

**“Five Keys to Getting a Fair
Property Division in Your Texas Divorce”
Teleseminar held on April 1, 2009**

Good afternoon this is Scott Morgan and I'm going to go ahead and mute all the lines so that so we won't have a lot of background noise and I'm going to do that right now.

Ok it is 2:00 on Wednesday afternoon and I'm going to start the call. My name is Scott Morgan and the topic today is Five Keys to Getting a Fair Property Division in Your Divorce. So if you called in to learn about how to protect your rights in a property division in your divorce case you are in the right place. Now first I wanted to say to all my callers that you have made a good decision to be on the call. You are going to get educated on the key areas that can make a real difference in getting a good result versus a bad result in your divorce case and you are smart to do that. A lot of people get don't get educated on the process and don't get educated on what are really the important issues and as a result they get a bad outcome and later on they regret it. So you made a really smart decision to be here for that purpose.

I am a lawyer so let me start with a disclaimer. Obviously, this teleseminar is not a substitution for a consultation with an experienced qualified attorney. The teleseminar, the purpose of it really is to provide some information and some education on the basics of property division under the Texas Family Code and it is absolutely not a substitute for doing a consultation with an experienced qualified attorney who can find out about your situation and give you custom fit advice.

Let me explain just a little bit of who I am and why you should listen to what I have to say on the subject of Texas property division. My name is Scott Morgan. I am a Board Certified Family Law attorney. I've been practicing family law in Texas for 15 years and I specialize in family law. I do no other kind of cases and although every case is a little bit different, I have seen just about every imaginable legal issue that you can see in a Texas divorce property

division case so I am well qualified to speak on the subject. So why don't we get right into the content of the call.

Let me start with key number one to getting a fair property division. This is what I consider probably the biggest conception in Texas property division and that is the percentage split of the community property. Now most people do know that Texas is a community property state but here is where people get confused. I hear all the time people say that it's a community property state which automatically means that the community property is going to be divided 50/50 and in some states that would be accurate, California for example. My understanding is that in a California divorce the judge is required to divide the property 50/50. The judge doesn't have any discretion. But here is the law in Texas: in Texas the Family Code specifically says that the judge is to divide the community property in a fair and just manner way. Now that means different things to different judges, but what it definitely means is the judge in your divorce case is not required to divide your community property 50/50. They can do what is called a disproportion division and they do them all the time. There are many factors that can lead to a disproportion division and when I say disproportion division all that means is any division that is other than 50/50. If its 60/40, 55/45 or even 51/49 that's considered a disproportion division. It just means that one party got more of the community property than the other party. So people often come to my office quite surprised when they find out that there is actually a risk and in some cases a likelihood that it is not going to be a 50/50 division in their case.

There's another statute that gives the judge a little bit of guidance on how they are to divide the property. The initial statute doesn't give the judge any guidance at all. But the language is that the judge needs to divide the property, "in a just and right manner." The other statute gives some detail to that and kind of gives a list of reasons why a judge or justifications for a judge to make a disproportion division. There are a whole lot of possibilities but the most common issues have to do with whether they have kids from the marriage, if so, which of the

spouses is going to get primary custody and typically the courts, that will be one reason that the Court may give one side more of the community property in the property division.

Another reason is fault and this one is actually, I'll talk about this one at length in a little bit but fault is one of those issues that people think it actually carries a lot more weight than it really does. The biggest reason and there's a whole lot of them but I'm just glossing over the key ones that really can make a difference or commonly make a difference. Here is the biggest reason the judge will order a disproportion division. Most common one and that is income between the parties. Let's say we have a couple that's been married for 20 years and husband is a successful executive and makes \$200k a year and wife has been a stay at home mom pretty much the entire marriage and has little to know job skills and hasn't been in the workforce for many years. Well if that's the case that is tailor made for a disproportion division and the only real question if you're looking at it from husband's prospective, the question on that is not normally can I get 50/50, it's how close can I get to 50/50. Because those are facts that really lend themselves to a judge quite likely doing a disproportion property division. If you ask most divorce lawyers what is a pretty disproportion division, most will say a 60/40 division is consider pretty disproportion. And that's generally true in Harris County. Different judges have different attitudes about doing disproportion divisions. Some are more nclined to do a disproportion division than others but the facts that I just laid out where we have a very high income earning spouse and another spouse after a long marriage who has no job skills, that is a case like I said, that is a tailor made disproportion division. Now some of you maybe be thinking to yourselves that's it not really fair, and I can't argue whether it is or not but what I can say is in the Family Courts that I operate in, and under the Family Code, that is in place and that's the law and that's how its applied and if you don't know what the ground root trying your case thinking, "hey I should get a 50/50 division" when the reality is under the facts that exists, there's no chance you're going to get 50/50 division. So to be informed and educated is to be prepared and that can help you get a much better outcome than you otherwise would. This is a scenario by the

way that can make a big difference whether you have a lawyer who is familiar with the judge that's handling your case or not. What I mean by that is I often hear people talk about well I want a lawyer that's friends with the judge. That's really not the big issue. The big issue is does the lawyer know the judge's tendencies. The bottom line is you want to know on this issue you want to know are you dealing with a judge who is likely to do a disproportion division and if so, how disproportion do they tend to go and those are very important issues. And you want to know what your judge's tendencies are.

Let's move on to Key number two to getting a fair property division. And that's on the subject of alimony. What's the truth about the Texas alimony statute. And this is another area that catches some people off guard because the law in Texas on alimony is significantly different than the law in other states. In Texas, so you'll know the history of it a little bit, Texas had no alimony statute at all as recently as I believe it was 1995 that the Texas legislature enacted the alimony statute. And with a few modifications that alimony statute is the same one that we've been operating under every since then. Before that year in 1995, there was no alimony statute which mean that absents an agreement, a Texas court had no discretion, no authority whatsoever to order alimony in a divorce case. They just didn't have the power to do it.

Texas, like I said the law here is a bit different than a lot of other places and the law here on alimony is extremely conservative and extremely limited as compared to other states. For example in most cases, there are a few exceptions involving cases where they have a history of family law violence but in most cases, a spouse cannot even request alimony unless the marriage is at least ten years long. So if you're getting divorce and your marriage is eight years or nine years, it doesn't matter and you cannot ask for alimony because you haven't met that ten year threshold. Now even after getting past that threshold, there are some severe restrictions how long alimony can be awarded for and the amount of alimony that can be awarded.

Under the State of Texas statute the maximum amount (there is an exception to this that we'll talk about in just a minute) is \$2,500.00 per month. There's another way to calculate that if your income is not very high but generally alimony is not going to be awarded unless the payor has a pretty high income to begin with so. Maximum you can count on alimony being is \$2,500.00 per month. Maximum duration can be up to three years after the divorce. These are maximum statutory caps that if a judge is to decide alimony, there's a trial, a settlement can't be reached and now it's time for the judge to decide what it's going to be, the absolute maximum that a judge can order in nearly all cases is going to be three years at \$2,500.00 per month.

Now there is an exception on the duration limit of three years that I should mention. That is if the spouse asking for alimony is disabled then it is possible (and this is very rare) to request that the Court order alimony to last indefinitely until further Court order. I don't know of any cases where it happened but the statute does provide for it.

So those maximums may seem high but when you keep in mind that those are the maximums that apply to everyone so it doesn't matter if you're a professional athlete and you make eight million dollars a year, if you have a trial the maximum alimony that can be awarded is three years and \$2,500.00 per month.

Now even getting to that ten year cap it is significant to realize that the person requesting alimony has got some pretty difficult burdens of proof to meet. They're going to have to prove that they can't meet their minimum reasonable needs and either 1) they're disabled, 2) they have to care for a child who is disabled, or 3) (this is the common one) that the spouse lacks earning capacity so they can meet their minimum reasonable needs.

In other words, if you have a person like who I described a wife who is a 20 year homemaker stay at home mom and she had no job skills, well she in all likelihood will be asking for alimony and she will argue, I don't have any earning capacity or very little earning capacity and I certainly don't have capacity to meet my minimum reasonable needs. Now that term "minimal reasonable needs" is very significant because unlike other states where I understand

they have the standard along the lines of the lifestyle to which the person became accustomed, which can lead to some extraordinary high awards if you're looking at a person that was wealthy in their marriage and their issue is well how much money is it going to take for that spouse to continue to live that lifestyle, well that can be a lot of money. But under the Texas statute it is minimum reasonable needs and minimum pretty much means minimum - what it takes you to live. So very different results in Texas than some other states.

Another variable that the person asking for alimony is going to have to show is that while the case is pending they exercised diligence in either trying to find work or improve their job skills so that they can find work. In other words, it doesn't help their case to sit around for say 6, 9, or 12 months while the case is pending and go to trial and say, "I should be awarded alimony." If they haven't lifted a finger to either try to get a job or improve their job skills so that they can get a job than they are really in a bad position when they ask the court to award alimony because the statute specifically requires that they shown diligence in trying to improve the situation.

Now here's one issue about alimony that people often overlook. The caps that I'm talking about are for what the Court can order if there is no agreement. Now it is very common that parties will reach an agreement on alimony and it's very common that the agreement will be for some amount either above the guidelines or above the alimony maximums and for a period of time that is longer than three years or will occur in a divorce case where a person is not qualified under the statute. For example, let's say you have a seven year marriage and there was a divorce, the parties ended up reaching an agreement that the spouse is going to receive alimony.

Why would someone agree to that? Well the reason is pretty simple. An alimony term in a divorce case can be a significant negotiation tool and the primary reason is that there are some tax advantages to alimony payments that do not exist in the event of a property division. For example, you could agree to pay a certain amount of alimony and whatever you pay in

alimony is tax deductible to you and income to the recipient. Now that is significant because let's say if you have one spouse who has an income of \$200k year and they're in the top tax bracket and they are transferring money via alimony to their ex who happens to be in a very low tax bracket because they only make a fraction of what the other spouse did, you're paying a dollar of alimony but your after-tax cost is maybe only \$0.65 because you get such a significant tax benefit. So it can often be agreed where you offer alimony and in return you get a better property division. So that happens all the time. So alimony like I said, even though the person doesn't qualify under the statute or don't have an argument for it, it sometimes can be use to really negotiate a better deal than you can otherwise get as a result.

By the way, a lot of people get thrown by the language and by the term. I use the term alimony but the statute actually refers in the Texas Family Code, the term they use is spousal support. Now I don't know why they call it that or why the tax code calls it alimony but everybody that I know calls it alimony. But in the Texas Family Code it is referred to as spousal support. So it is synonymous, when I say alimony, I'm talking about spousal support.

Let's move onto key number three to getting a fair property division and this is an area that I think it is the most misunderstood area in property division and that is separate property claims in Texas.

So let's start with the basics: Texas is a community property state and the presumption by statute is that anything owned by husband or wife at the time of marriage, the presumption is that it is community property. That's the starting point. Anything you own or your spouse owns, whether held by you solely or jointly, it doesn't matter, all of it is presumed to be community property.

The only exception to that is separate property which is defined by the statute and the statute lays out three categories of separate property. The first category is extremely rare. Certain types of personal injuries recoveries are separate property. Happens very rarely and its rarely an issue but I have had cases with that as an issue and its very significant and it confuses

lawyers because it's not entirely separate property. Certain parts of it are separate property and some parts of it are not. But in any event, for most people this is a non-issue because most people never have a personal injury recovery. But that is one category.

The second kind of separate property is inheritance or gifted property. For example, if Uncle Joe leaves you \$100,000 in his will while you're married, that \$100,000 is your separate property. That is what people get. The part that people don't get or are somewhat surprised by is that gifts are also separate property. Same example, let's say Uncle Joe while he's still alive makes a gift to you \$100,000 that is your separate property. What people don't get is that gifts, any gifts, are separate property. So that means when husband buys wife diamond earrings for their anniversary those earrings are separate property. The end results is that a lot of jewelry is actually separate property. I always say the husband tends to fair not as well as the wives when it comes to separate property gifts because the wives get jewelry and the husband gets power tools and things like that that generally are not nearly as expensive as jewelry. But in any event, that's the second kind of separate property.

The third kind of separate property is probably the biggest issue. That is property you owned prior to marriage. Property that you owned prior to marriage is separate property. So for example, if the time you got married you had \$100,000 in a savings account, that savings account, that \$100,000 is your separate property. Now for people that get married young or get married when neither of them have any property or are pretty much starting from scratch this is a non-issue. For a lot of people who got married a little older or when they have accumulated assets (maybe they have some money in a 401k or maybe they have money in the stock market or they own a piece of land), all of that is separate property and that is a significant variable in a property division case and here's why.

The Texas divorce court has authority to divide only community property. Anything proven to be separate property, the Court has so discretion to award any part of that to the other spouse. It effectively takes that asset, whatever you can prove that is separate property, it

takes that asset and plucks it out of the community property pie and moves it to the side and, in effect, says to the spouse who owns it, who's separate property it is, this is yours and the other spouse gets no part of it.

So the significance is when you're dealing with a community property division and you're debating if it's going to be 50/50, 55/45, 60/40 all of a sudden you take out a chunk of those assets and move it to the side because you can prove it is separate property that can make a very significant difference in the overall outcome. There are a whole lot of confusing issues surrounding separate property claims and that's why I described this as the most misunderstood area of property division.

One of those issues is, let's go back to the example of \$100,000 savings account before marriage. Well in Texas we've got separate property and community property, but the income on your separate property is actually community property. So how does that play out?

Well for example let us say you got that \$100,000 savings account that pays (let's make it simple) 1% interest rate per year. Well if it's a \$100,000 on the day you get married within a year you earn 1% interest and now its \$101,000 in that account and the end result there is now you have \$100,000 of separate property and \$1,000 of community property.

The biggest mistake that people make when they have separate property is they take their separate property and they mix it all up with all the assets that they accumulated after they get married. For example, using the example I already gave, if the spouse took the \$100,000 from the savings account and moved it to a Fidelity brokerage account and bought some stocks, sold some stocks, took some money that they earned from their job that they accumulated and dumped that money in there and bought some stocks and sold some stocks and the next thing you know 15 years later you got an account that has literally hundreds of trades, maybe thousands of trades going in and out of the account. The bottom line is that the person claiming the separate property has the burden of proof to show that it is separate property.

That means with evidence you got to be able to trace it back to show that it was your separate property. Now if what you have was the savings account like I talked about and it just sat there and it never moved, that's really easy to trace back. If instead you have the example that I described afterwards where you have all these transactions where you mixed it all up together it may be possible to trace that back. It's often impossible to trace it back. Sometimes it is possible to trace it back but it requires an expert witness and an accounting that goes through literally years and years of records and the expert has to go back and analyze all that so it makes it more complicated.

So the simple way to avoid it, keep your separate property separate and you don't ever mix the two together and that can make your separate property claim much easier to prove.

I'll give you one quick example of a case I had and how this makes a big difference. Talking about the difference between separate property and community property, how that can change the overall complexion of property division. I had a client who had stock in his employer and worked for an oil company, he had one of these employee stock ownership plans and he accumulated lots of shares of stock and he did that before he was married. Then he got married, kept that stock and then say 20 years later he got divorced.

The stock increased in value something like 20-25 fold. So it had really dramatically risen and I represented the husband in that case. The wife claimed the appreciation was community property. She said it was income. But here's the law on that issue - with stock in a company what constitutes the separate property is actual asset the shares of stock. And the fact that the value, the stock price, increases and decreases over time, that is not income. So the result was it was a very highly contested issue but the case law favored my client and the outcome of that was that we were able to prove that the stock was his separate property and we got to take it out of the community property equation and the result was about \$250k on his side of the ledger that wouldn't have been his otherwise, he would have had to share in that. So as

you can see that can make a big difference in getting maximum value in your overall property division.

Let's move on to key number four to getting a fair property. This is one where I see people make a mistake over and over that is a common error that will turn the judge against you. Specifically when you try to hide assets in your divorce case, if you do get caught, and most of the time people do this they get caught, it will absolutely make the judge dislike you tremendously. I get asked, probably on a monthly basis I'll have someone come to my office and say can you help me hide assets and there's this particular asset that I don't want to share with my spouse because I don't think he/she deserves and I don't want to share it.

My answer is, no I won't help you do that because, first of all it is unethical and, secondly you will get yourself in trouble and you run the risk of hurting yourself if you try to hide it and in the final analysis you're going to hurt yourself a lot more than you're going to help yourself. Because if you get caught the judge will absolutely to have a lot of animosity towards you. Judges are like everybody else. Judges don't like liars so that can really hurt your case.

I'll give a quick example of a case I had. I had a client who actually hid assets from me early on in the case. I have a form that whenever somebody hires me, I have a form that I have them fill out that explains or gives me information what all the assets are and what all the liabilities are. And he did not put on that form a fairly significant asset that he held in his name. And later going through the financial records, I came across it and I discovered it. Unfortunately, for my client this was before the other side had done discovery or taken his deposition or done anything that would have required him to lie to keep the other side from finding out about this asset. So he was planning on lying but he hadn't done so yet. Except to me.

So when I asked him or confronted him about it, he said yes I didn't want to let you know because I didn't want her to know this asset existed because I don't think it's fair that I have to share it with her. And I explained to him that this is a very dangerous area to get into that he

could have gotten into a lot of trouble. If you get on the stand and you lie about something that's perjury and you can go to jail for that and at a minimum you're going to make the judge quite angry with you. And that's not very smart, to anger the person who's going to decide how to divide the property. Not a good strategy.

Well here's the twist to the story. When I begin to question him about the asset and what it was, when he acquired it, what I quickly determined was that he owned it pre-marriage. It was his separate property and we could prove that it was separate property. So the end result was she didn't get a share in it, because it was his separate property. He didn't have to share it with her. But had he lied about it and had he failed to disclose the asset when he answered discovery and he got his deposition taken and when he went to trial, it wouldn't have mattered that he was wrong, that it actually was his separate property. That would not have mattered, what mattered would have been that he lied under oath and the judge would have been just as mad and he would have been had it been community property. So the end result was that he got the outcome he wanted but he was fortunate that I discovered it before the other side discovered it and was able to use it against him.

Let's move on to the fifth and final key to getting a fair property division. And this is I would say is the most frequent error that I see that leads to people getting a very bad property division and that is this: they don't get representation in their divorce case. They sign off and they let the other spouse get a lawyer and they sign off on whatever is given to them. I cannot tell you how many consultations I have done where the person came to me (most frequently it is the husband) and said I got divorced whatever it may be 3 months ago, 6 months ago, 9 months ago, a year ago, and now my head is a little clearer and I'm looking at the terms I agreed to and it is about to bankrupt me and 1) I want to know if what I agreed to is fair and 2) if it's not fair what can I do to get out of it.

And some of these people who come will have really bad child support terms, they might be paying way over what they should be paying for child support, they might have visitation

schedules that are very unfair and unreasonable and don't allow much access to their children and if they came to see me, it probably means that they have a property division that was very unfair to them. In some cases where they got literally nothing or nearly nothing from the community assets. The last one, the bad property division is quite frankly the worst issue to make a bad deal on because all the kid issues can be modified.

If you have a bad child support term there are provisions in the family code that will allow you in certain circumstances you to go back and modify your child support. If you have a visitation schedule or rights and duties that aren't in the kids best interest there is a provision in the Family Code that allows you to go back and petition the court to modify those terms. And that happens all the time. What the Family Code does not allow is for you, after you agreed to what you later realized that it was a bad property division or an unfair property division, the Family Code does not allow you to go back and petition the court and say 'hey, let me have another shot at it because I got a really bad deal.' The Court says you get one bite at the apple. If you made a bad deal you have to live with it so often there's not a whole lot I can do to help out the person who's entered into a bad agreement and they're just kind of stuck with it and I can help them with some of the kid issues but usually the answer is after you agreed to a bad deal, you're stuck with a bad deal and really the only exception that ever works is if you were somehow defrauded in the settlement of the divorce case.

This is rare but an example would be the other person signed a sworn Inventory that was notarized that listed supposedly all the assets that they were aware of and you saw that Inventory and you relied on it and you based the information on it and you entered the settlement and then later you come to find out that there was another asset that maybe a million dollar account somewhere that they did not disclose, well that would be grounds to reopen the case because you were defrauded into and misled about the facts in a specific way.

That rarely happens in the cases that I see, I've never seen one where that was an issue normally they just sign off on it because they want to get the case over. There's a lot of reason

why people want to do this because they just want the case over, they feel guilty sometimes because they want the divorce and their spouse doesn't and often think 'why should I get an attorney when there's one in the case already' or why should they pay for two. And sometimes people are just cheap. They don't want to pay for legal fees because who wants to pay for legal fees, but the bottom line is if you don't get representation you are not going to be protected. Your spouse's lawyer isn't going to protect you, their goal is to protect your spouse and that means it could be an unfair deal for you, well so be it. So don't let this happen to you if you're going to get divorce. Get competent advice from an experienced divorce attorney before you sign anything or do anything.

Well we've talked about what I think the five key areas are to getting a good result in your property division. We've talked about the percentage and how that works, we talked about alimony, separate property claims, mistakes in hiding assets and how much trouble you can get into for that, and the importance of getting good representation.

Having done this for 15 years and seen people making all kinds of mistakes I really would recommend that if your situation is such that a divorce is actually a possibility, it doesn't have to be about to happen next week, but if you see that as an actual real possibility you should get advice from a qualified experienced family law attorney. Ideally you want to get advice from somebody who's board certified in family law, it is very specialized area.

You don't want a general practitioner handling your divorce case anymore you would want brain surgery performed on you by a general practitioner doctor. You would want a brain surgeon. Well same thing with family law. It is very specialized area and you want somebody who is well versed in the field. Sometimes I hear people who say they put off going to talk to a lawyer because they weren't sure if they were going to get divorced and my advice is go do a consultation as early as you can in the process because you'll benefit from that piece of mind.

Your spouse doesn't have to know, you don't have to tell them. Just make an appointment and go to the consultation. It is confidential and you can discuss your legal issues

you can get educated on what the issues are in your case and you'll be able to create a plan that gives you some idea on what to expect if you were to get divorced. Sometimes the lawyer, I know I do it a lot frequently when I have a client who says they don't really want a divorce, I actually like to hear that. And I have some specific resources to recommend that I think improve your chances of improving your marriage so you don't have to get a divorce.

But in any event those are issues that you don't have to put off just because you haven't been served with divorce papers. Get some advice early on in the process. If you're interested in doing a consultation with me I'm available to do so in a limited basis. I am frankly not the lawyer for everyone. If you are someone that is looking for a free consultation or somebody who wants a lawyer who's going handle your case for a low flat fee, I don't do free consultations, I am quite frankly expensive, I charge \$350.00 an hour and on each case I require the payment of an advance retainer. The amount of the retainer varies on how complicated the case looks but if you want an experienced family law attorney to handle your case and you want to make sure your rights are fully protected and that you get a fair result then I'll be happy to meet with you and discuss your situation.

I mentioned the hourly rate is \$350.00 per hour but for an initial consultation I do those for a flat fee of \$250.00. In other words the hourly charges don't apply. The initial consultation only takes an hour, sometimes a little over an hour, but the charge is still the same which is \$250.00 flat fee regardless of how long you take and we will discuss your situation in detail. You will leave with some specific advice on what I believe you ought to do and a specific plan on how we would handle the case if you were to hire us.

If you would like to set up a consultation with me all you need to do is call my office during business hours. The phone number is 713-840-9669, that is 713-840-9669. You can talk to my assistant, Lily, she can help you schedule that consultation or if you prefer you can go to my website. My website is www.houstondivorce.com. You would click on the questionnaire button, which is on the left side of the page, click on the questionnaire button and then you

would fill out the questionnaire form with some details about your situation. That form goes directly to my email, I'll look at it and either I will contact you or Lily will contact you about how to schedule a consultation.

Well, we are just about out of time so I want to thank all of you for joining me on the call and I hope you found it helpful and I hope you gained some insight and a little better of understanding of Texas Family Law on property division and if I can be of assistance in the future, just feel free to contact my office. Thank you everybody!