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Married, Unmarried, Same-Sex, Heterosexual? We can help, but in different ways.

As family law practitioners, we serve all kinds of families... same-sex couples (married and unmarried) and heterosexual couples (married and unmarried). Some couples have children, but almost all of them have property that was acquired during the relationship that needs to be divided when they split up. Some couples have pre- or post-marital property agreements and some have partnership agreements. Interestingly, the way a couple's property is divided depends on the type of union they have formed and the agreements they have made concerning the property they have accumulated together.



For instance, if you are heterosexual and married, your property is divided by the family court in accordance with marital property laws, which includes the concept of community property. If you are heterosexual but not married, your property is divided in a civil court in accordance with plain old property laws that are more similar to a business-like partnership transaction than to the intimate partnership that actually exists. Other benefits of a legal marriage are unavailable to the unmarried: an unmarried person, for example, cannot make claims for spousal maintenance or enjoy the benefits of community property laws that presume that all property owned at the time of divorce is community.

If you are a same-sex couple and married in another state, the State of Texas is still trying to figure out what laws apply to your situation. In one case called *In re Marriage of J.B. and H.B.*, the Texas Court of Appeals in Dallas decided that Texas courts do not have jurisdiction over same-sex divorces because recognizing such a union is contrary to Texas' Constitution, which was amended in 2005 to say that "(m)arriage in (Texas) shall consist only of the union of one man and one woman." [Texas Constitution article I, §32] In a more recent case, *State of Texas v. Naylor*, the Texas Court of Appeals in Austin dismissed the State's appeal of a divorce granted to a same-sex couple for lack of standing. [State of Texas v. Naylor, 330 S.W.3d 434 (Tex. App.—Austin 2011, no pet. H.).] In *Naylor*, the State of Texas intervened after the trial court granted a divorce to a same-sex couple who had married in another state. The Court of Appeals found that the State's post-judgment intervention was too late, and the State thus lacked standing to appeal. The court also concluded that the State did not have standing under the "virtual representation" doctrine, because the constitutionality of a Texas statute was not directly challenged or invalidated. Noting that it lacked subject matter jurisdiction, the Austin Court of Appeals declined to consider whether the state's action in granting a divorce to a same-sex couple violated state law. As a result, that same-sex divorce remains valid. Texas now has two different outcomes from two courts of appeals that will need to be reconciled by the Supreme Court of Texas or the Texas legislature.

While unmarried or same-sex couples can legally enter into contracts with one another that define their rights to property, they often don't take this action. If they can't agree on how to divide their property, they must turn to the courts to parcel up the pots, pans and Porsches. Seeking relief for unmarried couples in the courts is challenging, because the pleading itself cannot use language from the Family Code that is intended only for marital property cases. For example, asking the court for some temporary financial support for a person who has not been employed outside of the home during the relationship could result in the case being thrown out altogether because this request is based on spousal maintenance provisions provided in the Family Code for married persons. If Texas does not recognize you as a married person, you cannot seek this type of relief under the Family Code. Other principals of contract, property and partnership law can apply, however, so a creative practitioner must search for some other theory recognized by law that would allow relief. Every situation is as unique as the people involved, so several possibilities for establishing rights to property should be considered:

1) Constructive Trust: A person who has contributed money to another person's house by either paying the mortgage or making improvements should ask that a constructive trust be imposed on the house and that the owner be named the constructive trustee for the benefit of the person who contributed financially. This obligates the owner to be accountable to the non-owner, and recognizes that the non-owner has an interest in the property.

2) Conversion of Funds: A person who has contributed income to a joint account should plead for conversion of funds if the other owner of the account removes all of the funds. The Probate Code mandates that joint account holders own the funds in proportion to their contributions.

3) Theft Plea: If a person is denied access to his or her personal belongings, they should plead for theft under the Penal Code. Theft occurs when a person "unlawfully appropriates property with intent to deprive the owner of property," and appropriation of property is unlawful if "it is without the owner's effective consent." [Texas Penal Code §31.03]

The easier and suggested route to an assured division of property for unmarried or same-sex couples is to enter into a written cohabitation agreement with the help of a qualified lawyer. By doing this, parties can establish what rights they each will have to property owned or earned by the other during the relationship, and can even make provisions for future support in the event the relationship does not last. While its enforceability may not be governed by the Family Code, it is still a contract governed by Texas contract law, and it can be enforced or defended against under laws applying to contracts generally. Please contact Partner, Andi St. Leger (astleger@nems-law.com) with questions or requests for additional information.

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