

## Reimbursement Claims in Divorce Cases for Capital Contributions to Business Entities

Elisa Reiter and Daniel Pollack | March 25, 2024



Life is about change. Individuals come together and decide to build a life together. Sometimes, happiness evaporates and there is a need to dissolve the union. When couples divorce, or one party to the relationship dies, bliss can disintegrate and morph into battle. We like to think that we can rely on Texas statutes to help resolve such conflicts.

While the Texas Legislature is well intentioned, has it consolidated Tx. Fam. Code Section 3.402 to the point of eliminating claims for capital contributions to business entities? Let's look at the current statute:

**Fam. Code Section 3.402**

**Claim for Reimbursement; Offsets**

**(a)** A claim for reimbursement exists when one or both spouses use property of one marital estate to confer on the property of another marital estate a benefit which, if not repaid, would result in unjust enrichment to the benefited estate.

**(b)** A spouse seeking reimbursement to a marital estate must prove:

1. that the spouse or both spouses used property of the marital estate to confer a benefit on the property of another marital estate;
2. the value of the benefit described by Subdivision (1); and
3. that unjust enrichment of the benefited estate will occur if the benefited estate is not required to reimburse the conferring estate.

**(c)** For purposes of this subchapter, the property of a marital estate confers a benefit on another marital estate's property if:

1. one or both spouses used property of the conferring estate to make improvements on the benefited estate's real property, and the improvements resulted in an enhancement in the value of the benefited estate's real property; or
2. one or both spouses used property of the conferring estate to pay a debt, liability, or expense that in equity and good conscience should have been paid from the benefited estate's property;

3. one or both spouses used time, toil, talent, or effort to enhance the value of property of a spouse's separate estate beyond that which was reasonably necessary to manage and preserve the spouse's separate property, and for which the community marital estate did not receive adequate compensation.

**(d)** For purposes of this subchapter, the value of the benefit conferred by the property of one marital estate on the property of another marital estate is determined as of the date of the trial's commencement and:

1. if the benefit resulted from the use of the conferring estate's property to make improvements on the benefited estate's real property, then the value of the benefit conferred is measured by the enhancement in the value of the benefited estate's real property that resulted from the improvements; or
2. if the benefit resulted from the use of the conferring estate's property to pay a debt, liability, or expense that in equity and good conscience should have been paid from the benefited estate's property, then the value of the benefit conferred is measured by the amount of the debt, liability, or expense paid by the conferring estate;
3. if the benefit resulted from the use of time, toil, talent, or effort to enhance the value of property of a spouse's separate estate, then the value of the benefit conferred is measured by the value of the time, toil, talent, or effort beyond that which was reasonably necessary to manage and preserve the spouse's separate property."

Do capital contributions to a business entity fit into one of the provisions of Tx. Fam. Code Section 3.402 (c) (1)? Are capital contributions to a

business entity similar to payment of a debt? Certainly those who drafted the new statute will defend their drafting, noting that it was never their intent to eliminate potential reimbursement claims for capital contributions to business entities.

Some may remember attending bi-annual legislative updates that were presented with great care and acumen by attorneys Harry Tindall and John Sampson. Well into Tindall and Sampson’s presentation, Ken Fuller would raise his hand, and ask a question in such a way as to stump the panelists—despite the fact that the panelists had prepped, and likely had a hand in actually drafting the new changes they were presenting. We are raising our hands with such questions here.

Changes were enacted by the 88th Legislature via H.B. 1547. In addition to the new provisions, which became effective Sept. 1, 2023, see the below language, which was stricken from Tx. Fam. Code Section 3.402:

“For purposes of this subchapter, a claim for reimbursement includes:

1. payment by one marital estate of the unsecured liabilities of another marital estate;
2. inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse;
3. the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage;
4. the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a

marriage, to the extent the debt existed at the time the property was received;

5. the reduction of the principal amount of that part of a debt, including a home equity loan:
  - a. incurred during a marriage;
  - b. secured by a lien on property; and
  - c. incurred for the acquisition of, or for capital improvements to, property;
6. the reduction of the principal amount of that part of a debt:
  - a. incurred during a marriage;
  - b. secured by a lien on property owned by a spouse;
  - c. for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached; and
  - d. incurred for the acquisition of, or for capital improvements to, property;
7. the refinancing of the principal amount described by Subdivisions (3)-(6), to the extent the refinancing reduces that principal amount in a manner described by the applicable subdivision;
8. capital improvements to property other than by incurring debt; and
9. the reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses.”

Also, see the following revisions:

“(g) A claim for reimbursement of a marital estate by one spouse may be offset by the value of any related benefit that the other spouse proves that the conferring estate received from the benefited estate, including:

1. the value of the use and enjoyment of the property by the conferring estate, except that the separate marital estate of a spouse may not claim an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by the separate marital estate against contributions made by the community marital estate to the separate marital estate;
2. income received by the conferring estate from the property of the benefited estate; or
3. any reduction in the amount of any income tax obligation of the conferring estate by virtue of the conferring estate claiming tax-deductible items relating to the property of the benefited estate, such as depreciation, interest, taxes, maintenance, or other deductible payments.

~~(h) (c) Benefits for the use and enjoyment of property maybe offset against a claim for reimbursement for expenditures to benefit a marital estate, except that the separate estate of a spouse may not claim an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by the separate estate against contributions made by the community estate to the separate estate. (d) Reimbursement for funds expended by a marital estate for improvements to another marital estate shall be measured by the enhancement in value to the benefited marital estate.~~

What's missing? There is no specific reference in the Tx. Fam. Code Section 3.402(c) to assure reimbursement for capital contributions to a business entity owned by one estate and paid for by another estate. Moreover, there is an argument to be made that there are only three grounds—and perhaps less—for reimbursement by one estate to

another. Certainly, many will contend that we can just “plug” capital contributions to a business entity into section 3.402(c) somehow, or that the specificity of section 3.402(d) trumps the immediately preceding provision. Which construction will prove to be “grammatically correct and reasonable”? By consolidating the statute, the Legislature created a “conjunctive versus disjunctive issue” by virtue of our legislators use of “and” as well as “or” in Tx. Fam. Code Section 3.402. The legislative history underlying HB1547 assures the reader that the Legislature’s intent was to clarify, not to make substantive changes to the statute. As the Texas Supreme Court held in Texas Health v. D.A. and M.A.:

“In many statutory-construction cases, the parties dispute the meaning of particular words or phrases, and we construe the statute by applying the terms’ common, ordinary meaning unless the text supplies a different meaning or the common meaning leads to absurd results.” Fort Worth Transp. Auth. v. Rodriguez, 547 S.W.3d 830, 838 (Tex. 2018).

The wording of the new statute appears to create a reimbursement claim “when one or both spouses use property of one marital estate to confer on the property of another marital estate a benefit which, if not repaid, would result in unjust enrichment to the benefited estate.” So, to satisfy the statute, the initial burden of proof for a spouse seeking reimbursement would be to present evidence that:

1. Property of one marital estate was used to in order to benefit another marital estate;
2. The benefit had quantifiable value, which the spouse seeking reimbursement must substantiate;

3. One estate would be unjustly enriched if there was not some type of reimbursement.

Reimbursement claims remain subject to just and right offsets. Three reimbursement claims clearly exist under the revised statute (subject to offsets):

1. Payment of debts of another estate;
2. Payments for improvements to real estate by one estate for property owned by another estate; and/or
3. Time, toil and effort (a Jensen claim).

Capital contributions to business entities are not specifically addressed in the revised statute, but are thought to be incorporated in one or more of the foregoing claims. The alternative remedies established in Texas Family Code Chapter 3, Subchapter are not exclusive remedies. These alternatives are in addition to other forms of relief, such as those set out in Tx. Fam. Code Section 3.411.

The lack of specificity as to capital contributions to business entities may be bound for appeals. In Milkovich v. Lorain, Chief Justice William Rehnquist quotes "Othello" (Act 3, Scene 3):

"In Shakespeare's 'Othello,' Iago says to Othello:

'Good name in man and woman, dear my lord.

Is the immediate jewel of their souls.

Who steals my purse steals trash;

Tis something, nothing ...'



Isn't that the essence of a reimbursement claim? One party declares "'tis something!" The other party frequently responds that the claim "'tis nothing!" Married couples may think "what's mine is yours, and what's yours is mine." Upon divorce, their individual perspectives shift. The understanding that each owes the other fiduciary duty and trust may dissipate quickly. One spouse may feel that the other may be stealing something—or perhaps nothing—from the other by seeking a reimbursement claim.

Will relief granted specifically tied to capital contributions to business entities be upheld on appeal? Consider changes through the years to the economic contribution statute and the statute characterizing retirement plans; what was "set in stone" changed over time as revisions were made to those provisions of the Texas Family Code. The 88th Legislature strove to streamline Tx. Fam. Code Section 3.402(c), but in doing so, has it left some questions unanswered? How are lawyers to present the measure for claims as of the date of trial? Will that measure include interest from the time of the contribution until the matter is heard at trial, or would doing so be a logical leap in interpretation based on an attorney's zealous advocacy? Is there a presumption that if capital contributions were made to a spouse's separate property entity that the contribution should be characterized as a gift upon dissolution of the marital relationship? How will judges effectuate fair divisions in light of the revised statute? Might the 89th Legislature revisit this provision and (re)expand the statute? Judges, beholden to thousands of constituents and the power of appellate courts, must grapple with what may be perceived as unintended vagueness in the interim.

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