

### Separate Property To-Do List

Separate Property Agreements (also known as Marital or Pre-Marital Agreements, depending on when they are done) are often the last thing on a soon-to-be-married couple's mind. Though many people perceive these agreements as evidencing mistrust between a couple, marital agreements often achieve greater harmony. For certain couples, a marital agreement can help promote overall family harmony and protect key assets from the debts of the other spouse. If you are soon to be married, or are currently married and believe that you may benefit from entering into a post-marital agreement, these are some things you and your partner can do:

1. **Discuss and Evaluate your Individual Assets and Debts** – Before you can consider how your property will be affected by a marital agreement, first evaluate what property both you and your soon-to-be spouse own individually. Texas is a community property state. In most instances, any property that was acquired during the marriage, other than property obtained by gift or inheritance, will be considered community property. Conversely, any property obtained prior to the marriage (or by gift or inheritance) will be considered separate property. This concept is an important one because the classification of particular property could affect the rights of creditors. Generally speaking, liability for debts incurred before the marriage cannot reach the community assets or the sole assets of the non-debtor spouse. Keep in mind that this creditor “protection” can be difficult to utilize in the event the spouses sufficiently “commingle” their property.
2. **Discuss How Separate Property Will be Treated in the Event of Death or a Divorce** – After evaluating your particular asset mix, couples should discuss how your separate property should be divided in the event of the death of one spouse or a divorce. If one or the other spouse has children from a previous relationship, the characterization of property as separate or community may dictate the disposition of that property upon the death of one of the spouses. This discussion goes far beyond simply saying “what’s mine before the marriage is mine after the marriage.” In many situations, separate and community assets are so “commingled” that separate assets can be difficult to trace. For example, personal savings accumulated before the marriage could be used to buy a home or pay a mortgage during the marriage. How will a spouse’s separate property be accounted for in such a situation? Will the contributing spouse be credited for the separate property or will it be considered a gift to the community? What if one spouse pays off the other spouse’s premarital credit card debt? Will that be considered a gift or will the non-debtor spouse be reimbursed in the event of death or a divorce? Obviously, these are not easy questions, but it is often easier to agree on these issues early on, before a dispute arises.
3. **Discuss How Community Property Will be Treated** – In most circumstances, income and assets received during the marriage are considered community property. This includes wages, earnings and income earned on separate property. It is important to discuss how this property will be treated in the event of death or a divorce. Dividing community property 50/50 is common with many couples. However, there are certain situations where a 50/50 split may not be desirable. For example, if one spouse owns separate property that produces large amounts of income, the spouses may stipulate that a larger portion of the income will be classified as the separate property of the owner spouse.

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4. **Discuss How the Assets Will be Managed** – Combining finances and money management styles is never easy. Though you and your partner may share a mutual love for music, dancing or certain types of food, your individual approaches towards money may not be so harmonious. Therefore, you and your partner should discuss early on how assets and debts will be managed. Will you use a joint checking account? Will that account be divided equally in the event of death or a divorce, regardless of the community/separate property ratio that comprises the account? Furthermore, how will pre- and post-marital debt be managed? Will one spouse be responsible for making sure all bills are paid? These may seem like difficult questions to answer, but they will undoubtedly need to be discussed at some point.
5. **Evaluate the Debts** – At some point, the credit history and debts of both partners will need to be reviewed. For some couples, it may be advantageous to formulate early on how premarital debt will be paid. Will premarital debt be paid using only separate property of the debtor spouse? Will community assets be used? If so, will the non-debtor spouse be credited for their portion of the community estate that was used to pay the debt? Texas law provides certain protections to community assets under the control of a particular spouse. If pre- or post-marital debts are a concern to you and your partner, it may be advantageous to speak with an attorney to discuss asset protection options.
6. **Consider Gifts from Family and Friends** – As previously mentioned, in most instances property obtained via a gift is not considered community property. However, this can change depending on how the gift is given to a particular spouse. For example, some family members will give real estate as a wedding present to help newlyweds “get on their feet.” However, most parents do not desire to have the property end up in the name of their ex-son/daughter-in-law in the event of a divorce. If the property is not properly titled upon conveyance, this could very well be the case. Furthermore, some gifts may take the form of a low interest loan. How will this loan be handled? Will both spouses be liable for repayment? Will one spouse be credited in the event he/she uses separate funds to repay the loan?

Discussing finances, debts, desires and goals is essential to any healthy relationship. While this article is not intended to be an exhaustive list of the considerations soon-to-be married couples should take into account when deciding whether to enter into a marital agreement, it should help get the important conversations started. If you believe that you and your intended fiancé would benefit from entering into a marital agreement, seek the services of competent attorneys in this area.©