



Family Law Myth Busters

Lawyers who specialize in handling divorces are often confronted with clients who are absolutely certain they know their legal rights and how their divorce case will unfold. They invariably know someone who has been divorced and have been told what their friend's lawyer said about custody or child support, or they have done their own advance

research about their case on the internet. Despite the overwhelming amount of information available on the internet and elsewhere, or perhaps even because of it, certain "myths" about the law in Texas as it relates to divorce seem to persist. The following are the most common:



Myth #1: "If I get the kids 50% of the time, then I won't have to pay child support, right?"

Truth: Actually, you may have to pay child support anyway.

If one parent makes significantly more money than the other, the party with the greater income is likely to be ordered to pay child support. This is particularly true if one party has been the "stay at home" parent while the other has spent years during the marriage pursuing the advancement of their career, resulting in a substantially higher earning capacity. The Court will always care more about the welfare of the kids than what either party thinks is "fair." So it is entirely up to the trial court judge to decide who, if anyone, will pay child support, and what that amount will be. Judges in Travis County have indicated that they would consider looking at both parties' incomes and calculating what each would owe under the guidelines. The party with the greater income could then be ordered to pay the difference to the lesser-earning party. This is just one way to handle child support in a truly 50-50 possession schedule. Bottom line, the court can ultimately do whatever it thinks is best for the children, including awarding support to one party, even in 50-50 custody arrangements.

Myth #2: "Texas has a no-fault divorce system, so my affair is irrelevant."

Truth: Your affair is relevant, and it may lead to a disproportionate division of the marital estate to your spouse.

"No-fault" divorce means that neither party has to prove fault by the other party in order to get divorced. Anyone who wants a divorce can get one by alleging that the marriage has become insupportable because of discord or conflict that destroys the legitimate ends of the marital relationship. The fact that one party is at fault in the breakup of the marriage, however, is still very relevant in terms of how the marital property may be divided. The Texas Supreme Court has held that fault in the breakup of the marriage is one of many factors the court can look to as justification for awarding one party more than 50% of the marital estate. See *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981). Thus, fault-based grounds for divorce like adultery and cruel treatment are still relevant and admissible in a divorce case. The extent to which allegations of affairs or cruel treatment will affect the outcome of a property division can vary depending on the county and the circumstances alleged.

Myth #3: "Texas doesn't have alimony."

Truth: Texas does have alimony – we just call it "spousal maintenance" instead.

Under Texas Family Code §§8.001, et seq., courts have the discretion to award "spousal maintenance" in a divorce case. In general, if a spouse is eligible for spousal maintenance, the court can award up to a maximum of 20% of the paying spouse's average gross monthly income, or \$5000, whichever is less. A party is eligible for spousal maintenance (1) if that party is unable to earn sufficient income to provide for his/her own minimum reasonable needs because of a disability, or (2) if the parties have been married for ten years or more, a party is eligible if he/she lacks the ability to earn sufficient income to provide for their minimum reasonable needs. Victims of family violence may also be eligible without regard to length of marriage.

Significantly, spousal maintenance is another area where an affair or other marital misconduct may turn out to be relevant (see Myth #2). Under Texas Family Code §8.052(10), marital misconduct, including adultery and cruel treatment by either spouse, is one of many factors the court can consider in deciding whether to award spousal maintenance. Other considerations include the contribution of a spouse as homemaker, the relative education and employment skills of the spouses, contributions by one spouse to the education of the other, and family violence.

Myth #4: "If the property is in my name only, it's my separate property, right?"

Truth: No, just putting your name on something does not make it yours.

All property possessed by either party at the time of divorce is presumed to be community, and it is the burden of the party claiming that something is separate to prove, by clear and convincing evidence, that the property is actually separate. Under Texas Family Code §3.001 (and the Texas Constitution), separate property is defined as (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage. Thus, it is the manner in which a party has acquired property that determines whether it is separate or community – not whose name is on it.

Nevertheless, keeping separate property in your name only can be beneficial for identifying and proving separate property. If you put your spouse's name on an account or title to real property, the law will presume that it was a gift to your spouse. If you have gifted your separate property to your spouse in this way, the property will then be owned ½ by your separate estate, and ½ by your spouse's separate estate (the community estate cannot receive "gifts"). The presumption of a gift is rebuttable by evidence that you did not intend such a gift, so either do not put your spouse's name on the property or otherwise make your intention of non-ownership on the part of your spouse perfectly clear. Likewise, commingling separate funds with community funds makes the task of proving what is separate much harder later. This task can be done by tracing the separate funds, but it can be an expensive and time-consuming process during a divorce, often requiring expert testimony to establish what portion of an account or other property is still separate versus community property.

Myth #5: "I earned it, so it's mine, right?"

Truth: Actually, the opposite is true. If you earned it during marriage, it is community property.

Income earned during marriage by either party is community property. That includes retirement benefits as well. Contributions to a 401(k) or IRA during marriage – whether made by you or your employer – belong to the community estate. The same is true of your pension or other benefit plan – if the benefits accrued because of your work during the marriage, those benefits, even if not received until some point in the future, belong to the community estate.

Myth #6: "I bought it with my earnings, so it's mine, right?"

Truth: Again, the opposite is true.

Since income earned during the marriage belongs to the community estate, anything you purchase with those earnings belongs to the community estate as well.

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