

# **CHARACTERIZATION AND TRACING**

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**MARRIAGE DISSOLUTION 101**

April 25, 2012

Dallas

**CHAPTER 4**



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Texas Tech University  
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Pro Bono Committee, State Bar of Texas Family Law Section 2005 to present  
Co-Chairman, Pro Bono Committee, State Bar of Texas Family Law Section 2010 to present  
Family Law Practice Manual Revision Committee, State Bar of Texas (2006-2009)  
Family Law Council of the Family Law Section of the State Bar of Texas 2006 to present  
Board of Directors, Tarrant County Family Law Bar Association (2007-2009)  
Supreme Court of Texas Uniform Forms Task Force 2011 to present  
Director - Texas Academy of Family Law Specialists 2011 to present  
Adjunct Professor, Texas Christian University 2008 to present

### **PUBLICATIONS**

"Mediation: When is it Really Over?" (with Gary L. Nickelson) 2002 Advanced Family Law Course  
"Characterization and Tracing on a Budget" (with Gary L. Nickelson) 2003 Marriage Dissolution Institute  
"Family Law for Fun and Profit" (with Gary L. Nickelson) 2003 Advanced Family Law Course  
"Dealing with the "Not So Right" Client" 2004 Marriage Dissolution Institute  
"The ABCs of Trying the Simple or Complex Case" (with Gary L. Nickelson) 2005 Marriage Dissolution Institute

“Evidence” 2005 Marriage Dissolution Institute

“Using Outside Resources” (with Gary L. Nickelson) 2005 Advanced Family Law Drafting  
“If You Can’t Get It Before the Factfinder, You Can’t Win” - Effective and Practical Application of the rules of Evidence 2006 Advance Family Law Course

“Summary Judgments” 2007 Marriage Dissolution Institute

“Possession Orders, Including Special Circumstances” (with G. Thomas Vick, Jr.) 2007 Advance Family Law Course

“Evidence & Discovery” 2008 Marriage Dissolution Institute

“Show Me the Money” Advanced Collection Methods 2008 Advance Family Law Course

“Courtroom Objections: Proper Methods of Objecting and Otherwise Protecting Your Client in the Courtroom” (with Kimberly M. Naylor) 2009 Advance Family Law Course

“Creative Possession Schedules” (with Kimberly M. Naylor) 2010 Advance Family Law Drafting Course

“Venue, Standing and Jurisdiction” 2011 Marriage Dissolution 101

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### **SPEAKER AND LECTURER**

Speaker at Family Law Essentials Seminar, presented by the Family Law Section, September 2003, Lubbock, TX

Speaker at 2003 Family Law Seminar, presented by the Family Law Section, October 2003, Wichita Falls, TX

Speaker at 2004 Marriage Dissolution Institute, April 2004, Fort Worth, TX

Speaker at 2004 Annual Meeting, June 2004, San Antonio, TX

Speaker at 2004 Family Law Boot Camp, presented by the Family Law Section, August 2004, San Antonio, TX

Speaker at LAU Seminar, presented by the Legal Assistants Division, September 2004, Fort Worth, TX

Speaker at Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of the Family Law Section, September 2004, Laredo, TX

Speaker at 2005 Marriage Dissolution Institute, April 2005, Galveston, TX

Speaker at 2005 Annual Meeting, June 2005, Dallas, TX

Course Director, Family Law Basic Training, by the Family Law Section, August 2005, Dallas, TX

Speaker at 2005 Family Law Seminar, presented by the Family Law Section, September 2005, Eagle Pass, TX

Speaker at 2006 Advanced Family Law Course, August 2006, San Antonio, TX

Course Director, Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of the Family Law Section, April 2007, Mineral Wells, TX

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Course Director, Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of the Family Law Section, April 2008, Wichita Falls, TX

Speaker at 2008 Advanced Family Law Course, August 2008, San Antonio, TX

Moderator of a panel at 2009 Marriage Dissolution Institute, April 2009, Fort Worth, TX, "Psychology of a Possession Order"

Moderator of a panel at the 9th Annual Family Law On The Front Lines, June 2009, San Antonio, TX, "When You Play, You May Pay! Paternity Fraud – The Newest Form of Birth Control"

Speaker, 2009 Advanced Family Law Course, August 2009, Dallas, TX

Course Director, Pro Bono Family Law Seminar, presented by the Family Law Section, October 2009, Eagle Pass, TX

Speaker, Parent-Child Relationships: Critical Thinking for Critical Issues, January, 2010, Austin, TX

Course Director and Speaker, Pro Bono Family Law Seminar, presented by the Family Law Section, September 2010, Sherman, TX

Course Director, 2010 Advanced Family Law Course, August 2010, San Antonio, TX

Speaker, 2010 Advanced Family Law Drafting Course, December 2010, Houston, TX

Speaker, 2011 Marriage Dissolution 101 Course, April 2011, Austin, TX

Speaker, State Bar College 13th Annual Summer School, July 2011, Galveston, TX

Speaker, 2011 Advanced Family Law Course, August 2011, San Antonio, TX

Speaker, 2011 Advanced Family Law Drafting Course, December 2011, Dallas, TX

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## CHARACTERIZATION AND TRACING

### I. INTRODUCTION

The intended scope of this paper is to provide you with a few quick, easy, and hopefully, inexpensive ways to characterize and trace the assets in your case. We all hope to sign up that case where there are enough assets that we don't have to worry about the cost of characterizing and tracing the assets. Unfortunately, most of us live on the borderline cases where there are a few assets that may be separate, and now that the divorce has been filed, are significant to our client. The small inheritance from your client's mother was never even discussed by the parties and never considered a possible issue of disagreement; that is until the divorce was filed and the parties began discussing separate vs. community property. Almost every family law attorney has had this discussion with their client during the initial consultation. Then once you do, the client's separate estate (to which they are entitled to 100% of) takes on a life of its own.

I would strongly advise all of you that if you have significant separate assets, you should hire an expert witness whose business it is to do characterization and tracing and not to try to use the tools in this article. DO NOT be penny wise and dollar foolish.

The purpose of this paper is to provide the average practitioner with some elementary tools to effectively perform characterization and tracing without spending a lot of money.

### II. THE WITNESS

The first item you need to address, if you are not going to have an expert witness, is exactly who are you going to use as your witness to prove up your separate property. The most common occurrence is to use your own client as your "testifying expert." Most clients know the story better than anyone, they lived it. Unfortunately, quite often they are not equipped to tell the story in a question and answer format as required by our rules of evidence. They do not understand "hearsay" or "non-responsive" objections. Therefore, you MUST school them on "how to testify." They must be taught how to get their point across.

Here are some simple rules for testifying that you can use and expound on with your client:

1. Always tell the truth (do not exaggerate).
2. Listen carefully to the question.
3. Be sure you understand the question asked. (I tell my clients that if they are not certain what the opposing counsel is asking to say, "Are you asking me .....?" Then once they are certain what is being asked, to answer the question.)
4. Answer only the question asked. (I like to use the

example of "Do you have any brothers or sisters?" The answer is yes or no, NOT yes 2 brothers and 1 sister.)

5. Be sure to in fact answer the question asked.
6. DO NOT GUESS (unless you are specifically asked to guess).
7. If an attorney stands up or objects, do not answer the question until told to do so.
8. Be confident and firm in your answers.

As the attorney, you MUST make sure your client knows what questions you are going to ask. NEVER let them hear the questions for the first time in the trial or hearing!!!! Of course you do this by meeting with your client prior to the hearing or trial and going over all of your questions as well as what questions you anticipate the opposing party to ask. It is your job to make them comfortable with the questions and answers.

You also need to help them understand and avoid giving hearsay responses, i.e.:

Question: How much was your home worth when you bought it in 1994?

Wrong Answer: I was told by the realtor that it was worth \$200,000. (This, of course, will bring on a hearsay objection).

Correct Answer: \$200,000.

Let the other attorney do their job. If they want to question how, why, what, where your client got or came into possession of that information, let them, but do not beg the hearsay objection.

Lastly, help them avoid the "non-responsive objection." Sometimes it is very hard for clients to be responsive, it is a learned trait. In your practice session prior to the hearing teach them to be responsive to your question and not to provide a lot of non-responsive information. They need to know that you are going to ask them the right questions so that they can tell their whole story.

The second most common person you may use as your "expert witness" may be your client's CPA. Even if you choose to use the CPA you will need to prepare this witness to testify. Most CPAs are not accustomed to testifying in court. Thus, they need to be taught how to testify just as you hopefully taught your client. The CPA will undoubtedly charge your client for their time, but depending on their hourly rate, they may be a better choice than your client to be the testifying expert.

Don't be afraid to school any and all witnesses you plan to call to the stand. Most people have never testified in a courtroom before and it can be a very intimidating experience for non-lawyers.

### III. THE RULES

No matter who you use, they need to have a good working knowledge of the rules for characterization and tracing contained in the Texas Family Code. If your witness has a thorough knowledge of the rules, they will always be able to justify their testimony. "It is my separate property because it was a gift from my uncle."

Therefore, I have included the basic rules of characterization and tracing in this article for your use. I have also included these rules in a laminated form so that you can keep them in your trial notebook.

#### A. Characterization Rules

1. Inception of Title - the character of property is fixed at the time of claim or acquisition. Welder v. Lambert, 44 S.W. 281 (Tex.1898)
2. Presumption of Community Property
  - a. purchase money Cooke v. Cordray, 333 S.W.2d 461 (Tex.Civ.App.-Beaumont 1960, no writ)
  - b. debt or loans Cockerham v. Cockerham, 527 S.W.2d 162 (Tex. 1975)
  - c. withdrawals from accounts Horlock v. Horlock, 533 S.W.2d 52 (Tex.Civ.App.-Houston [1<sup>st</sup> Dist] 1976, writ dism'd)
  - d. withdrawals from commingled accounts "community out first rule" Sibley v. Sibley, 286 S.W.2d 658 (Tex. 1955)
3. Presumption of Separate Property
  - a. parent's transfer to child Kyles v. Kyles, 832 S.W.2d 194 (Tex.Civ.App.-Beaumont 1992, no writ)
  - b. specific deed recital Henry S. Miller Co. v. Evans, 452 S.W.2d 426 (Tex. 1970)
  - c. interspousal conveyance Grost v. Grost, 561 S.W.2d 223 (Tex.Civ.App.-Tyler 1977, writ dism'd)
  - d. including spouse's name in title Pemelton v. Pemelton, 809 S.W.2d 642, 646 (Tex.Civ.App.-Corpus Christi 1991, rev'd on other grounds sub nom.)
  - e. income from interspousal gift Tex.Fam. Code §3.005
  - f. cemetery plot of person named as grantee Health and Safety Code §711.039(a)
4. Real Property acquired by adverse possession
  - a. no color of title when period complete Brown v. Foster Lumber Co., 178 S.W.787 (Tex.Civ.App.-Galveston 1915, writ ref'd)

- b. with color of title when period began Strong v. Garrett, 224 S.W.2d 471 (Tex. 1949)
5. Spouse can spend a reasonable amount of time, toil and talent caring for, persevering, making productive their separate estate. Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984)
6. Gifts
  - a) intent to make a gift } Harrington v. Bailey,
  - b) delivery of the gift } 351 S.W.2d 946
  - c) acceptance of the gift } (Tex.Civ.App.-Waco 1961, no writ)
7. You cannot make a gift to the community - if married, gift is to each spouse's separate estate. Tittle v. Tittle, 220 S.W.2d 637 (Tex. 1949)
8. All property possessed by either spouse during or on dissolution of marriage is presumed to be community property. Tex.Fam.Code §3.003(a)
9. On dissolution of marriage to overcome community property presumption, burden of proof is on the separate property proponent and the legal sufficiency is by "clear and convincing evidence." Tex.Fam.Code §3.003(b)
10. Property can have mixed title owned by the community and a separate estate or by both separate estates of the spouses. Gleich v. Bongio, 99 S.W.2d 881 (Tex. 1937)

#### B. Community Property

1. All property acquired by either spouse during marriage (except for separate property acquired during marriage) Arnold v. Leonard, 273 S.W.799 (Tex. 1925)
2. Recovery for loss of earning capacity or medical expenses during marriage of spouse Graham v. Franco, 488 S.W.2d 390 (Tex. 1972)
3. Distributions of partnership profits or income during marriage Harris v. Harris, 765 S.W.2d 798 (Tex.App.-Houston [14<sup>th</sup> Dist] 1989, writ denied)
4. Earnings of children (and items purchased with these funds) Insurance Company of Texas v. Stratton, 287 S.W.2d 320 (Tex.Civ.App.-Waco 1956, writ ref'd n.r.e.)

5. Damages for injury to a child Hawkins v. Schroeter, 212 S.W.2d 843 (Tex.Civ.App.-San Antonio 1948, no writ)
6. Crops Cleveland v. Cole, 65 Tex. 402 (1886)
7. Earnings of spouses, employee benefits, retirement, life insurance premiums paid by employer, disability benefits, workmen's comp Herring v. Blakeley, 385 S.W.2d 843 (Tex. 1965)
8. Federal plans
  - a. military retirement Koepke v. Koepke, 732 S.W.2d 299 (Tex. 1987)
  - b. military disability U.S. v. Stelter, 567 S.W.2d 797 (Tex. 1978)
  - c. federal work comp Anthony v. Anthony, 624 S.W.2d 388 (Tex.App.-Austin 1981, writ dismissed)
  - d. civil service retirement pay Adams v. Adams, 623 S.W.2d 500 (Tex.App.-Fort Worth 1981, no writ)
  - e. civil service disability benefits In the Matter of the Marriage of Butler, 543 S.W.2d 147 (Tex.Civ.App.-Texarkana 1976, writ dismissed)
9. Rents, revenues and income from separate property Arnold v. Leonard, *supra*
10. Livestock bred and raised during marriage Gutierrez v. Gutierrez, 791 S.W.2d 659 (Tex.Civ.App.-San Antonio, 1990, no writ)
11. Lottery prizes and gambling winnings Dixon v. Sanderson, 10 S.W.535 (Tex. 1888)
12. Delay rentals paid on oil and gas leases McGarraugh v. McGaraugh, 177 S.W.2d 296 (Tex.Civ.App.-Amarillo 1943)
13. Cash dividends on separate stock Amarillo National Bank v. Liston, 464 S.W.2d 395 (Tex.Civ.App.-Amarillo 1970, writ refused n.r.e.)
14. Profits made by a spouse through trade, speculation, investment or venture whether using community or separate funds In the Matter of the Marriage of York, 613 S.W.2d 764 (Tex.Civ.App.-Amarillo 1981, no writ)
15. Commercial goodwill of a community property business Allen v. Allen, 704 S.W.2d 600 (Tex.App.-Fort Worth 1986, no writ)
16. Separate property that has been transmuted by statutory agreement Tex.Fam.Code §4.201 et seq.

### C. Separate Property

1. Acquired before marriage (owned or claimed) Welder v. Lambert, *supra*
2. Acquired after marriage by gift, devise or

descent Tex.Fam.Code §3.001

3. Recovery for personal injuries (pain, anguish, distress, disfigurement, loss of body part, loss of mental function) Graham v. Franco, *supra*
4. Property purchased with separate property funds Gleich v. Bongio, *supra*
5. Community property partitioned by statute Tex.Fam.Code §4.102
6. Pecuniary loss, loss of companionship, mental pain and suffering for death of a child Johnson v. Holly Farms of Texas, Inc., 731 S.W.2d 641, 646 (Tex.Civ.App.-Amarillo 1987, no writ)
7. Increase in value of separate stock due to market conditions Dillingham v. Dillingham, 434 S.W.2d 459 (Tex.Civ.App.-Fort Worth 1968, writ dismissed)
8. Professional goodwill Nail v. Nail, 486 S.W.2d 761 (Tex. 1972)
9. Damages for loss of consortium property of deprived spouse Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978)
10. Stock dividends, stock splits on separate stock, new stock from a merger or a liquidating cash dividend Horlock v. Horlock, *supra*
11. income from a trust that is not received and to which the beneficiary has no claim, but only an expectancy Ridgell v. Ridgell, 960 S.W.2d 144 (Tex.App.-Corpus Christi 1997, no writ)

### D. Property Not Divisible on Divorce

1. Fleet reserve pay Sprott v. Sprott, 576 S.W.2d 653 (Tex.Civ.App.-Beaumont 1978, writ dismissed)
2. Military readjustment benefits Perez v. Perez, 587 S.W.2d 671 (Tex. 1979)
3. Railroad retirement benefits Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979)
4. Social Security benefits Richard v. Richard, 659 S.W.2d 746 (Tex.App.-Tyler 1983, no writ)
5. Veterans Administration benefits Ex Parte Johnson, 591 S.W.2d 453 (Tex. 1979)
6. National Service life insurance Wissner v. Wissner, 338 U.S. 655 (1950)

### E. Conditional Gift

Engagement gifts - can be recovered if condition not met McLain v. Gilliam, 389 S.W.2d 131 (Tex.Civ.App.-Eastland 1965, writ refused n.r.e.)

**F. Mineral Interests**

1. In place - character of land Norris v. Vaughan, 260 S.W.2d 676 (Tex. 1953)
2. Sale of minerals in full or part sale of corpus - no character change
  - a. leasehold income Norris v. Vaughan, *supra*
  - b. working interest Cone v. Cone, 266 S.W.2d 480 (Tex.Civ.App.-Amarillo 1953, writ *dism'd*)
  - c. royalty interest Norris v. Vaughan, *supra*
  - d. bonus payments Texas Co. v. Parks, 247 S.W.2d 179 (Tex.Civ.App.-Fort Worth 1952, writ *ref'd n.r.e.*)

**\*\* However, if the acquisition and development of minerals is operated as a business, the profits are community.** In the Matter of the Marriage of Read, 634 S.W.2d 343 (Tex.App.-Amarillo 1982, writ *dism'd*)

**G. Tracing Rules**

1. The character of separate property will not be altered by the sale, mutation, exchange or substitution of the property. Gleich v. Bongio, *supra*
2. So long as separate property can be traced and identified, it remains separate property. Norris v. Vaughan, *supra*
3. If community and separate property have been hopelessly commingled as to defy resegregation and identification, the presumption of community controls and the entire amount is community. Cockerham v. Cockerham, *supra*
4. Spouses managing community and the other spouse's separate estate - the burden on managing spouse to trace community portion - if the managing spouse fails, entire amount separate property of nonmanaging spouse. Sibley v. Sibley, *supra*
5. Spouses managing community funds owe a fiduciary relationship to the other spouse. Reaney v. Reaney, 505 S.W.2d 338 (Tex.Civ.App.-Dallas 1974, no writ)
6. If the managing spouse has commingled community and separate funds, then the presumption is against the wrongdoer's interest - whether community or separate. Farrow v. Farrow, 238 S.W. 2d 255 (Tex.Civ.App.-Austin 1951, no writ)
7. Property acquired during marriage on credit is presumptively community - use of community credit. Cockerham v. Cockerham, *supra*

8. Property acquired during marriage on credit can be separate if:
  - a. there is an agreement that the creditor will look solely to the separate estate of the spouse for payment; or Cockerham v. Cockerham, *supra*
  - b. an agreement between the spouses that the borrowed money will be repaid out of separate funds. Sparks v. Taylor, 90 S.W.485 (Tex. 1906)

**H. Methods of Tracing**

**MUST BE MATCHED WITH SPECIFIC FACTS**

1. Clearinghouse and Identical Sum Inference Method

**FACTS: There is an account into which separate funds were temporarily deposited and then withdrawn.**

- a. Clearinghouse - must identify one or more sums of separate funds into account then identify withdrawals were made that "match up" and are identifiable as those same funds being withdrawn from account. Estate of Hanau v. Hanau, 730 S.W.2d 663 (Tex. 1987)
- b. Identical Sum Inference - same as clearinghouse except only one deposit and one withdrawal - usually a short time later. McKinley v. McKinley, 496 S.W.2d 540 (Tex. 1973)

2. Minimum Sum Balance

**FACTS: Account with separate funds in it, into which community funds were placed. There must be only a few and identifiable transactions.**

The party seeking to prove separate property traces the community funds into and out of the account and shows that after each transaction the account never fell below the separate property balance. Then it is presumed that the balance left is separate property. Pardon v. Pardon, 670 S.W.2d 354 (Tex.App.-San Antonio 1984, no writ)

3. Community Out First Rule

**FACTS: Account has both separate and community funds.**

Withdrawals are presumed to be community to the extent that community funds exists in the account. Withdrawals are separate only when all community funds are exhausted. Sibley v. Sibley, *supra*

4. Pro Rata Approach

**FACTS: Account with both separate and community funds.**

Withdrawals are pro rata in proportion to the respective balances of separate and community funds in the account. Mariana v. Gen. Am. Life Ins., 898 S.W.2d 397 (Tex.App.-Fort Worth 1995, writ denied)

5. Item Tracing

**FACTS: Items (property) on hand at dissolution of marriage must be traced to their inception of title.**

The proponent of separate character must establish by clear and convincing evidence that the item on hand was acquired by the use of separate property funds/credit, etc. Cockerham v. Cockerham, *supra*

6. Value Tracing

**FACTS: To be used to trace cash assets - to determine character of cash on hand at dissolution of marriage.**

The proponent of separate property must trace all funds brought into and out of an account. Each deposit and each check must be accounted for. In Re Marriage of Tandy, 532 S.W.2d 714 (Tex.Civ.App.-Amarillo 1976, no writ)

#### IV. GETTING THE DOCUMENTS

The key component to any characterization and tracing case is the documents needed to establish inception of title and to then trace the various mutations of the subject assets.

With little or no money to use expensive discovery techniques, here are our suggestions:

1. Request for admissions - TRCP 192.1(e) and more specifically in TRCP 198, *et.seq.* These are cheap to send to the opposing party and can help you prove up your characterization or tracing case. Example: Did Heywood U. Sueme own the residence at 2016 Owens, Fort Worth, Tarrant County, Texas on July 3, 1992? with the

date used being the date of the marriage or the day before.

You can also ask for admissions as to any statement of opinion, or fact, or the application of law to fact, or the genuineness of any documents. If you can get the other side to admit to the genuineness of a critical tracing document, this may help you avoid problems with admissibility.

Admissions are not limited as to number and must be answered by the opposing side within 30 days as in the other permissible forms of discovery.

2. Subpoenas - TRCP 176. Now that attorneys can issue subpoenas there should be no reason that any documents needed to trace a particular asset should not be obtained. TRCP 176.2 authorizes a subpoena to have documents produced for inspection and copying. This is an extremely easy way to get documents you need for your tracing that are not in your client's possession.

3. Request for production of documents - TRCP 192.3(b) and specifically TRCP 196.1, *et.seq.* All family lawyers are well acquainted with this discovery tool. As a matter of fact, this tool is probably overused by everyone sending out a form request in every case asking for all types of documents, whether it applies to the case or not!

But nonetheless, this is a good way to get bank records that are needed to trace funds for a commingled account.

In a budget sensitive case, it would make a lot of sense to narrow your request for production and be as specific as you can about the exact documents you need.

4. Interrogatories to a party - TRCP 192.1(d) and specifically 197.1, *et.seq.* As you all know, interrogatories are limited to no more than 25 written interrogatories excluding interrogatories asking a party only to identify or authenticate specific documents. TRCP 190.2(c)(3) says you can ask as many interrogatories as you need to get the other side to authenticate documents. This is and can be a great help on a case with little money and a great need to "prove up" certain documents needed to characterize or trace your separate property assets.

So after the documents have been produced, you can get the other side to authenticate your documents through interrogatories with no limitation as to number of interrogatories asked. They will not count against your total of 25 questions you can ask.

This procedure is a very cheap, underutilized method of discovery.

5. Deposition upon written questions - TRCP 200. This again is a very seldom used, but highly effective discovery method of obtaining documents from institutions. You can get, for example, retirement plan documents from a large employer that you may need to prove up that your client's retirement account had X dollars in it at the time of the marriage. This again is an especially cheap way to get highly valuable documents and you can be very time specific. This method lets you detail what you want and get someone else (the employer or their plan administration) to do your work for you; i.e., Please attach the documents that show the value of employee Heywood U. Sueme's 401(k) as of July 3, 1992. They then will have to pull the documents they have that prove your needed facts. These can then be filed with the Court at least 14 days before trial and can come into evidence as a business record of the employer.
6. Business records affidavit - TRE 902(10). This again is a cheap, simple procedure to obtain business records that prove up needed facts to establish inception of title or value. If you have a house that was separate property, get the title company that closed the sale to do a business records affidavit on the sale documents and file it 14 days before trial to establish the character of the funds from the proceeds of sale. This can establish the sale proceeds as the separate property of your client prior to the marriage or show that the proceeds were separate property when received during the marriage.
7. Deposition - TRCP 199, et.seq. While the taking of a deposition is a great discovery tool, it is also the most costly. If you are operating on a tight budget, you should only do depositions for characterization and tracing purposes as a last resort, after you have completed all of the above methods of discovery. Further, if you must take one or more depositions, consider doing so by non-stenographic means, possibly over the phone. Many times for characterization and tracing purposes all you really need is the information to be sworn to- the witness's demeanor, appearance, etc. is really of no importance.

## V. METHODS

A simple and inexpensive method for tracing bank accounts, savings accounts, and other financial accounts is to create a ledger of the account summaries. The ledger can be created using a basic column pad or an Excel spreadsheet. An example of this system is attached as

Exhibit "A".

For each account, identify the date of the summary, the beginning balance, the total amount of deposits and/or credits for that month, the total amount of checks and/or debits for that month, and the ending balance. You will also want to include a column for comments to identify any debits or credits of particular interest. Begin your spreadsheet at least one month before the date of marriage and continue the spreadsheet for each month to the approximate date of divorce.

The amounts for each column are easily obtained from the account statement. An average statement will provide you with the beginning and ending balance and the total amount of debits and credits. Even if the statement does not include copies of each check, debit, deposit, or credit, you should be able to determine the debit or credit of interest by date and amount. Once you determine the debit or credit of interest, you can request the original or a copy of that particular item. The debit or credit of interest should be identified in the comment section and the original or copy of the document should be included in a tabbed notebook attached to the exhibit.

In addition to the credit or debit document from the bank, you may also have documents that substantiate the source of the funds. These documents should also be included in the notebook attached to the exhibit. For example, if you have closing documents from the sale of wife's separate property that indicate the amount wife was paid for the property you would want to include the closing documents in the notebook. If the date on the closing documents and the amount wife was paid for the property match a deposit into the account of interest, the closing statement may be used to establish the source of the deposit.

If you use a notebook of exhibits, it is extremely helpful to have a time line of events as the first exhibit. The time line allows the Court to see how each document is related to the next document.

The notebook is also a simple and inexpensive method for tracing funds used to purchase property. Again, always begin with a time line of events. Then start with the earliest available document that establishes the source of the funds used to purchase the property in question. That may be a will, gift tax return, stock agreement, or other document. Then trace the funds from that point in time to the actual purchase of the property, using as many documents as necessary.

Attached as Exhibit "B" you will find an example table of contents for the notebook. These are examples of the types of documents you might include in the notebook.

Another method of tracing and characterization on a budget is the use of a sworn inventory and appraisal. The I&A allows you to identify the specific properties on which you need to concentrate your efforts. It sounds simple, but it is important to

remember, if the other party's inventory acknowledges that certain property is your client's separate property, you do not want to waste valuable time and money proving same. Sworn inventory and appraisements are judicial admissions. See Roosevelt v. Roosevelt, 699 S.W.2d 372, 374 (Tex. App. - El Paso 1985, writ dismissed w.o.j.) Therefore you can concentrate your efforts on the property in dispute.

## VI. CONCLUSION

As I stated in the beginning, the intended scope of this paper was to provide you with a few quick, easy, and hopefully, inexpensive ways to characterize and trace the assets in your case. We have all experienced this phenomenon: Our clients believe our fees are too high and they want us to cut corners wherever possible, sometimes against our advice. So, we do our best to save them money and help them become "shade tree" expert witnesses. I hope this paper will help you in this regard. Characterization and tracing can be a difficult task, thus, I leave you with what I believe are the five most important rules about characterization and tracing on a budget:

5. Obtain the documents;
4. Organize the documents in a easily understood, logical presentation;
3. Pick your best witness to testify;
2. Prepare your witness, prepare your witness, prepare your witness!
1. There are no cheap shortcuts to quality characterization and tracing cases- it takes a lot of time and hard work.







**EXHIBIT “B”****TABLE OF CONTENTS**

1. Time Line of Events
2. 1956 Gift Tax Return of Harold W. Husband
3. 1974 Gift Tax Return of Harold W. Husband
4. Will of Harold W. Husband
5. Cashier's check from Arlington National Bank for \$70,000.00 to Harold W. Husband, II for funds from the will of Harold W. Husband dated 03-03-98
6. Bank statement of Harold W. Husband, II dated 04-01-98 from Arlington National Bank with deposit dated 03-05-98 for \$70,000.00
7. Real estate contract between Harold W. Husband, II and Mr. and Mrs. John Q. Public for the purchase of the home at 1234 First Avenue, Fort Worth, TX dated 11-21-98
8. Cashier's check from Harold W. Husband, II to Alamo Title Company for \$500.00 as earnest money for the purchase of the home at 1234 First Avenue, Fort Worth, TX dated 11-22-98
9. Estimated closing statement dated 11-29-98 reflecting \$500.00 earnest money payment and estimating funds necessary at closing of \$65,207.62
10. Bank statement of Harold W. Husband, II dated 12-01-98 showing a debit for \$500.00 for cashier's check.
11. Cashier's check from Harold W. Husband, II to Alamo Title Company for \$65,207.62 dated 21-29-98
12. Closing documents for the home at 1234 First Avenue, Fort Worth, TX reflecting payment of two cashier's checks in the amounts of \$500.00 and \$65,207.62
13. Bank statement of Harold W. Husband, II dated 01-02-99 showing a debit for \$65,207.62 for cashier's check