



# What is Community Property?



*Note: This guide is intended to provide general legal advice regarding community property and separate property in a divorce. **Determining whether property is community property and dividing community property in a divorce is a difficult and complicated matter. If you need specific legal advice regarding your situation, please contact an attorney.***

## What is the Difference Between Community Property and Separate Property?

### What is Community Property?

Idaho defines community property as: (1) any property “acquired after marriage by either” spouse that is not separate property and (2) any income, including the rents, issues and profits, of all property, whether separate or community, is community property. See Idaho Code Section 32-906(1).

### What is Separate Property?

Separate property is defined in various ways and may be any of the following:

- 1. Property Owned Prior to the Marriage by One Spouse:** Any property acquired by either spouse prior to the marriage is considered separate property of that spouse. See Idaho Code 32-903.
- 2. Gifts or Inheritances:** A gift or inheritance of one spouse, even if it occurs during the marriage, may also be considered separate property of that spouse. See Idaho Code 32-903.
- 3. Property Acquired with Separate Property:** If a spouse uses solely his or her separate property to obtain or acquire other property, either through money or property, that newly purchased property shall remain his or her separate property. See Idaho Code 32-903.
- 4. Separate Property by Written Agreement:** A court may uphold a written agreement between the parties that declares that some community property item(s) are going to be considered separate property of one spouse, such as a prenuptial agreement or a deed or other contract. See Idaho Code Section 32-905 regarding marriage settlements and Idaho Code Section 32-906 regarding conveyances by written instruments.
- 5. Property Conveyed By One Spouse to the Other Spouse:** There is a legal presumption (the court will assume this unless proven otherwise) that any property conveyed by one spouse to the other will be considered separate property of the receiving spouse. Idaho Code Section 32-906(2).

*Note: This list of separate property is not meant to encompass all types of separate property but provides common types of separate property to be considered in a divorce.*

## What If the Property is Not in Both Spouses' Names – Will It Still be Considered Community Property?

It does not matter whose name is on the title to property or whose money purchased the property, so long as community property funds were used to purchase the property (see the “What is Separate Property?” section on Page 1 for further explanation) rather than separate property funds – this property would still be considered community property as long as it was acquired after the marriage by either spouse and does not meet any of the definitions of separate property on Page 1 of this guide.

## Can Separate Property Become Community Property?

There are certain circumstances where separate property can become or be converted into community property, depending on a variety of factors. See *Winn v. Winn*, 105 Idaho 811, 673 P.2d 411 (1983) and *Barrett v. Barrett*, 149 Idaho 21, 232 P.3d 799 (2010). This is sometimes referred to as transmutation of property.

Due to its complexity, if you have questions about transmutation, please consult an attorney.

## Reimbursement for Funds Spent Toward Separate Property

There are also situations where a spouse may be entitled to reimbursement for funds spent toward their spouse's separate property. For example, if one spouse owned a house prior to the marriage, which would be considered that spouse's separate property, but the other spouse spent funds toward the mortgage or renovations on that house, that spouse may be entitled to reimbursement from the other spouse for some, or possibly all, of those funds. See *Matter of Freeburn Estate*, 97 Idaho 845, 850, 555 P.2d 385, 390 (1976).

Due to its complexity, please consult with an attorney regarding possible reimbursement claims.

## What Is Considered “Property” in General?

## What Kinds of Property Are Included in Community and Separate Property?

Community and separate property includes personal property and real property:

1. **Personal Property** – such as cars, furniture, clothes, electronics, other household items, money in checking or savings accounts, stocks, retirement accounts\*; and,
2. **Real Property** – such as homes, land, or other real estate, and any rents, issues, or profits from this property, whether that property is community or separate property.

*\*Note that any amount put into a retirement account prior to the marriage will be considered separate property of that spouse but any amount put into a retirement account during a marriage would be considered community property.*

## How is Community Property Divided in a Divorce?

### How is Community Property Divided?

Both parties have an equal right to community property and “unless there are compelling reasons otherwise, there shall be a substantially equal division in value, considering debts, between the spouses.” Idaho Code Section 32-712(1)(a).

In other words, the court will decide the value of all the community property and try to divide it so that each spouse gets about half of the overall value. However, if compelling reasons exist to not divide the property equally, the court may divide community property in another way, when considering the following factors and any other relevant factors:

- (1) Length of the marriage;
- (2) Any agreement of the parties before they were married; however, the court shall have no authority to amend or rescind any such agreement;
- (3) The age, health, occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse;
- (4) The needs of each spouse;
- (5) Whether the apportionment of community property is in lieu of (instead of) or in addition to spousal maintenance (support);
- (6) The present and potential earning capability of each party; and
- (7) Retirement benefits, including, but not limited to, social security, civil service, military and railroad retirement benefits.

Idaho Code Section 32-712(1)(b).

### How is a House or Land That is Considered Community Property Normally Divided?

If you own your home or other land, this community property must also be divided equally among the spouses.

The most common outcome is that the court may order the property sold so that each party gets 50% of the profits from the sale of the home or 50% of any debt if the house does not sell for a profit.

It is possible for the court to award one spouse the home and give the other spouse other property to make up for his or her 50% share of the home, such as retirement accounts that equal the equity in the home.

If the court believes it would be better for the children to remain in the home, it is possible for the court to permit the children and the custodial parent to remain in the home until the children are 18 years old. At which time, the house would then be sold and the parties would equally split any profits or debts from the sale.

See Idaho Code Section 32-712(2) and (3) for considerations regarding a home in a divorce. *Note that the above are just examples of different considerations and possible divisions of a community property home.*

### Attorney Services

**Dividing community property in a divorce is a difficult and complicated matter.** If you have specific questions related to community property, please seek an attorney for legal advice or assistance.

You may represent yourself or hire an attorney to file an action to quiet title or an action for partition if you need to divide real property between an unmarried couple where both parties' names are on the deed. If you need help finding an attorney, contact the following organizations:

- [Idaho Legal Aid Services, Inc.](#)
- [Idaho Volunteer Lawyers Program](#)
- [Idaho State Bar Association Attorney Referral Service](#)