

In its first significant case addressing marital property liability after the passage of the Matrimonial Act of 1967 (and the original version of the Texas Family Code of 1969), the majority of the Texas Supreme Court in *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975), in the author's opinion, got it wrong, but, in his dissent, Justice Reavley got it right. That decision helped perpetuate the Texas "urban myth" of "community debt." It then took the Texas Supreme Court almost forty years to get it right in *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013). In *Tedder*, Justice Hecht explained:

Much of the judicial discussion of "community debt" is based on the erroneous supposition that all "community debts" are equally shared by the spouses whether they are both makers of the debt or not. That supposition is not warranted by the basic principles of Texas law. Apart from the context of acquiring necessities, debt incurred by only one spouse does not affect the other spouse at all except that it makes the nonobligated spouse's share of community property liable for payment if the property sought for payment is subject to the sole or joint management of the spouse who incurs the debt.

No Community Debt

The Texas Family Code's liability rules do not support the notion of a "community debt." That term suggests that (i) both spouses have personal liability for the debt and (ii) all nonexempt

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Marital Property Liability: Post *Tedder*
by Tom Featherston*

community property can be reached to satisfy the debt. Neither statement is necessarily true. For a more complete discussion, see *Marital Property Liabilities: Dispelling the Myth of Community Debt*, Featherston and Dickson, *Texas Bar Journal*, January 2010.

In *Tedder*, the court effectively confirmed the Legislature's basic rules of marital property liability found in Sections 3.201, 3.202 and 3.203 of the Texas Family Code. Those rules depend in part on the definitions of sole management community property and joint management community property found in Section 3.102 of the Texas Family Code. The *Tedder* approach recognizes that neither “community property” nor the “community estate” is an entity that can own property or incur debt. Community property is simply a form of co-ownership. Only the spouses themselves can incur debt. A debt is the debt of one spouse, the debt of the other spouse, or the debt of both spouses. For a more complete discussion of Texas marital property liability since *Tedder*, see the author’s discussion in *Texas Practice Guide – Probate*, Chapter 2. When the Decedent Was Married, §§ 2:21 – 2:34 (Thomson Reuters 2016).

Statutory Rules

1. Separate Property Exemption

As a general rule, a spouse's separate property is not subject to the debts of the other spouse. Tex. Fam. Code § 3.202(a).

2. Sole Management Community Exemption

As a general rule, a spouse's sole management community property is not subject to any debts incurred by the other spouse prior to the marriage or any nontortious debts of the other spouse incurred during the marriage. Tex. Fam. Code § 3.202(b).

3. Other Rules of Law

These two exemptions exist unless both spouses are personally liable under "other rules of law." Tex. Fam. Code § 3.201.

4. Generally Exempt Property

Of course, the family homestead and certain items of personal property are generally exempt from the debts of both spouses, regardless of the marital character of the property. Tex. Prop. Code §§ 41.001 and 42.001. The Texas Property Code and Texas Insurance Code also create exemptions for retirement benefits, certain savings plans and life insurance. Tex. Property Code §§ 42.0021 and 42.0022. Tex. Insurance Code § 1108.051.

5. Creditors' Rights

Accordingly, a spouse's nonexempt separate property and sole management community property are subject to any liabilities of that spouse incurred before or during the marriage. Nonexempt joint management community is liable for the debts of either spouse incurred before or during marriage. In addition, the nonexempt sole management community properties of both spouses are subject to the tort liabilities of either spouse incurred during marriage. Tex. Fam. Code § 3.202 (c) and (d).

6. Order of Execution

A court may determine, as deemed just and equitable, the order in which particular separate or community property is subject to execution and sale to satisfy a judgment. In determining the order, the court is to consider the facts and circumstances surrounding the transaction or occurrence on which the debt is based. Tex. Fam. Code § 3.203.

Other Factors

The general rules described above apply unless both spouses are personally liable under “other rules of law.”

1. Joint Obligations

Of course, both spouses may sign a contract or commit a tort which would make them jointly and severally liable and thereby subjecting the entire nonexempt marital estate to liability.

2. Principal-Agent

The law also defines other situations where any person can be held personally liable for debts of another. These situations include the following relationships: respondeat superior, principal/agency, partnership and joint enterprise. These special relationships can exist between spouses and can impose vicarious liability on an otherwise innocent spouse. *See Lawrence v. Hardy*, 583 S.W.2d 795 (Tex. App.—San Antonio 1979, writ ref'd n.r.e.). The Texas Family Code has codified this concept. Tex. Fam. Code § 3.201(a)(1). However, the marriage relationship, in and to itself, is not sufficient to generate vicarious liability. Tex. Fam. Code § 3.201(c). *See also Wilkinson v. Stevison*, 514 S.W.2d 895 (Tex. 1974).

3. “Necessaries”

Each spouse has a duty to support the other spouse and a duty to support a child generally for so long as the child is a minor and thereafter until the child graduates from high school. Tex. Fam. Code §§ 2.501 and 154.001. Accordingly, all nonexempt marital assets (separate and community) are liable for such "necessaries."

The Necessaries Doctrine

A spouse’s duty of support extends beyond the marital relationship itself. For example, a spouse who fails to discharge this duty is generally liable to third parties who provide necessities to the other spouse. Tex. Fam. Code § 2.501(b). Accordingly, when third parties provide services deemed reasonably necessary for one spouse’s support, both spouses are personally liable for the costs of such services.¹ While the spouse who actually incurs the debt may be deemed to be primarily liable, both spouses are liable to the third party under the necessities doctrine. Tex. Fam. Code § 3.201(a)(2). Accordingly, debt incurred for necessities by either spouse exposes the entire nonexempt marital estate (separate and community) to liability.

¹ The author’s research discovered statements from various sources suggesting that once one spouse has qualified for Medicaid nursing care the other spouse no longer has any personal liability for the nursing care. The author appreciates notes elder law attorney, Clyde Farrell, confirming this general understanding of this complex set of Medicaid rules. Clyde also explained that, while the community spouse is still generally liable for other “necessaries,” when the other spouse is in the nursing home, Medicaid covers most of the needs of the other spouse. If the other spouse is receiving Medicaid home care, Medicaid does not pay for “necessaries” other than medical care (including personal attendant care). However, for the purpose of this paper, it will be assumed that neither spouse has qualified for Medicaid nursing care.

Key Questions

The Texas Legislature has actually enacted a logical liability process that utilizes a multiple-step process to determine which nonexempt marital assets of the spouses are liable for which debts during the marriage. The process is dependent upon the answers to four questions:

1. When was the debt incurred? *It was incurred either prior to or during the marriage.*
2. Whose debt is it? *It is either the debt of one spouse, the debt of the other spouse or both spouses' debt.*
3. What type of debt is it? *Was it tortious or contractual in nature or was it incurred for a "necessity"?*
4. If not a "necessity," was the spouse who incurred the debt acting as the other spouse's agent? *Thereby creating vicarious liability.*

The ultimate answer depends on the relevant facts and circumstances and the specific answers to these four questions.²

Summary

Accordingly, excluding generally exempt assets, a spouse's separate property and sole management community property, as well as the couple's joint community property, are liable for

² Professor Paulsen, in his excellent article on post-divorce liability, challenges what most have assumed to be established Texas law; divorce cannot prejudice the rights of preexisting creditors. He argues that such a rule ". . . lacks any modern legal justification and subverts the intent of the Texas Constitution and Family Code." He encourages the Texas Supreme Court to declare that ". . . an unsecured creditor . . . has no special rights against a former spouse or that spouse's property once the marriage ends." See James W. Paulsen, *The Unsecured Texas Creditor's Post-Divorce Claim to Former Community Property*, 63 Baylor Law Review 781 (2011).

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that spouse's debts whether incurred prior to or during the marriage. If the liability is a tort debt incurred during the marriage, the other spouse's sole management community property is also liable for the debt (the other spouse's separate property may be exempt depending upon the circumstances).

If the debt is not a tort debt incurred during the marriage, the other spouse's separate property and sole management community property are exempt during the marriage from the debt unless the other spouse is personally liable under "other rules of law." In which event, the other spouse's property (i.e., that spouse's sole management community and separate) is liable as well.

However, if the debt was incurred as a reasonable expense for the support of either spouse, each spouse has personal liability, and the entire nonexempt marital estate (each spouse's separate property and their community property) is liable.