

SUBJECT: Agreements to convert separate property to community property

COMMITTEE: Juvenile Justice and Family Issues — committee substitute recommended

VOTE: 8 ayes — Goodman, Isett, P. King, Morrison, Naishtat, A. Reyna, E. Reyna, Truitt
0 nays
1 absent — Pickett

WITNESSES: For — Bernard Jones and Jerry Jones, Texas Academy of Probate Attorneys

Against — William Dudley; Stewart Gagnon, Family Law Section of Texas State Bar; Victor Negron, Family Law Section and Texas Family Law Council; Jennifer Tull

On — John Sampson

BACKGROUND: Under the Texas Constitution, community property in marriage may be recharacterized as separate property provided that both spouses agree. Separate property includes property owned by a spouse before the marriage or acquired by the spouse by gift or inheritance. Money damages recovered from a personal injury case also are separate property. Community property generally is any property acquired during the marriage. If property is purchased during the marriage with funds coming from separate property, the purchased property is separate property.

Current law does not allow the conversion of separate property to community property. For example, if one spouse receives an inheritance of land in the name of both spouses, the ownership of that inheritance is split, with each spouse owning an undivided interest in the land as separate property.

Texas allows prenuptial agreements that are made in writing and signed by both spouses. Such agreements may consider property rights.

DIGEST: CSHB 734 would amend Family Code, chapter 4, to authorize the conversion of separate property to community property if certain formalities were met. Specifically, the bill would allow spouses to agree to convert all or part of their separate property to community property if:

- ! the agreement was in writing and signed by both spouses, identified the property to be converted, and specified that the property was to become community property; and
- ! the agreement was enforceable without consideration.

Simply transferring a spouse's separate property to the name of the other spouse or to the name of both spouses would not be sufficient to convert the property to community property.

CSHB 734 would apply different provisions for management, control, and disposition of community property. If the converted property was in the name of one spouse or was transferred to community property without any proof of other ownership, the property would be under the sole management of that one spouse. If the converted property was held in the name of both spouses or, absent proof of other ownership, was owned by both spouses before conversion, the property would be under the joint management of both spouses.

An agreement to convert property could not be enforced if the spouse against whom the enforcement was sought proved in court that the agreement was not executed voluntarily or that the spouse had not received fair and reasonable disclosure of the legal effect of converting the property.

CSHB 734 would specify language in an agreement that would provide a rebuttable presumption that the agreement was made voluntarily and with full knowledge of its legal effects.

Converting separate property to community property would not affect any rights of a preexisting creditor of the spouse whose separate property was being converted. The conversion could be recorded in county deed records. The conversion of real property to community property would be constructive notice for good-faith purchasers and creditors without actual notice only if the agreement was recorded in the county where the property was located.

CSHB 734 would take effect January 1, 2000, contingent on voter approval of HJR 36, the companion constitutional amendment.

**SUPPORTERS
SAY:**

CSHB 734 would authorize the conversion of separate property to community property just as community property may be converted to separate property. This reciprocity would give Texas spouses more freedom in disposing of their separate property. Greater freedom of contract is part of a growing trend in Texas.

Texas already allows prenuptial agreements that provide for conversion of certain community property to separate property. CSHB 734 would accommodate the desires of some spouses to go the other way and convert separate property into community property. Although optional, the boilerplate language specified by the bill would create a rebuttable presumption that each spouse received fair and reasonable disclosure of the agreement's legal effects. This provision would be similar to that found in prenuptial agreements.

CSHB 734 also would provide tax benefits for spouses. When a separate property asset is converted to community property, there may be a "step up" in the basis of the converted property without any tax consequences. For example, if a spouse converted to community property a separately owned house that was worth \$50,000 when purchased and if the property was worth \$100,000 upon the death of that spouse, the \$50,000 increase in the house's value would not be taxed upon sale.

Enactment of CSHB 734 is contingent on approval by Texas voters of HJR 36, which would enable Texans to decide directly by referendum whether the bill should take effect.

**OPPONENTS
SAY:**

The conversion of separate property to community property could lead to unintended consequences. While in a happy marriage, a spouse may convert separate property to community property only to regret that decision when the marriage turns sour. Upon divorce, what formerly belonged to that spouse could be divided in half. The change in the character of the property would appear irrevocable, as the proposed boilerplate provisions would create a rebuttable presumption that the agreement accurately reflected the wishes of both spouses. This rebuttable presumption would be a high legal hurdle to clear before a spouse could recover separate property.

Under CSHB 734, the boilerplate language relating to the spouses' understanding that the conversion would result in loss of sole property ownership would be voluntary. If an agreement did not contain this language, a spouse could convert his or her property without full knowledge of the legal effects. Prenuptial agreements that provide for property conversion are required to provide full disclosure of the legal effects to both spouses.

The principle that underlies community property — part of a longstanding tradition in the Texas Constitution — is that this property be “built up” by both spouses during the marriage. A spouse should be able to share only what is earned during marriage and should be protected from having his or her separate property converted.

NOTES:

The committee substitute would require that the boilerplate language providing rebuttable presumption concerning the fair disclosure of the agreement's legal effects be “prominently displayed in bold-faced type, capital letters, or underlined.” The original bill would have required that this language be displayed “in conspicuous print on the same page as the signature of the spouses.” The substitute also changed the effective date from January 1, 1999, to January 1, 2000.

HJR 36 by Goodman, the companion constitutional amendment, was reported favorably by the House Juvenile Justice and Family Issues Committee on March 23.