

“KEEPING WHAT IS YOURS”

There are many married couples today who entered marriage with assets that were their separate property but did not create a premarital agreement. There are also spouses who received property during the marriage by gift or inheritance which is by law their separate property. Often the spouse with the separate property wants to keep that property separate so that the property can go to his or her children upon death or stay in his or her “side” of the family. Separate property must be held and treated a certain way in order for it to maintain its character as separate property.

The following scenario is based on a true life example of how “intent” alone is not enough to keep separate property separate. Husband and Wife were married in 1960. This was the second marriage for each of them and each had children from prior marriages. Prior to their marriage, both Husband and Wife had acquired homes. In addition, when Wife's first husband passed away she used the insurance money to acquire another piece of property which she allowed her daughter and grandchildren to live in at reduced rent. The deeds to all the properties remained in the name of the spouse who acquired the property and each of the properties had mortgages except the property Wife bought with the insurance proceeds.

Upon marriage Husband moved from his home into Wife's home, which was much larger and in a better location. He rented out his former residence to third parties. During the marriage the couple maintained a joint bank account from which earnings during the marriage were deposited and household expenses were paid, including the mortgage on the home they lived in. Husband also kept open a separate bank account in which he deposited the rent from his property and paid expenses related to the property. Wife deposited rent from her property into the joint bank account and paid expenses related to the property from the joint bank account. Since Husband was a handyman type, he kept all the properties in good condition and repair.

Husband was diagnosed with cancer last year. While ailing, Husband's daughter persuaded Husband to sign a will she had prepared which left all of his property to her. Husband thought it was a good idea since, fearing he might die first, he didn't want his wife's children to wind up with everything after his wife's death.

The Husband died and his daughter made a claim to Husband's rental property *and* half the value of the two real estate properties which were in Wife's name. In support of her claim, Daughter pointed out two things: (1) With respect to the residence, even though it was initially separate property, it became community property because mortgage payments were made from the joint bank account; and (2) Husband devoted time, effort and skill to maintaining Wife's separate rental property so he acquired an interest in that property as well. Guess what? The law says that the daughter has a valid claim to a portion of Wife's property. What's more, since Husband kept the rents from his property in a separate account and used that account to pay for the mortgage and maintenance, Wife had no similar claims on his property. Wife and daughter are currently embroiled in a lawsuit that will take lots of money and many years to resolve.