

## **IS A SPOUSE'S JOINT COMMUNITY PROPERTY LIABLE FOR A DEBT INCURRED BY THE OTHER SPOUSE?**

Absent a statutory exemption, a spouse's separate property and special community property, as well as the joint community property, are liable for the other spouse's debts during the marriage.

If the liability is a tort debt (i.e. negligence), for instance incurred during the marriage, the other spouse's "special 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 (i.e. a contract debt) incurred during the marriage by one spouse, the other spouse's separate property and special community property are exempt during the marriage from the debt unless the other spouse is personally liable under other rules of law. However, if the debt was incurred as a reasonable expense for the "support" of either spouse, each spouse has personal liability, and the entire non-exempt marital estate (each spouse's separate property and their community property) is liable. *Note: These rules change when the first spouse dies.*

### **CREDITORS' RIGHTS DURING THE MARRIAGE**

If both spouses have joint and several liability for a debt, the entire non-exempt marital estate, his separate, her separate and their community estate, can be attacked by the creditor. Generally, excluded from this grouping of marital assets are those assets exempt from creditors' claims under the Texas Property Code §§ 41.001–42.0022 (the homestead, certain items of personal property and certain savings plans) and the Texas Insurance Code §§ 1108.51-1108.53 (insurance policies and proceeds).

#### **A. Joint and Several Liability**

The entire non-exempt marital estate is at risk if the debt is the debt of both spouses because (i) they both signed the contract; (ii) they both committed the tort; or (iii) they both signed the joint income tax return. Both spouses may have personal liability for the debt because the spouse who actually incurred the debt was acting as the agent of the other spouse – the Principal-Agent Rule.

Even if the Principal-Agent Rule is not applicable, if the debt is owing to a creditor who provided goods or services deemed reasonable necessities for the support of one spouse (or a minor child – see Tex. Fam. Code § 154.001), both spouses also have personal liability – the Necessaries Doctrine.

## **B. Tort Debt of One Spouse**

If the debt is, in fact, the tort debt of only one spouse (i.e., the other spouse does not have personal liability pursuant to IV, A, *supra*), the non-exempt separate property of the spouse who committed the tort and the entire non-exempt community estate (their joint community property, his special community property and her special community) are at risk. A court is, however, directed to determine, as deemed just and equitable, the order in which particular assets are subject to execution. Only the other spouse's separate property is exempt. If the tort was actually committed prior to the marriage, all of the other spouse's special community property is also not subject to execution.

## **C. Contract Debt of One Spouse**

If the debt is, in fact, a breach of contract by only one spouse and the other spouse does not otherwise have personal liability then the non-exempt separate property of the spouse who incurred the debt and the non-exempt special community property of that spouse and the joint community property are at risk. The other spouse's separate property and all of the other spouse's special community property are not at risk. The court is directed to use equitable principles to determine which particular assets are subject to execution.

## **D. Observations**

In many situations, the entire community estate is going to be at risk because of either the nature of the debt itself or the type of community property owned by the spouses. Even if the debt was incurred during the marriage by only one spouse, the Principal-Agent Rule or the Necessaries Doctrine may be applicable, creating joint and several liability. Even if neither the Principal-Agent Rule nor the Necessaries Doctrine is applicable, most, if not all, of the community assets may be their joint community property, even if certain assets are held in one spouse's name.

Perhaps more importantly, even the other spouse's separate property is at risk, if that spouse cannot prove by clear and convincing evidence that a separate asset is separate property due to the community property presumption. Tex. Fam. Code § 3.003.

**Please see CREDITORS' RIGHTS IN AND TO THE MARITAL ESTATE: WHAT PROPERTY IS LIABLE FOR WHICH DEBTS?**

**By Thomas M. Featherston, Jr. who wrote an article for the State Bar of Texas on this and other marital property issues from which excerpts were used. It can be located online.**