"Your Estate Matters" Legal-ease

By Ronda M. Gabb, NP, JD, RFC

Character TRAITS...

One of the most important things an estate planning attorney must do is determine the character of a client's property. This is true whether it is an initial consultation to establish an estate plan, or a succession consultation for a deceased person's estate. We must know which assets are classified as community property and which are separate property. This is of utmost importance when handling successions for decedents who died without a will, called an "Intestate Succession," because community property assets and separate property assets are distributed quite differently.

Under the community property matrimonial regime, legally called the Community of Acquets and Gains, all assets acquired during the marriage (with the exception of inherited property) are presumed to be community property. This means that each spouse owns an undivided one-half interest in the community property. If it was acquired during the marriage with community funds, it is community property and belongs to both spouses equally. This is true even if only one spouse's name appears on the title, business, deed, or account.

You may choose to "opt out" of the community property regime. You can do this without Court approval only if it is done prior to the marriage, or within one year of moving into Louisiana as a married couple. While other states call these "prenuptial" agreements, in Louisiana we call them "Marriage Contracts" or "Matrimonial Agreements". If you wish to terminate the community regime after marriage it must go through the Court and be approved by a Judge.

Understand that terminating the entire "community property regime" is what needs Court approval, not the spouses agreeing to choose assets on an "asset-by-asset" basis and converting them to the separate property of the other. For example, spouses own properties A and B as community property, but they each agree to convert Property A to the Separate Property of Husband and Property B to the Separate Property of Wife. That is perfectly fine to do without needing the Court, or even an attorney, as it is generally accomplished through an Act of Donation which can be done through a non-attorney Notary Public.

If you are married, your separate property would include assets you owned prior to marriage, or assets you received by gift or inheritance during the marriage, assuming the separate funds were not "commingled" and were kept separate from community accounts.

Under the community property regime, ALL income, including income from either spouse's separate property (which includes inherited property), is presumed to be community property. Many people are very surprised to learn this. The good news (if you thought this was bad news) is there is a pretty easy solution to rectify this. It is called an "Article 2339 Declaration" and it is ideally signed by both parties (but that is not a necessary requirement, only that the other spouse is "provided a copy") and recorded in the conveyance records of the Parish of domicile and in every other Parish where real estate is owned. The recordation is "notice to all" that from the filing date forward, all income from the separate property is now separate property and no longer belongs to the community.

The "Article 2339 Declaration" does not terminate the community regime, it only affects income from separate property. As I mentioned, terminating the community regime post-marriage is quite a bit more difficult and costly, but in some cases may be a wise choice (perhaps large medical debts of one spouse are expected in the future or one spouse has a greater propensity for being sued).

It is not always easy to determine the character of property as sometimes it may be both separate and community! We have had several clients over the years who have inherited part of their property from their parents (separate property) and then have purchased the remaining interest in the property from their siblings with community funds (community property). While a well-written Last Will and Testament can certainly address this, if that person died intestate (without a will) the end result may be tragic for their surviving spouse, especially if they have different children! It is imperative that your attorney dig deep into the property character while doing the estate planning during life so that property disposition is handled as you wish upon your death.

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