

Q: My husband had a business and significant assets before we got married, but we don't have a prenuptial agreement; so if we get divorced then everything is still split 50/50, right?



A: The most likely answer is yes as to community property, but no as to separate property. Arizona is a community property state that also recognizes separate property rights for any property brought into the marriage, or acquired during the marriage. So while the community property will likely be equitably divided (usually 50/50), any separate property will remain separate assuming that it was not commingled with community funds, or gifted to the community.

To begin, community property means all property acquired by either spouse during the course of the marriage. It does not apply to property acquired prior to the marriage or to property acquired during the marriage by gift or inheritance. An analysis of whether separate property exists begins with the time frame of the existence of the property. For example, a Merrill Lynch account with \$500,000 in it before you were married is separate property. The same would hold true with an inheritance before or during the marriage, assuming that no community funds were added into either. If these accounts were never touched during the marriage then they will remain separate.

And while Arizona respects separate assets, those assets can be gifted to the community -- if there is intent, delivery and acceptance. They can also be "transmuted" to community property if they lose their character because of transfers or commingling. A common example of where separate funds are "gifted" to the community is when one party uses their separate funds as a down payment on a house that is titled in both parties names. In that case, there is a presumed gift to the community, which means that the separate property holder will not get the money back in a divorce. Transmutation occurs when separate funds and community funds cannot be traced back to the source, which usually occurs when both types of funds are mixed in one account. If you move funds back and forth from the separate account to a joint or community account or deposit the community paycheck into the separate account, then you risk having all the funds be considered community. A general theory is that if there is a question as to the character of property, the community usually wins.

The trickiest cases are businesses that were owned before marriage, but in which one or both spouses worked during the marriage. In those cases, the business, and income from the business could be separate and community property and is a complex examination for a professional.

Basically, if you want to keep assets separate, the first rule is: then keep them physically separate. Don't commingle the funds, place in joint names, or buy property with the funds that is jointly titled. If you dip into that separate Merrill Lynch account to buy a boat in San Diego, and title it in both you and your spouses' names, then it becomes community property. So just because you don't have a prenuptial agreement, it doesn't mean that your spouse was not careful keeping separate assets separate, and you may end up with no part of his separate assets.

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