stay-at-home mom for several years and currently has little or no job skills. Wife’s attorney would certainly argue that wife should be

awarded a bigger share because husband's high income will allow him to make up the difference in a very short period of time. In this situation, judges are often predisposed towards giving wife a larger share of the community estate.

Another common argument in favor of a disproportionate division is that the divorce is the fault of one spouse. The most common example is a claim of infidelity. While affairs can certainly have an impact on how a court divides the community property, how a judge views a particular affair can vary greatly depending on the specific facts. Often the damage can be greatly mitigated by evidence that the affair was not the cause of the divorce, but rather a symptom of a marriage with other significant underlying problems.

There are many other issues that can be raised in requesting a disproportionate division. The key point to remember in negotiations is that the division is not necessarily going to be 50/50 and that your objective should be to negotiate the best terms possible given the many different factors that affect your particular case.

TIP #8: Texas Post-Divorce Spousal Maintenance (Alimony) Can Be a Significant Property Division Factor

Until 1995, Texas was the only state in the country that had no form of post-divorce court ordered alimony. The current alimony statute is quite far-reaching in terms of amount and duration. Depending on the facts of your case it can be a very significant factor in the property division of your case.

First, let's discuss the requirements and maximum awards of a typical case (there are some exceptions that will be discussed later).

The spouse seeking alimony must prove a marriage of at least 10 years and that the spouse is unable to "provide for the spouse's minimum reasonable needs."

The spouse seeking an award of alimony has several hurdles to clear. First, if that spouse is awarded property in the divorce, the statute requires that this be factored into the analysis of whether the spouse is meeting his or her minimum reasonable needs.

In other words, there is a very effective counter-argument to an award of alimony when the receiving spouse is going to receive a significant amount of assets under a property division. According to the specific language of the statute a spouse who has sufficient property to meet that spouses minimum reasonable needs is not eligible for alimony.

The statute has a further presumption that requires a spouse seeking alimony to exercise diligence in seeking employment or

developing the necessary skills to become self-supporting during the parties' separation. This creates a fairly strong counter-argument against alimony if the facts show that the requesting spouse has taken little or no action to improve his or her situation while the case was pending.

Regarding the amount of alimony that can be awarded the maximum is the smaller amount of either 20% of the payor's average monthly gross income or \$5,000.00. The court is prohibited from awarding more than this.

Regarding the duration of the alimony award, that depends primarily on the length of the marriage. If the parties have been married at least 10 years the court can order alimony for up to 5 years. If the parties have been married at least 20 years the court can order alimony for up to 7 years. If the parties have been married at least 30 years the court can order alimony for up to 10 years.

Of course, a party can always agree to a higher amount or a longer duration. Such an agreement would then give the court the authority to approve the term above the statutory maximums.

In negotiations alimony is frequently agreed to even when the paying party has a very strong case against an award of alimony. The motivation for doing so is that an agreement on a period of alimony can sometimes be given in exchange for a more favorable property division.

So far I have discussed the far more common scenarios that arise concerning alimony. However, there are a couple of very significant but rare issues in the statute that can greatly alter the results described above.

For example, the requirements that a spouse prove both a 10 year marriage and an inability to be self-supporting are unnecessary if the payor spouse was convicted of a crime constituting an act of family violence within two years before the divorce case was filed or during the pendency of divorce.

Also, for a spouse who is physically or mentally disabled or is the custodian of a child of the marriage who has a physical or mental disability there is no statutory restriction on the duration of alimony. The court is specifically authorized to order maintenance for as long as the disability continues.

Given the significance of the spousal maintenance statute, it is a complicated and key issue to be aware of while negotiating a property division and it is important to at least be aware of your potential exposure.

CONCLUSION

Property division in Texas can be very complicated. You can benefit greatly by having a quality family law attorney represent you, guide you through the process, and help you obtain a favorable property division in your divorce case. I hope you have found this information helpful and informative.

If you have are involved in or considering he possibility of a Travis County divorce feel free to contact my office so that we may discuss your situation and options in detail.

Best Regards,

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