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## Family Law: Husband and Wife

Joseph W. McKnight  
*Southern Methodist University*

Shanin Turner Brevig  
*Southern Methodist University*

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# FAMILY LAW: HUSBAND AND WIFE

Joseph W. McKnight\*  
Shanin Turner Brevig\*\*

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## I. STATUS

### A. SAME-SEX UNIONS

**S**AME-sex unions, whether formal or informal, remain unrecognized under Texas law.<sup>1</sup> Nevertheless, Texas appellate courts dealt with disputes concerning same-sex marriages that were recognized by other states and their proprietary consequences. Of these cases, *In re*

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\* B.A., University of Texas, B.A., M.A., B.C.L., Oxford University, L.L.M., Columbia University. Professor of Law, Southern Methodist University of Dallas, Texas.

\*\* B.A., Texas Women's University, J.D. Southern Methodist University.

1. See TEX. FAM. CODE ANN. § 2.001(b) (West 2006). Persons of the same sex may not be issued a license for a ceremonial marriage, but an informal marriage may be contracted by a man and a woman. *Id.* § 2.401(a).

*Marriage of J.B. and H.B.*<sup>2</sup> and *State v. Naylor*<sup>3</sup> both dealt with the proprietary aspects of divorce proceedings involving same-sex couples.

Previously in August 2010, the Fifth Circuit Court of Appeals disagreed with a Dallas County district court, siding with Texas in *In re Marriage of J.B. and H.B.* when it reversed and remanded for ultimate dismissal.<sup>4</sup> The Fifth Circuit concluded that J.B. and his partner, who married in Massachusetts, could not divorce in Texas.<sup>5</sup> The Fifth Circuit also concluded the State's petition for intervention should not have been struck by the district court as untimely and in violation of the Equal Protection Clause.<sup>6</sup> J.B. seeks a reversal on this decision, and, in the interim, remains in marital limbo.

In *State v. Naylor*, a Travis County district court granted a divorce in 2011 to a same-sex couple who also were wed in Massachusetts.<sup>7</sup> The State intervened the day after the divorce was granted, arguing the trial court lacked subject matter jurisdiction over the divorce.<sup>8</sup> Additionally, the State argued that the sole vehicle for marriage dissolution should be voidance.<sup>9</sup> The trial court issued the divorce without ruling on the State's claims, and the State appealed.<sup>10</sup> The Third Circuit Court of Appeals dismissed the State's appeal for lack of subject matter jurisdiction, emphasizing "the rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."<sup>11</sup> Both of these cases now have been granted review by the Texas Supreme Court.<sup>12</sup> Because the United States Supreme Court recently decided on two cases based on constitutional questions relating to same-sex unions in June 2013,<sup>13</sup> it is likely Texas will resume its handling these cases now.

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2. *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 659 (Tex. App.—Dallas 2010, pet. granted). Texas will not dissolve a marriage that it cannot legally recognize between same-sex couples, based on the state's accepted definition of marriage between a man and a woman. *See id.* at 663.

3. *State v. Naylor*, 330 S.W.3d 434, 435–36 (Tex. App.—Austin 2011, pet. granted).

4. *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 681.

5. *Id.*

6. *Id.*

7. *Naylor*, 330 S.W.3d at 436–37.

8. *Id.* at 437–38.

9. *Id.* at 437 (citing TEX. FAM. CODE ANN. § 6.204(b) (West 2006) (stating marriage between persons of the same sex is void in Texas)).

10. *Id.* at 438.

11. *Id.* (quoting *Marine v. Ortiz*, 484 U.S. 301, 304 (1988)); *see also* *Gunn v. Cavanaugh*, 391 S.W.2d 723, 724 (Tex. 1965) (per curiam) (stating remedy by appeal is "available only to parties of record"); *Gore v. Peck*, 191 S.W.3d 927, 929 (Tex. App.—Dallas 2006, no pet.) (dismissing appeal for lack of standing because appellant failed to timely intervene).

12. *In re Marriage of J.B. and H.B.*, No. 11-0024 (Tex. filed Feb. 17, 2011); *State v. Naylor*, No. 11-0114 (Tex. filed Mar. 22, 2011).

13. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (holding petitioners did not have standing to seek relief in federal court); *see also* *United States v. Windsor*, 133 S. Ct. 2675, 2679 (2013) (holding the "Defense of Marriage Act" (DOMA), a federal statute defining marriage for all federal purposes as a legal union between one man and one woman as husband and wife unconstitutional).

## B. INFORMAL MARRIAGE

In *Small v. McMaster*,<sup>14</sup> the Houston Court of Appeals was concerned with issues involving informal marriage and property division.<sup>15</sup> The alleged wife, Murriah McMaster, claimed she had a common-law marriage with Jack Small.<sup>16</sup> She sued for divorce and property division after the union lasted a number of years.<sup>17</sup> She also alleged fraudulent transfer of property to some of her husband's relatives that deprived the community estate of valuable assets.<sup>18</sup> Although the informal marriage and property issues were bifurcated and tried separately, the first jury trial found evidence of informal marriage between the couple.<sup>19</sup> The husband appealed.<sup>20</sup> The Houston Court of Appeals reversed, finding the evidence at trial insufficient to find an informal marriage.<sup>21</sup>

The appellate court, applying Texas Family Code § 2.401(a)(2),<sup>22</sup> concluded there was sufficient evidence to support the fact that the parties had an agreement to be married and that they had lived together; however the wife did not offer sufficient evidence that she and her alleged husband had represented to others in Texas that they were married.<sup>23</sup> Thus, they did not demonstrate publicly that they were married to each other.<sup>24</sup> Occasional references to each other in public as "husband" and "wife" were not enough.<sup>25</sup> The court of appeals compared the evidence in this case to that in *Danna v. Danna*,<sup>26</sup> where the Dallas Court of Appeals found no informal marriage between a couple who had held themselves out as married only four times over a period of approximately two years.<sup>27</sup> Representations of marriage must be consistent in order to raise a genuine issue of fact.<sup>28</sup> Based on the evidence, and in light of the holding in *Danna*, the court concluded that the "holding out" requirement had not been met by merely offering as evidence a few instances in which the parties allegedly referred to each other as husband and wife while talking to unidentified telephone callers at home, or while speaking to

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14. *Small v. McMaster*, 352 S.W.3d 280 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

15. *Id.* at 282.

16. *Id.*

17. *Id.* at 283–89.

18. *Id.* at 282.

19. *Id.*

20. *Id.*

21. *Id.* at 288.

22. See TEX. FAM. CODE ANN. § 2.401(a)(2) (West 2006). An informal or common-law marriage exists in Texas if the parties (1) agreed to be married, (2) lived together as husband and wife after the agreement, and (3) represented to others that they were married. *Id.*

23. *Small*, 352 S.W.3d at 282, 284, 287.

24. *Id.* at 286.

25. *Id.*

26. *Danna v. Danna*, No. 05-05-00472-CV, 2006 WL 785621, at \*1 (Tex. App.—Dallas Mar. 29, 2006, no pet.) (mem. op.) ("The couple's reputation in the community as being married is a significant factor in determining the holding[-]out element.").

27. *Id.* at \*1–2.

28. *Id.* at \*2.

people at church.<sup>29</sup> Determining whether evidence is enough to establish that a couple held themselves out as married “turns on whether the couple had a reputation in the community for being married.”<sup>30</sup> The court of appeals further found overwhelming testimony from both parties that their representations to the community tended to show that they were *not* married.<sup>31</sup> The wife never used her husband’s last name or even registered for wedding gifts.<sup>32</sup> Nor did she ever establish a joint account with the alleged husband.<sup>33</sup> Moreover, although Murriah introduced multiple witnesses, including family members, friends, and acquaintances, who testified that the couple “exchanged rings” and “committed to each other” in a “private ceremony,” these facts only weighed toward establishing their agreement to be married and not to the “holding out in public” as such.<sup>34</sup> The couple did not have a party to celebrate their marriage, and Murriah could not produce any documents where she referred to Jack as her alleged husband.<sup>35</sup> Furthermore, she had filed all of her federal income tax returns as “single” since 1991.<sup>36</sup> Finally, when her alleged husband entered into a ceremonial marriage with a woman named Aiskel in Venezuela in 1998, Murriah knew of the marriage but made no effort to file bigamy charges against Jack or otherwise claim that his Venezuelan marriage to Aiskel was invalid.<sup>37</sup> In 1997 or 1998, Murriah moved out of the home she had previously shared with Jack in League City and moved into her own home where she operated an antique shop.<sup>38</sup> She did not file her lawsuit asserting common-law marriage until 2004, the same year the new owner of her antique business sought to evict her.<sup>39</sup>

Later in 2012, the Houston Court of Appeals had a second look at the issue of common-law marriage when Jimmy Bailey sought to overturn a trial court’s judgment establishing an informal marriage to his wife, Christy Hoover.<sup>40</sup> The formal elements of a common-law marriage include that: (1) the man and woman agreed to be married; (2) after the agreement they lived together in Texas as husband and wife; and (3) the couple represented to others that they were married.<sup>41</sup> Bailey challenged the trial court’s finding on the last two elements of informal marriage: the sufficiency of evidence establishing that the couple had an agreement to be married and whether the couple held out to the public that they were

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29. *Small*, 352 S.W.3d at 284, 286.

30. *Id.* at 285.

31. *Id.* at 286.

32. *Id.*

33. *Id.*

34. *Id.* at 283–84.

35. *Id.* at 286.

36. *Id.*

37. *Id.* at 287.

38. *Id.*

39. *Id.*

40. *Bailey v. Thompson*, No. 14-11-00499-CV, 2012 WL 4883219, at \*1 (Tex. App.—Houston [14th Dist.] Oct. 16, 2012, no pet.) (mem. op.).

41. TEX. FAM. CODE ANN. § 2.401(a)(2) (West 2006).

wed.<sup>42</sup> The court reiterated that the existence of informal marriage is determined on a case-by-case basis,<sup>43</sup> where all three elements must be presented by preponderance of the evidence in order to find informal marriage.<sup>44</sup> The court found that although the evidence may be conflicting, each case “turns on [each] witnesses’ credibility and demeanor.”<sup>45</sup> Further, “[s]poken words are not necessary to establish representation as husband and wife.”<sup>46</sup> Convincing evidence may be found through conduct and actions; however, “[t]he element of [representing] to others requires both parties to have represented themselves as married.”<sup>47</sup> Here, the parties opened a joint bank account with rights of survivorship, consistently wore wedding bands, and attended yearly family celebrations and employers’ parties together where they acknowledged each other as husband and wife.<sup>48</sup> Jimmy also introduced himself at school events as “stepfather” to Christy’s children.<sup>49</sup> Although several documents presented in court reflected the parties’ marital status as “single,” these documents merely went “to the weight of the evidence” and “did not necessarily negate a marriage.”<sup>50</sup>

### C. ANNULMENTS

Using fraud to induce a marriage came back to haunt a man in El Paso in April 2012. Miguel Montenegro carefully planned to marry a U.S. citizen to obtain a permanent green card and then quickly divorce her.<sup>51</sup> He received his come-uppance when the 65th District Court in El Paso granted his wife an annulment based on fraud, and the El Paso Court of Appeals affirmed.<sup>52</sup> Having obtained his green card under false pretenses, Montenegro is certainly on his way to deportation with Immigration and Customs Enforcement (ICE).<sup>53</sup>

Montenegro, a Columbian citizen unable to get a tourist visa to return to the United States met Yamel Avila, a school teacher and U.S. citizen from El Paso, through an online dating service in 2003.<sup>54</sup> After six months of online courtship, the couple met in person in Mexico and then in Columbia, where Montenegro proposed.<sup>55</sup> Avila successfully applied for a

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42. *Thompson*, 2012 WL 4883219, at \*7.

43. *Id.* (citing *Estate of Claveria v. Claveria*, 615 S.W.2d 164, 166 (Tex. 1981)).

44. *Id.* (citing *Small*, 352 S.W.3d at 282–83); see *Eris v. Phares*, 39 S.W.3d 708, 713 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

45. *Thompson*, 2012 WL 4883219, at \*9.

46. *Id.* (quoting *Winfield v. Renfro*, 821 S.W.2d 640, 648 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).

47. *Id.* at \*9 (quoting *Small*, 352 S.W.3d at 285) (emphasis added).

48. *Id.* at \*10–11.

49. *Id.* at \*11.

50. *Id.* at \*11–12.

51. *Montenegro v. Avila*, 365 S.W.3d 822, 833–24 (Tex. App.—El Paso 2012, no pet.).

52. *Id.* at 823, 829.

53. ICE is a division of the U.S. Department of Homeland Security formerly a part of Immigration and Naturalization Service and U.S. Customs. ICE, *Overview*, Ice.gov, <http://www.ice.gov/about/overview/> (last visited Nov. 14, 2013).

54. *Montenegro*, 765 S.W.3d at 823.

55. *Id.* at 824.

fiancée visa to bring Montenegro to the United States, where they married in 2005.<sup>56</sup> Soon after the ceremony, Montenegro immediately applied for a two year conditional residency card and then moved in with his new wife and her parents.<sup>57</sup>

Over the next three years, Montenegro made monthly transfers of between \$100 and \$400 to a “friend” in California.<sup>58</sup> He explained the transfers were to pay off a previous debt.<sup>59</sup> He often rejected physical intimacy with his wife.<sup>60</sup> He purchased a life insurance policy but did not list his wife as a beneficiary.<sup>61</sup> Finally in January 2007, a month after obtaining his permanent green card and after two years of a roommate-like marriage, Montenegro took a \$4,000 cash advance on a personal credit card, tuned up his car, and gave notice to his employer that he was moving to Katy, Texas.<sup>62</sup> When Avila returned home from work, all of Montenegro’s belongings were gone.<sup>63</sup>

The El Paso Court of Appeals, in a legal sufficiency review, found the marriage to be fraudulent.<sup>64</sup> This allowed the court to “grant an annulment of [the] marriage [because one] party used fraud, duress, or force to induce the [other party] to enter into the marriage.”<sup>65</sup> Because Avila did not “voluntarily cohabit[ate] with the other party since learning of the fraud,”<sup>66</sup> and because “the trier of fact is the sole judge of the credibility of witnesses,”<sup>67</sup> Avila’s testimony prevailed.<sup>68</sup> She explained that she stopped cohabiting with Montenegro the moment she realized that he “never intended to have a meaningful relationship or kids with her, and that his sole intent . . . was to obtain [a green card].”<sup>69</sup> Instead of loving her, he used her to obtain his legal resident status. Now he is receiving his just rewards.

## II. CHARACTERIZATION

### A. PARTITIONS AND EXCHANGES

Preuptial agreements have been on the rise for several years. People are reacting to the downturn in the economy with a desire to make sure

56. *Id.* at 823.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 825.

63. *Id.*

64. *Id.* at 827. In a legal sufficiency review, an appeals court will reverse only if the trial court’s findings are “so against the great weight and preponderance of the evidence as to be manifestly wrong.” *Sotelo v. Gonzales*, 170 S.W.3d 783, 787 (Tex. App.—El Paso 2005, no pet.).

65. TEX. FAM. CODE ANN. § 6.107 (West 2006).

66. *Id.*

67. *Montenegro*, 365 S.W.3d at 828; *see also* *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005).

68. *Montenegro*, 365 S.W.3d at 829.

69. *Id.* at 828.

everything is clear-cut before marriage. Baby boomers are becoming more cautious with the divorce rate and prefer to enter into marriage with the benefit of premarital contracts.<sup>70</sup> Such was the case in *Moore v. Moore*, when Gary and Caroline Moore married in 2004.<sup>71</sup> Three years later, Gary sought a divorce and wanted the premarital agreement enforced.<sup>72</sup> A Dallas County district court found sufficient evidence Caroline did not sign the premarital agreement voluntarily and therefore rendered the contract unenforceable.<sup>73</sup> After dissolving the marriage, the trial court proceeded to equitably divide \$2,798,246.00 from seven business assets deemed part of the community estate and awarded Caroline her half (\$1,399,123.00) as her community interest in those entities.<sup>74</sup> Gary then appealed.<sup>75</sup>

At trial, Caroline testified that prior to signing the agreement, Gary had explained to her that he had been “‘digging himself out of a hole’ for several years” and that the “premarital agreement [was] to protect her from ‘loans, liens, and lawsuits.’”<sup>76</sup> He offered to have his attorney and business partner, Marty Barenblat, draw up the agreement as a “‘collaborative process’” between them.<sup>77</sup> In the rare occasions Caroline spoke to Barenblat during the drafting process, he never mentioned his conflict of interest.<sup>78</sup> Later, Gary had the foresight to encourage Caroline to hire her own attorney and offered to pay for the services of Mickey Hunt, a second attorney that shared offices with Barenblat.<sup>79</sup> When Hunt saw the prenup, he suggested changes for Caroline, which included Gary listing schedules of his assets; Barenblat, who remained the contract draftsman, never made the changes.<sup>80</sup> Instead, Barenblat repeatedly stalled Caroline’s requests to see the finished contract.<sup>81</sup>

Without the contract in hand, Caroline flew to Martha’s Vineyard for her wedding.<sup>82</sup> Upon arriving, and over the next several days, she continued to check the hotel’s front desk for the contract’s delivery to no avail.<sup>83</sup> Caroline was finally given the contract to sign a mere four to five hours before the wedding ceremony.<sup>84</sup> She had no knowledge that her groom had possession of the agreement in his suitcase for the entire dura-

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70. Richard Acello, *Law Practice: Princely Prenup? U.S. Lawyers See Rise in Requests for Asset Protection*, ABA JOURNAL, (Mar. 1, 2011, 4:00 A.M.), [www.abajournal.com/magazine/article/princely\\_prenup\\_U.S.\\_lawyers\\_see\\_rise\\_in\\_requests\\_for\\_asset\\_protection/](http://www.abajournal.com/magazine/article/princely_prenup_U.S._lawyers_see_rise_in_requests_for_asset_protection/).

71. *Moore v. Moore*, 383 S.W.3d 190, 192 (Tex. App.—Dallas 2012, pet. denied).

72. *Id.*

73. *Id.* at 192–93.

74. *Id.* at 193.

75. *Id.*

76. *Id.* at 196.

77. *Id.* at 193.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 194.

84. *Id.*



tion of the trip.<sup>85</sup> Instead, she was told days before that the contract was still undergoing revisions and would be delivered to the hotel as soon as possible.<sup>86</sup>

At time of signing, Gary assured her Hunt had seen and approved the final draft, and therefore it was acceptable to sign.<sup>87</sup> In reality, however, no revisions had been made to the contract after Hunt's initial preview.<sup>88</sup> In fact, Hunt had not reviewed the contract since that time and had not approved it.<sup>89</sup> At trial, he testified he had not approved any document and would have forbidden her from even talking to Barenblat about the matter.<sup>90</sup>

Given the express language of the Texas Uniform Premarital Agreement Act,<sup>91</sup> the Dallas Court of Appeals applied the test of legal sufficiency to determine the involuntariness of the premarital agreement between Gary and Caroline.<sup>92</sup> Because the Texas Uniform Premarital Agreement Act does not expressly define volition, the court relied on precedent in *Martin v. Martin* and "construed 'voluntary' to mean an action that is taken intentionally or by the free exercise of one's will."<sup>93</sup> In its determination, the court considered four questions: whether (1) Caroline could obtain an attorney's advice before signing the agreement, (2) there were any misrepresentations concerning the contract, (3) there was any information freely disclosed, and (4) there was any information withheld surrounding the contract.<sup>94</sup>

In this case, testimony revealed that Gary intentionally withheld important information about his finances.<sup>95</sup> Additionally, he rejected his fiancée's choice of attorney in favor of steering her toward hiring a lawyer of his own choosing, after first attempting to use his own lawyer in "a collaborative effort."<sup>96</sup> After lying about having possession of the agreement, which effectively prevented her attorney from reviewing its contents, he presented to her a final draft that lacked full admission about his assets while simultaneously asking her to waive further disclosure.<sup>97</sup> In a panic just hours before the ceremony and with Caroline unable to reach Hunt, Gary then misrepresented to Caroline that Hunt fully backed the

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. TEX. FAM. CODE ANN. § 4.002 (West 2006) (making premarital agreements presumptively binding and enforceable under Texas law).

92. *Moore*, 383 S.W.3d at 194–95; see also TEX. FAM. CODE ANN. § 4.006(a)(1) (West 2006) ("A premarital agreement is not enforceable if the party against whom enforcement is requested proves that . . . the party did not sign the agreement voluntarily.").

93. *Moore*, 383 S.W.3d at 195 (citing *Martin v. Martin*, 287 S.W.3d 260, 263 (Tex. App.—Dallas 2009, pet. denied)).

94. *Id.* at 195.

95. *Id.* at 196.

96. *Id.*

97. *Id.*

agreement and approved of her signing it.<sup>98</sup> The happy ending is this: the appellate court affirmed the district court's decision, threw out the premarital agreement, and, in its property division, awarded Caroline more than a million dollars of community assets.<sup>99</sup>

## B. REIMBURSEMENT AND ECONOMIC CONTRIBUTION

### 1. Reimbursement

Courts are vested with wide discretionary powers in property division in suits for divorce and, in the absence of abusing their discretionary powers, the trial court may divide the property, whether it be separate or community, in such a way as will seem just and proper to the court.<sup>100</sup> The right of reimbursement to the community estate, although not definite, is an equitable right that a court applies at its own discretion.<sup>101</sup> To enforce an amount due from one party to the community estate, it is sometimes necessary to hold that party in contempt of court until various debts to the community estate are paid. Such was the case in *In re Davis*.<sup>102</sup> In this divorce proceeding, the trial court held the husband, William Bovas Davis, in contempt for failing to comply with a court order, and ordered him incarcerated for seventy-two hours and to remain in prison until he made the payments that he was ordered to make.<sup>103</sup> The court's order required Davis to repay several debts owed to the community estate that were "necessary to protect [the] community assets."<sup>104</sup> Specifically, the order directed Davis to pay \$2,500 to his attorney in fees and also to pay an additional \$2,500 in attorney's fees for his spouse.<sup>105</sup> The Dallas Court of Appeals reviewed the pleadings and noticed the Davis' contradictory testimony.<sup>106</sup>

Davis appealed while incarcerated, maintaining "certain . . . community property[—apparently the property generating the need for the payment of funds from Davis in order to preserve them—]should be sold to him and not to a third party."<sup>107</sup> Davis "[alleged] that he had access to hundreds of thousands of dollars in funds sufficient to purchase [the assets]."<sup>108</sup> Davis filed a writ of habeas corpus arguing (1) that the contempt order should be void because the underlying order was so am-

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98. *Id.* at 197.

99. *Id.* at 197-98, 201.

100. TEX. FAM. CODE ANN. § 7.001 (West 2006).

101. *See* *Zeptner v. Zeptner*, 111 S.W.3d 727, 734 (Tex. App.—Fort Worth 2003, no pet.) (explaining that the right of reimbursement is an equitable claim which falls under the purview of the trial court); *see also* *Zieba v. Martin*, 928 S.W.2d 782, 787 (Tex. App.—Houston [14th Dist.] 1996, no writ) (noting the reimbursement is an equitable doctrine and in considering a claim for reimbursement the court must look at all facts and circumstances to determine what is fair and just).

102. *In re Davis*, 372 S.W.3d 253, 254 (Tex. App.—Texarkana 2012, no pet.).

103. *Id.* at 254-55.

104. *Id.* at 254.

105. *Id.* at 256 n.1.

106. *Id.* at 255.

107. *Id.*

108. *Id.*

biguous as to be unenforceable and (2) that his failure to pay was because he lacked the funds and not because of a refusal to obey court orders.<sup>109</sup>

Although Davis needed to conclusively establish by direct evidence to the court that he had no source by which to pay his debt,<sup>110</sup> the Dallas Court of Appeals promptly vacated the trial court's order holding Davis in contempt.<sup>111</sup> The court cited a lack of specificity in the contempt order because the order did not separate penalties for each contemptuous act, which was required to prevent discharge from the confinement.<sup>112</sup> Additionally, and perhaps most importantly, the court noted that "[t]he Texas Constitution prohibits imprisonment for debt, so a contempt order based solely on a failure to pay a debt is void."<sup>113</sup>

## 2. Economic Contribution

In a divorce decree or annulment, a court will determine the rights of both spouses claimed as economic contribution that a court considers "just and right."<sup>114</sup> This economic contribution is measured by "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."<sup>115</sup> Prior to September 1, 2009, § 3.403 of the Texas Family Code stated that "[a] marital estate that makes an economic contribution to the property owned by another marital estate has a claim for economic contribution [against] the benefitted estate."<sup>116</sup> Furthermore, § 3.403 provided a formula for calculating the economic contribution.<sup>117</sup>

"[A] claim for equitable contribution is a statutory remedy designed to compensate a contributing estate for reduction in principal amount of debt secured by a lien on property owned by the benefitting estate."<sup>118</sup> On the other hand, "the recovery for reimbursement—expenditures of a contributing estate used to improve property of the benefitting estate—is based only in equity" and "lies within the trial court's discretion."<sup>119</sup>

Under an abuse of discretion standard, the Austin Court of Appeals in *Pappas v. Pappas*, affirmed a trial court's refusal to recognize any eco-

109. *Id.*

110. *Id.*

111. *Id.* at 257.

112. *Id.* at 256 (holding handwritten revisions, unexplained notations, and incomplete sentences in the original document made the document "less than crystal clear").

113. *Id.* (citing TEX. CONST. art. I, § 18 ("No person shall ever be imprisoned for debt")); see also TEX. FAM. CODE ANN. §§ 157.001, 157.166–167 (West 2008); but see *In re Henry*, 154 S.W.3d 594, 596 (Tex. 2005) (jailing for debt is not permissible but for failure to perform a legal duty, such as failure to pay child support).

114. TEX. FAM. CODE ANN. §§ 7.001, 7.007(2) (West 2006).

115. TEX. FAM. CODE ANN. § 3.402(3) (West 2006).

116. *Pappas v. Pappas*, No. 03–12–00177–CV, 2013 WL 150300, at \*4 (Tex. App.—Austin Jan. 10, 2013, no pet.) (mem. op) (alteration in original) (quoting Act of May 28, 2003, 78th Leg., R.S., ch. 230, § 1, 2003 Tex. Gen. Laws 1056, 1056, repealed by Act of May 19, 2009, 81st Leg., R.S., ch. 768 § 11(3), 2009 Tex. Gen. Laws 1950, 1953).

117. *Id.*

118. *In re Marriage of Cigainero*, 305 S.W.3d 798, 802 (Tex. App.—Texarkana 2010, no pet.).

119. *Id.*

conomic contribution to the community estate under former § 3.403 of the Texas Family Code.<sup>120</sup> To do so, the court used the two-prong approach set forth in *Zeifman v. Michels*.<sup>121</sup> In *Pappas*, partnership income—considered in this instance a community asset—was used to pay off construction loans for three buildings on William Pappas’s separate property business lot, and Danette Pappas appealed.<sup>122</sup> Danette maintained William and her father-in-law took out partnership loans, as opposed to personal loans, after they married for building improvements on three empty lots owned by the couple’s storage business. Because the loans were partnership-based and not personal, this made the debt part of the community estate and therefore subject to the mandatory economic formula detailed in former Texas Family Code § 3.403.<sup>123</sup> The difficulty in Danette’s appeal laid with the fact that she had the heavy burden to establish the economic contribution claim as a matter of law, or she had to point to evidence that significantly indicated the trial court’s erroneous conclusion.<sup>124</sup> This she could not do, given that the trial court originally deemed her expert’s opinion concerning asset valuation not credible.<sup>125</sup> The Austin Court of Appeals held firm on the trial court’s original findings and found it reasonable for the trial court to find Danette’s expert unreliable.<sup>126</sup> The expert attributed the property’s fair market value to an amount three years before the date of the divorce proceedings and did not include any increases in value-essential components of the mandatory formula.<sup>127</sup> The trial court found the expert’s testimony “too remote to be a credible proxy for the fair market value of the property at the time of the community’s first contribution [at the time of divorce].”<sup>128</sup> In addition, Danette’s expert failed to consider William’s equity in the value of improvements constructed on the property before marriage.<sup>129</sup> Citing *City of Keller v. Wilson*, the court of appeals stood behind the trial court’s

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120. *Pappas*, 2013 WL 150300, at \*5.

121. *Id.* at \*2; see *Zeifman v. Michels*, 212 S.W.3d 582, 587 (Tex. App.—Austin 2006, pet. denied) (spelling out the two-pronged inquiry, whereby an appellate court considers (1) whether the trial court had sufficient evidence to exercise its discretion, and (2) if so, whether it erred in its application of that discretion).

122. *Pappas*, 2013 WL 150300, at \*3. The wife asserted the partnership made the loan payments. Any payments on the loans made by the partnership were effectively distributions of partnership profits, which would be community income. *Id.*; see also, *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 27 (Tex. App.—San Antonio 2006, pet. denied).

123. *Pappas*, 2013 WL 150300, at \*4. The law applicable at the time these parties filed their divorce petitions provided that “[a] marital estate that makes an economic contribution to property owned by another marital estate has a claim for economic contribution [against] the benefitted estate.” Act of May 28, 2003, 78th Leg., R.S., ch. 230, § 1, 2003 Tex. Gen. Laws 1056, 1056 (repealed 2009). The formula is: “Economic Contribution = Equity [of Wife] x (Community Contributions / (Community Contributions + Equity [of Husband] + Separate Property Contribution)).” *Pappas*, 2013 WL 150300, at \*4.

124. *Pappas*, 2013 WL 150300, at \*4.

125. *Id.* at \*5.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

decision and refused to second-guess it.<sup>130</sup>

Danette won, however, on her second issue.<sup>131</sup> In district court, William had successfully argued that he owned a mere non-controlling interest (49%) of the partnership as opposed to an equal interest. This meant, according to his experts, that a 33% discount should be applied to any community assets held within that partnership.<sup>132</sup> On appeal, Danette successfully argued that based on the trial court's acceptance that William owned a non-controlling (49%) interest in the business partnership (as opposed to an equal interest), and based on the trial court's acceptance of William's cost-approach valuation over Danette's preferred income-capitalization method, the trial court failed to include the valuation of *all* the lots attributed as community property—several thousand dollars' worth of lots, in fact.<sup>133</sup> Danette also argued that the court failed to attribute any value to over \$125,000 worth of improvements to the property.<sup>134</sup> The court of appeals agreed.<sup>135</sup> This mistake, the court remarked, resulted in a property division “so disproportionate as to constitute” the need for remand, and so the court ordered “a new just and right division of the community estate.”<sup>136</sup>

### III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

#### A. AMBIGUOUS DIVORCE DECREES

When construing judgments, such as divorce decrees, a court must apply the general rules regarding the construction of judgments.<sup>137</sup> If a decree, when read as a whole, appears unambiguous in describing its property division, then the court must try to bring to effect that decree as written.<sup>138</sup> Only when there appears to be more than one interpretation can the court review the record to try to adopt a construction that correctly applies the law.<sup>139</sup>

The husband in *In re M.M. III, Milton McKenzie*, filed a Motion to Clarify and/or to Modify Domestic Relations Order and requested clarification on the division of his military pension.<sup>140</sup> Having retired after

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130. *Id.* (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 819–20 (Tex. 2005), which noted the “fact-finder is [the] sole judge of witnesses’ credibility and weight to give their testimony and may choose to believe one witness and disbelieve another”).

131. *Id.* at \*9.

132. *Id.* at \*8. The trial court adopted William’s expert appraisal, which valued the business known as “Northwest Hills Storage” at an ownership interest of 49% and a non-controlling interest discount of 33% based on the real estate appraiser’s testimony regarding reductions in value for undivided interest. *Id.* at \*9.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* (citing *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 851 (Tex. App.—Texarkana 1996, writ denied)).

137. *In re M.M. III*, 357 S.W.3d 841, 843 (Tex. App.—El Paso 2012, no pet.).

138. *Id.*

139. *Id.*; see also *Wilde v. Murchie*, 941 S.W.2d 331, 332 (Tex. 1997).

140. *In re M.M. III*, 357 S.W.3d at 843.

twenty-six years of military service (and married for twelve of those years), Milton argued that the wording in his original decree was ambiguous because it “attempts to award [to his ex-wife, Lesa McKenzie,] a portion of his future-earned benefits,” which are separate property.<sup>141</sup> According to him, the Defense Finance and Accounting Service (DFAS)<sup>142</sup> was erroneously overpaying Lesa and thus unjustly enriching her.<sup>143</sup> The decree specified:

[O]ne half of twelve divided by the number of years of the United States Army's disposable retired or retainer pay to be paid as a result of [Milton McKenzie, Jr.'s] service in the United States Army, and fifty percent of all increases in the United States Army's disposable retirement or retainer pay due to cost of living or other reasons . . . .<sup>144</sup>

But the trial court took a look at the decree and decided the wording was not ambiguous at all.<sup>145</sup> It just needed to be “read with a bit of common sense.”<sup>146</sup> Milton appealed, but to no avail.<sup>147</sup> The clear language of the decree set out Lesa's interest in Milton's military retirement benefits at “one half of twelve,” i.e., six, “divided by the number of years' that [Milton] served in the Army.”<sup>148</sup> As put forth in *Shanks v. Treadway*, the court adopted the decree's construction that correctly applied the law.<sup>149</sup> The court had no authority to enter an order altering or modifying the unambiguous decree, and thus the El Paso Court of Appeals affirmed.<sup>150</sup> Milton's remedy for any substantive error of law in his decree was by direct appeal, and the appeals court would not allow him to attack his decree collaterally.<sup>151</sup> The military man was out of luck.

In a second case, Ronald Toler contended the trial court should have set aside his mediated settlement agreement (MSA) because it was ambiguous and contained “a mutual or unilateral mistake” in it that rendered the agreement unenforceable.<sup>152</sup> His main complaint concerned his railroad retirement account benefits, which provided his ex-wife, Vicky,

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141. *Id.*

142. The Defense Finance and Accounting Service, a division of the Department of Defense (DOD), oversees payments to DOD service members, employees, vendors, and contractors. *Agency Overview*, DFAS (last updated Nov. 6, 2012), [www.dfas.mil/pressroom/aboutfas.html](http://www.dfas.mil/pressroom/aboutfas.html). The DFAS also provides DOD decision-makers with business intelligence, finance and accounting information. *Id.*

143. *In re M.M. III*, 357 S.W.3d at 842.

144. *Id.* at 843.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*; see *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003); see also *Coker v. Coker*, 650 S.W. 2d 391, 394 (Tex. 1983) (observing that whether a divorce decree is ambiguous is a question of law).

150. *In re M.M. III*, 357 S.W.3d at 843.

151. *Id.*; see also *Shanks*, 110 S.W.3d at 449; TEX. FAM. CODE ANN. § 9.007(a) (West 2006).

152. *Toler v. Sanders*, 371 S.W.3d 477, 479 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

“50% of the community property of Ronald’s Railroad Retirement Benefits, with a stop date of September 27, 2010.”<sup>153</sup> But Ronald’s railroad retirement came in two tiers: Tier I constituted “about 57% of his total monthly benefit.”<sup>154</sup> Tier II, described as “supplemental annuity,” made up about 43% of his monthly amount.<sup>155</sup> A week after signing the document, which contained boldface type explaining “THIS AGREEMENT IS NOT SUBJECT TO REVOCATION,” Ronald first noticed that the retirement section, a handwritten insertion, did not match his understanding of what he signed.<sup>156</sup> Regardless, the agreement was marked “APPROVED,” and included all of the parties’ signatures, including the mediator’s.<sup>157</sup> Ronald tried to set aside the MSA and requested a new trial, only to be met with swift opposition from Vicky. The court approved the MSA as written. Vicky won attorney fees and expenses for her efforts.<sup>158</sup>

The Houston Court of Appeals decided that the issue turned solely “on the nature of the MSA and its interpretation.”<sup>159</sup> The Texas Family Code provides many methods for divorcing parties to execute a settlement agreement.<sup>160</sup> Among them is a way for parties to execute an agreement before rendition of the divorce, which must be approved by the judge presiding over the case.<sup>161</sup> The parties may (1) provide, in boldfaced type, that the agreement is not subject to revocation, (2) sign the agreement, and (3) have the attorneys present sign the agreement.<sup>162</sup> This makes the MSA “binding on [all] parties.”<sup>163</sup> By complying with all of the signing requirements at the time of execution, the parties are agreeing to make the MSA agreement binding *at that moment*, rather than later, at the time it is rendered in the court.<sup>164</sup> Because the Texas Family Code does not empower any court to add terms, undermine the intent of the parties, or change an MSA in any way before incorporating it into a divorce decree, the Houston Court of Appeals found that Ronald’s MSA was “more binding than a basic written contract.”<sup>165</sup> Furthermore, by according

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153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. See TEX. FAM. CODE ANN. § 7.006 (West 2006).

161. *Id.*; *Toler*, 371 S.W.3d at 479–80.

162. *Toler*, 371 S.W.3d at 480 (citing TEX. FAM. CODE ANN. §§ 6.602(b), 6.603(d), 6.604(b), 153.0071(d) (West 2006)).

163. *Id.* (quoting TEX. FAM. CODE ANN. § 6.604(d) (internal quotation marks omitted)); see also *Cayan v. Cayan*, 38 S.W.3d 161, 166 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *In re Joyner*, 196 S.W.3d 883, 890–91 (Tex. App.—Texarkana 2006, pet. denied).

164. *Toler*, 371 S.W.3d at 480.

165. *Id.* (quoting *In re Joyner*, 196 S.W.3d at 889) (internal quotation marks omitted); see also *Mullins v. Mullins*, 202 S.W.3d 869, 876 (Tex. App.—Dallas 2006, pet. denied) (“Unilateral withdrawal of consent does not negate the enforceability of a mediated settlement agreement in divorce proceedings.”).

Ronald's MSA contract language its plain meaning, the court of appeals found it clear and unambiguous.<sup>166</sup> "The term '50% of the community property of Ron's Rail Road Retirement benefits' is not reasonably susceptible to more than one meaning."<sup>167</sup> And as far as "mistake" was concerned, the record did not show a mistake that was mutual, and Ronald's sworn statement about the mediation could not shed light on any common intention because it "was not properly before the trial court" to examine.<sup>168</sup> Absent any showing of fraud, accident or mutual mistake, the court of appeals could not examine extrinsic evidence to contradict any terms of the written agreement, and therefore Ronald was forced to accept the terms of the MSA as written.<sup>169</sup>

#### B. LIABILITY OF MARITAL PROPERTY IN BANKRUPTCY

Often small businesses facing financial problems qualify, and can choose to file, for bankruptcy under either a Chapter 11 or a Chapter 7 plan. However, there are pros and cons to filing under either chapter. Under a Chapter 11 bankruptcy filing the business owner becomes a "debtor-in-possession," who in effect must answer to all his creditors by creating an acceptable pay-off plan that successfully pays all creditors within a three-year or five-year period.<sup>170</sup> After the plan has run its course, all outstanding debt is effectively discharged in bankruptcy.<sup>171</sup> On the other hand, the benefits of Chapter 7 offer the debtor complete liquidation of any and all non-exempt assets.<sup>172</sup> The bankruptcy trustee appointed to the debtor's case will sell off all non-exempt assets and use these funds to pay off the debtor's creditors.<sup>173</sup> Effective the day of filing, an automatic stay protects a debtor from creditor harassment.<sup>174</sup> In addition, the debtor is able to use all of his future income toward establishing a "fresh start."<sup>175</sup>

So what happens when a couple files for bankruptcy under a Chapter 11 business reorganization and it is unsuccessful? Chapter 7 bankruptcy is

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166. *Toler*, 371 S.W.3d at 480–81; *see also* *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003) (commenting that when language is unambiguous, the court tries to construe the entire writing in an effort to harmonize and give effect to the decree as a whole).

167. *Toler*, 371 S.W.3d at 481.

168. *Id.* at 481.

169. *Id.* at 481; *see also* *DeClaire v. G. & B. McIntosh Family Ltd. P'ship*, 260 S.W.3d 34, 35 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (noting that under the parol evidence rule, a court cannot consider extrinsic evidence absent a showing of fraud, accident, or mutual mistake); *In re Lyon Fin. Servs. Inc.*, 257 S.W.3d 228, 232 (Tex. 2007) ("A party who signs a document is presumed to know its contents.").

170. Elizabeth Warren & Jay Lawrence Westbrook, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES AND PROBLEMS*, 396–401 (Vicki Been et al. eds., 6th ed. 2009).

171. *See* 11 U.S.C. § 1328 (2006) ("[T]he court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title [including child support obligations], except" government taxes specified under §§ 507(a)(8)(c) and 523(a)).

172. Warren & Westbrook, *supra* note 170, at 115.

173. *Id.*

174. *Id.* at 116.

175. *Id.* at 361–66.



the “end game,” where all unsuccessful Chapter 11 reorganizations “go to die.”<sup>176</sup> Knowing this, a debtor has an absolute right to convert his case to Chapter 7, and the creditors can do so by properly showing a bankruptcy court that the debtor-in-possession under Chapter 11 is failing in his duties.<sup>177</sup>

Whenever a debtor files for Chapter 7, the trustee’s job is to acquire as many assets as he can to liquidate, since he is acting as a fiduciary to the creditors.<sup>178</sup> The debtor who converts from Chapter 11 to Chapter 7 is suddenly faced with having to answer to the trustee for assets that were previously more secure, and he may have to fight to save future assets in order to rebuild his “fresh start.”

Such was the case in *In re Cantu*.<sup>179</sup> Marco and Roxanne Cantu, joint debtors and owners of a law firm, filed for Chapter 11 bankruptcy.<sup>180</sup> The Cantus proceeded to obtain court approval for a settlement with a first lienholder, International Bank of Commerce (IBC), which successfully became a secured creditor entitled to 75% of the debtors’ future revenues over the life of the reorganization plan. IBC perfected a first lien for \$2.2 million.<sup>181</sup> In addition, in the settlement, IBC perfected a first lien on all of Marco Cantu’s accounts receivables at his law firm.<sup>182</sup> Several months later, the Cantus chose to convert their Chapter 11 into a Chapter 7 bankruptcy, and a trustee was appointed to liquidate their assets.<sup>183</sup> After they received a large payment from a personal injury case, they filed a “motion to clarify” and sought an order from the bankruptcy court that the new funds would not be subject to IBC’s lien.<sup>184</sup> In other words, they asked that the funds go towards their “fresh start” regardless of the previous agreement with IBC under Chapter 11.<sup>185</sup> The bankruptcy court denied their motion and the Cantus appealed.<sup>186</sup>

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176. *Id.* at 364.

177. *Id.* at 364–65; see 11 U.S.C. § 1112(a)–(b) (2006).

178. See, e.g., 11 U.S.C. § 704(a)(1) (2006) (detailing duties of the trustee in Chapter 7); 11 U.S.C. § 1106 (2006 & Supp. IV 2011) (detailing duties of trustee and examiner in Chapter 11).

179. *In re Cantu*, 464 F. App’x 385, 386 (5th Cir. 2012) (per curiam) (not designated for publication). Pursuant to 5th Cir. R. 47.5.4, the court has determined that this opinion should not be published and is not precedent except for the limited circumstances set forth in the rule. 5TH CIR. R. 47.5.4. However, the practice of denying precedential status to unpublished decisions is coming under increasing attack, especially when it can change the outcome of a case. See *Williams v. DART*, *abrogating Anderson v. DART*, No. CA3:97-CV-1834-BC, 1998 WL 686782 (N.D. Tex. Sept. 29, 1998) (which held DART, as a political unit of the State of Texas, was immune to 11th Amendment civil suits). The court rule giving DART immunity effectively took it away on appeal two years later, thereby receiving opposite results specifically because of the rule denying precedential value to opinions that, today, are readily available electronically. See *id.*

180. *In re Cantu*, 464 F. App’x at 386.

181. *Id.*

182. *Id.*; see also 11 U.S.C. §506(a)(1) (2006) (“An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim [with payment priority].”).

183. *In re Cantu*, 464 F. App’x at 386.

184. *Id.*

185. *Id.*

186. *Id.*

In the Fifth Circuit Court of Appeals, the Cantus argued that they were not bound to the previous settlement agreement with IBC on three grounds: that (1) the party bound to a settlement agreement is the Chapter 7 trustee, not the debtor; (2) it was not reasonable to hold debtors to this agreement, especially after the bankruptcy court approved a conversion from Chapter 11 to Chapter 7; and (3) under 11 U.S.C §§ 348 and 552 of the Bankruptcy Code, the Cantus' lien to IBC should be "relieved" post-conversion, thereby working to allow the funds to go to the debtors' "fresh start."<sup>187</sup> The court addressed only the Cantus' third issue, finding they waived the first two by failing to raise them at trial.<sup>188</sup> The court found that under the Bankruptcy Code the Cantus were not exempt from IBC's lawsuit after conversion.<sup>189</sup>

The crux of the issue turned on the timing of their settlement with IBC, and the Fifth Circuit was not going to allow the debtors to wiggle out of the agreement to repay their debt on a mere technicality.<sup>190</sup> The Cantus argued that under § 348(b) of the Bankruptcy Code, "settlement agreement[s] must be treated as if the parties entered into it before the commencement of the case,"<sup>191</sup> and under § 552(a) of the Bankruptcy Code states "post-petition receivables are not subject to any lien resulting from the agreement."<sup>192</sup> Here, however, the Cantus failed to recognize the difference between the term "claim" and "settlement agreement."<sup>193</sup> The Fifth Circuit pointed out that the term "claim" construes "a right to payment," and IBC's "right to payment . . . did not arise at the time the claim was resolved through the parties' agreement."<sup>194</sup> Thus, IBC's security interest in the Cantus' law firm accounts receivables did not arise "pre-petition" under section 348(d).<sup>195</sup> Nor did IBC's interest trigger the application of § 552(a).<sup>196</sup> In this case the Cantus, who converted to Chapter 7 as a strategy to maintain control over law firm receivables, had to concede their newly earned funds to IBC.<sup>197</sup>

Revisiting a previous case, *Small v. McMaster*, this time in bankruptcy,<sup>198</sup> it is apparent that a bankruptcy court can enforce an automatic stay over an ex-spouse who unilaterally files bankruptcy, despite the di-

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187. *Id.*; see also 11 U.S.C. § 348(d) (2006) ("[A] claim against the estate of the debtor that arises after the order for relief but before conversion . . . shall be treated . . . if such claim [arose] before the date [of the] petition); but see 11 U.S.C. § 552(a) (2006) ("[P]roperty acquired by [the] debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before [the debtor commenced] the case.").

188. *In re Cantu*, 464 F. App'x at 386.

189. *Id.* at 387.

190. *Id.* at 387; see 11 U.S.C. §§ 348(d), 552(a).

191. *In re Cantu*, 464 F. App'x at 387; see 11 U.S.C. § 348(b) (2006).

192. *In re Cantu*, 464 F. App'x at 387; see 11 U.S.C. § 552(a).

193. *In re Cantu*, 464 F. App'x at 387.

194. *Id.* (emphasis in original) (internal quotation marks omitted).

195. *Id.*; see 11 U.S.C. § 348(d).

196. *In re Cantu*, 464 F. App'x at 387.

197. *Id.*

198. *In re Small*, 486 F. App'x 436 (5th Cir. 2012).

voiced court orders.<sup>199</sup> Moreover, it can do so without violating the principles of collateral estoppel or *res judicata*.<sup>200</sup> After a Houston trial court found her informally married,<sup>201</sup> Murriah McMaster filed for a divorce and property division on her own during the pendency of her husband's appeal.<sup>202</sup> In 2007, a divorce court held a trial to determine community property division, where a jury awarded McMaster \$4,000 in monthly temporary spousal support.<sup>203</sup> McMaster never saw a penny because Jack Small filed for Chapter 7 bankruptcy, creating an automatic stay on his creditors at the moment of filing.<sup>204</sup> By 2008, McMaster had had enough, and she moved in state court to enforce her temporary spousal support order, asking the trial court to sentence Small to 179 days of confinement for each violation and to order Small to pay \$124,000 in delinquent support.<sup>205</sup> Small successfully countered by asking for a writ of mandamus from the Houston Court of Appeals, which held that the state trial court's civil contempt order violated Small's automatic stay in bankruptcy.<sup>206</sup>

Small then sued McMaster and her attorney in bankruptcy court, claiming damages as a result of the motion for enforcement.<sup>207</sup> The bankruptcy court sided with Small, holding that both McMaster and her attorney (1) knew about the automatic stay and (2) acted intentionally to violate that stay.<sup>208</sup> The court awarded Small over \$42,000 in damages, costs, and attorney's fees for the enforcement action.<sup>209</sup> McMaster appealed.<sup>210</sup>

First, Murriah argued that Small lacked standing to bring any adversary proceeding in bankruptcy court, and that because the bankruptcy court refused to apply the doctrines of abstention, collateral estoppel, or *res judicata*, its findings amounted to a relitigation of all the previous divorce proceedings.<sup>211</sup> Second, McMaster argued that her enforcement action fell under 11 U.S.C. § 362(b)(1)–(2) of the Bankruptcy Code, exempting it from automatic stay procedures because it was for criminal contempt, not civil contempt, and furthermore, because it involved domestic sup-

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199. *Id.* at 437.

200. *Id.* at 438–39.

201. *Small v. McMaster*, 352 S.W.3d 280, 282 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (deeming John Small and Murriah McMaster *not* informally married).

202. *In re Small*, 486 F. App'x at 437; *see also Small*, 352 S.W.3d at 282.

203. *In re Small*, 486 F. App'x at 437.

204. *Id.*; *see also* 11 U.S.C. § 362(a)(6) (2006) (“[A] petition filed . . . operates as a stay, applicable to all entities . . . [in] any act to collect, assess, or recover a claim against [a] debtor that arose before the commencement of the case.”); *but see* 11 U.S.C. § 362(b)(2)(A)(ii) 2006) (directing that exceptions to automatic stays include “the establishment or modification of an order for domestic support obligations”) (emphasis added).

205. *In re Small*, 486 F. App'x. at 438.

206. *Id.*

207. *Id.*

208. *Id.* at 439–40.

209. *Id.* at 441.

210. *Id.* at 438.

211. *Id.* at 439; *see also* *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994) (noting *res judicata* requires the same claim in previous litigation); *Swate v. Hartwell*, 99 F.3d 1282, 1289 (5th Cir. 1996) (stating collateral estoppel requires an identical issue in previous litigation).

port obligations.<sup>212</sup> Third, McMaster argued the bankruptcy court erroneously awarded Small attorney's fees, as a result of its reliance on inadmissible hearsay and because Small, as the plaintiff, failed to meet his heavier burden of establishing attorney's fees under the factors put forth in *Johnson*.<sup>213</sup>

The Fifth Circuit reviewed the issue of standing and affirmed, finding that Small, as the debtor had a private right of action in bankruptcy court against any person who willfully violated the automatic stay.<sup>214</sup> Interestingly, the court also found McMaster's contention that Small's claims were in connection with her divorce irrelevant.<sup>215</sup> The court affirmed the bankruptcy court's non-application of collateral estoppel and res judicata, noting "Small was entitled to relief [based] solely due to the violation of the stay."<sup>216</sup> It remarked that the bankruptcy court granted no relief based on previously litigated state-court findings, and therefore gave partial relief consistent with family court principles.<sup>217</sup> In addition, the court concluded that § 362(b)(1), which exempted criminal actions from automatic stays, did not apply here because McMaster's attorney willfully testified that they gave Small numerous opportunities to come up with the money before using incarceration to induce payment of support.<sup>218</sup> Further, in reviewing the bankruptcy court's decision *de novo*, the Fifth Circuit noted no error in refusing to apply the Bankruptcy Code section exempting domestic support obligations.<sup>219</sup> McMaster and her attorney sought the enforcement action without first considering "whether there was property that was *not property of the estate* from which to make the [spousal] payment."<sup>220</sup> Lastly, the Fifth Circuit reviewed the attorney's fees under a clear-error standard.<sup>221</sup> The court noted it would be difficult for any bankruptcy court to apply the *Johnson* standard for the fees.<sup>222</sup>

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212. *In re Small*, 486 F. App'x at 439; *see also* 11 U.S.C. § 362(b)(1) (2006) ("[T]he commencement or continuation of a criminal action or proceeding against the debtor" does not operate under the stay.); 11 U.S.C. § 362(b)(2)(A)(ii) ("[T]he commencement or continuation of a civil action or proceeding . . . [against the debtor] for the establishment or modification of an order for "domestic support obligations" does not operate under the stay.).

213. *In re Small*, 486 F. App'x at 440; *see also* *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *overruled on other grounds* by *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (holding that the plaintiff has the burden of proving, by clear and convincing evidence, a right to reasonable fees, considering the novelty and difficulty of the issues, the prerequisite skill to perform the legal services, the customary fees in the area, and the preclusion of accepting other employment during the pendency of the case).

214. *In re Small*, 486 F. App'x at 438.

215. *Id.* The bankruptcy court only rendered judgment that McMaster and her attorney violated the automatic stay in bringing the enforcement action, and because it made no other decisions regarding property, the Fifth Circuit only addressed the claim of standing. *Id.*

216. *Id.* at 439.

217. *Id.* at 438-39.

218. *Id.* at 439-40; *see also* 11 U.S.C. § 362(b)(1).

219. *In re Small*, 486 F. App'x at 440.

220. *Id.* (emphasis in original).

221. *Id.*

222. *Id.* at 441.

This bankruptcy court did not even discuss the twelve factors found in *Johnson* in its opinion.<sup>223</sup> In addition, Small acted pro se in the proceeding, which limited the bankruptcy court's ability to analyze Small's attorney's fees in any procedural context.<sup>224</sup> However, the appeals court found it helpful to review Small's testimony to bills totaling over \$400,000 (of which nearly \$100,000 were for the mandamus) and noted that McMaster never argued that those fees were unreasonable.<sup>225</sup> The moral of the story: before initiating an enforcement action on a Chapter 7 debtor and ex-spouse (that was never a legal spouse), make sure you are trying to limit enforcement to only property that is not part of a bankruptcy estate.

### C. EXEMPTIONS

#### 1. Homestead

During a contested divorce where one spouse is awarded the marital homestead along with its mortgage requirements, can this mortgage obligation be deemed part of "domestic support obligations" (DSO) that would become a non-dischargeable debt in bankruptcy? This was the issue addressed in *In re Nugent*.<sup>226</sup> An acrimonious divorce tumbled out of a courthouse in Alabama and, as a result, the Bankruptcy Court of the Southern District of Texas was forced to examine the prolonged quarrel dealing with the original financial obligations of the couple's homestead.<sup>227</sup>

It is normally against policy, in these common procedures, for a bankruptcy court to allow discharge under §§ 523(a)(5) and 523(a)(15) of any debt arising out of the marital bond.<sup>228</sup> The plaintiff in *In re Nugent*, however, failed to plead both aforementioned sections of the Code, thus opening a window for the bankruptcy court to decide on its own if the debt in question fit into the "category governed by the unpleaded provision."<sup>229</sup> The plaintiff had only himself and his choice of attorney to blame for the mistake, for this is what that bankruptcy court ultimately did.<sup>230</sup>

In this case, Samuel Woodward gave up the marital home and all its contents to his ex-spouse, Susan Ehrler-Nugent, in divorce.<sup>231</sup> Along with the house, however, an Alabama court required Ehrler-Nugent to take over all the mortgage payments, indemnify Woodward from any future mortgage payments (including a home equity line of credit (HELOC)),

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223. *Id.*

224. *Id.*

225. *Id.*

226. *In re Nugent*, 484 B.R. 671 (Bankr. S.D. Tex. 2012).

227. *Id.* at 673.

228. *Id.* at 684; see also 11 U.S.C. §523(a)(5) (2006) (dealing with spousal support and child support); 11 U.S.C. § 523(a)(15) (dealing with property division—or "not of the kind [of debt] described in [§ 523(a)(5)] that is incurred by the debtor in the course of a divorce").

229. *In re Nugent*, 484 B.R. at 684.

230. *Id.*

231. *Id.* at 673.

and to pay monthly amounts of \$233.43 to Woodward (for a total of \$14,000) for his equity on the home.<sup>232</sup> Ehrler-Nugent made only two monthly payments towards Woodward's equity while she continued to make mortgage payments for only three years.<sup>233</sup> This forced Wells Fargo, who held the first lien on the HELOC, to come after Woodward for the unpaid amount (approximately \$93,000).<sup>234</sup> Woodward sought an enforcement motion in Alabama district court requiring Ehrler-Nugent to comply with the original divorce judgment.<sup>235</sup> But in order to stop Woodward from prosecuting her, Ehrler-Nugent and her current husband, Robert Nugent, filed a Chapter 7 petition for bankruptcy in Houston and received a discharge of their debts in January 2012.<sup>236</sup> Woodward initiated proceedings in bankruptcy court, complaining of the discharge, asking for the sums owed to Wells Fargo for the lien and asking that the \$14,000 owed to him in equity be exempted from discharge under 11 U.S.C. § 527(a)(5).<sup>237</sup>

To support his case, Woodward pointed to the statutory definition of DSO, which clarified that the term included "a debt that accrues, before, on, or after the date . . . for relief . . . that is . . . owed or recoverable by . . . a spouse, former spouse, or child of the debtor or such child's parent, legal guardian or responsible relative . . . or a governmental unit."<sup>238</sup>

The Fifth Circuit had previously interpreted § 523(a)(5) in *In re Nunnally* and developed several factors to determine whether the obligations at issue were dischargeable.<sup>239</sup> Referring to *In re Nunnally*, the Bankruptcy Court for the Southern District of Texas had to examine the "true nature" of Ehrler-Nugent's obligations.<sup>240</sup> Because Ehrler-Nugent and Woodward had a divorce trial, the bankruptcy court was forced to consider the Alabama divorce court's intent in obligation characteristic.<sup>241</sup> If the intent in the original judgment was clear, it would control the bank-

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232. *Id.* at 675.

233. *Id.*

234. *Id.* at 674–75.

235. *Id.* at 675.

236. *Id.*

237. *Id.* at 673; *see also* 11 U.S.C. § 527(b) (2006) ("A debt relief agency providing bankruptcy assistance to an assisted person shall provide . . . notices required [that inform that person] . . . [that] if [they] choose to file under chapter 7, [they] may be asked by a creditor to reaffirm a debt."); 11 U.S.C. § 523(a)(5) ("A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . for a domestic support obligation.").

238. *In re Nugent*, 484 B.R. at 677 (quoting 11 U.S.C. § 101(14A) (2006) (defining domestic support obligation)).

239. *Id.* at 679–80; *see also In re Dennis*, 25 F.3d 274, 277–78 (5th Cir. 1994) (observing that although the label given an obligation in a divorce decree is not dispositive, the bankruptcy court has the ultimate authority to characterize a debt under the Code.); *In re Jones*, 9 F.3d 878, 880 (10th Cir. 1993) (holding a debt can be characterized in a bankruptcy court as "alimony" even though under state law, alimony may not exist); *In re Nunnally*, 506 F.2d 1024, 1027 (5th Cir. 1975). Alimony is interchangeable with "spousal support" or "maintenance." *In re Dennis*, 25 F.3d at 277–78.

240. *In re Nugent*, 484 B.R. at 679.

241. *Id.*

ruptcy court's characterization of the obligation.<sup>242</sup> Only if that intent was ambiguous would the bankruptcy court be allowed to turn to extrinsic evidence and look for evidence under the list of factors in *In re Nunnally*.<sup>243</sup>

The court found the intent ambiguous. On one hand, the divorce judgment was silent on the home's equity.<sup>244</sup> It ordered monthly payments made to Woodward, much like a DSO, but did not include any specific sections marked "alimony" or "property division."<sup>245</sup> On the other hand, the judgment specifically stated "No alimony is awarded."<sup>246</sup> It characterized the home as the "marital home place" (a joint asset not usually considered a domestic support obligation) and it used the term "settlement" to describe the \$14,000 Ehrler-Nugent owed Woodward instead of referring to it as "spousal support."<sup>247</sup>

Extrinsic evidence was also insufficient. Both Ehrler-Nugent and Woodward testified that Ehrler-Nugent had full control over the HELOC funds because she placed them into her separate account and used the funds to pay for trips, a Mercedes Benz, and property taxes.<sup>248</sup> The court, however, was specifically waiting for Woodward, the party with the burden in this suit, to provide evidence that aligned with the *In re Nunnally* factors.<sup>249</sup> With Woodward coming up short on evidence, the court decided that Ehrler-Nugent's previous marital obligations could be effectively discharged in bankruptcy through the loophole created by Woodward's attorney when he failed to plead both Code sections.<sup>250</sup> Since only one (§ 523(a)(5)) was before the court, and Woodward did not sufficiently prove Ehrler-Nugent's debt was a DSO, the court instead decided on its own that Ehrler-Nugent's debt could be characterized as "a property division" and discharged it.<sup>251</sup> Now Woodward is obligated to Wells Fargo for the debt and has no home to sell to recover any equity.<sup>252</sup>

## 2. *Liens on Homesteads*

When a homestead passes to a guarantor's wife upon his death, the decedent's creditor cannot seize that homestead absent evidence that the guarantor acted as his wife's agent with intention to cede his homestead

242. *Id.*

243. *Id.*; see also *In re Evert*, 342 F.3d 358, 364 (5th Cir. 2003) (citing *In re Nunnally* factors, which include: (1) disparities in the parties' earnings; (2) the parties' business opportunities; (3) their physical conditions; (4) expected future financial needs; and (5) any benefit each party would have gained had the marriage continued).

244. *In re Nugent*, 484 B.R. at 681.

245. *Id.* at 682.

246. *Id.*

247. *Id.*

248. *Id.* at 683.

249. *Id.* at 683-84; see also *Grogan v. Garner*, 498 U.S. 279, 291 (1991) (holding the plaintiff has the burden to prove by a preponderance of the evidence an exemption to discharge).

250. *In re Nugent*, 484 B.R. at 684.

251. *Id.*

252. *Id.*

to that creditor.<sup>253</sup> Under the Texas Probate Code, the “title to an [insolvent homestead] estate, where a constituent member of the family survives, descends to those entitled to inherit free from claims of creditors.”<sup>254</sup> Furthermore, the Texas Constitution generally protects and exempts homesteads under non-bankruptcy law.<sup>255</sup> Although “[a]n owner may apply for a home equity loan for any purpose,”<sup>256</sup> and he is not “precluded from voluntarily using the proceeds of an equity loan to pay on a debt owed to the lender,”<sup>257</sup> a lien can only be voluntarily created under a written agreement with the consent of the owner and the owner’s spouse.<sup>258</sup>

In *Martinek Grains & Bins, Inc. v. Bulldogs Farms, Inc.*, a homeowner who defaulted on several promissory notes from his business transferred his homestead to his childrens’ trust one month before his death.<sup>259</sup> He then continued to use the homestead as his residence.<sup>260</sup> At his death, his widow continued to live on the 200 acres of homestead land.<sup>261</sup> After the widow died, business creditor Martinek Grains & Bins brought suit in a Dallas district court to set aside the homestead transfer, alleging conspiracy to defraud under the Uniform Fraudulent Transfer Act.<sup>262</sup> However, Martinek lost on summary judgment.<sup>263</sup> Martinek then appealed, arguing that homeowner C.L. Miller, who died owing \$627,916.00 to the company, fraudulently transferred his ownership of 200 acres in homestead land to the “Miller Children’s Irrevocable Trust” to protect it from seizure, knowing he was in default of four promissory notes.<sup>264</sup> Martinek argued the trial court “erred on the merits” in rendering the summary judgment when the party did not even move for a summary judgment.<sup>265</sup>

Reviewing *de novo*, the Dallas Court of Appeals agreed with Marti-

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253. See *Martinek Grain & Bins, Inc. v. Bulldog Farms, Inc.*, 366 S.W.3d 800 (Tex. App.—Dallas 2012, no pet.); TEX. PROB. CODE ANN. § 279 (West 2003).

254. *Nat’l Union Fire Ins. v. Olson*, 920 S.W.2d 458, 461 (Tex. App.—Austin 1996, no writ) (citing TEX. PROB. CODE ANN. § 279).

255. TEX. CONST. art. XVI, § 50(a) (“The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for: (1) the purchase money thereof, or a part of such purchase money; (2) the taxes due thereon; (3) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding; (4) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner; [and] (5) work and material used in constructing new improvements[.]”).

256. *In re Chambers*, 419 B.R. 652, 671 (Bankr. E.D. Tex. 2009) (citing TEX. FIN. CODE ANN. § 11.308 (West 2010)) (quoting TEX. ADMIN. CODE ANN. § 153.18(2) (West 2006)).

257. *In re Chambers*, 419 B.R. at 671 (alteration in original).

258. See TEX. CONST. art. XVI, § 50(a)(6)(A).

259. *Martinek Gains & Bins, Inc. v. Bulldogs Farms Inc.*, 366 S.W.3d 800, 03 (Tex. App.—Dallas 2012, no pet.).

260. *Id.*

261. *Id.*

262. *Id.*; see also TEX. BUS. & COM. CODE ANN. §§ 24.001–.013 (West 2009).

263. *Martinek Grains*, 366 S.W.3d at 803.

264. *Id.*

265. *Id.* at 804; see also *Teer v. Duddleston*, 664 S.W.2d 702, 705 (Tex. 1984).



nek.<sup>266</sup> The court, however, held the transfer of the property to the trust, if there was any, was not a violation of the Uniform Fraudulent Transfers Act.<sup>267</sup> Martinek then switched gears to focus on two new assertions that attacked the transfer deed: (1) that the property was community property, and (2) that Miller's widow was personally liable for her husband's debt to Martinek upon death.<sup>268</sup> Citing Family Code §§ 3.003 and 3.202, Martinek argued that because the homestead was community property held in both C.L. and Olga Miller's names, the joint community property remained liable for 100% of the debt owed to them.<sup>269</sup> Martinek further argued that when Miller died insolvent, and the homestead passed to Miller's widow free and clear of Miller's debts, the land became subject to the widow's own debts because there was no longer any surviving spouse.<sup>270</sup>

The Dallas Court of Appeals, applying Family Code § 3.201 on spousal liability, reaffirmed that the widow had "no personal liability for [Miller]'s guaranty of the farm's debt *unless* [Miller] was *acting as [the widow's agent]*"<sup>271</sup> when he originally guaranteed the debts to Martinek and *unless* those debts were also for "necessaries."<sup>272</sup> Because the debt was business debt, Martinek "failed to show the trial court erred" and therefore the Dallas Court of Appeals overruled Martinek on its last two issues.<sup>273</sup>

#### IV. DIVISION ON DIVORCE

##### A. DIVISION PROCEEDINGS

"A defendant who challenges [a] trial court's exercise of personal jurisdiction through a special appearance carries the burden of negating all bases of personal jurisdiction."<sup>274</sup> In *Aduli v. Aduli*, the husband appealed a default divorce decree arguing the trial court erred by denying his special appearance.<sup>275</sup> He also contended that the trial court abused its discretion by allowing the husband's attorney to withdraw and by adopting his wife's proposed property division in the marital estate without sufficient evidence.<sup>276</sup> The Houston Court of Appeals disagreed.<sup>277</sup> The court affirmed the trial court's denial of his special appearance, as

266. *Martinek Grains*, 366 S.W.3d at 804.

267. *Id.* at 807.

268. *Id.*

269. *Id.* at 808.

270. *Id.* at 807.

271. *Id.* at 808 (emphasis added).

272. *Id.*; see also TEX. FAM. CODE ANN. § 3.201 (West 2006) ("A person is personally liable for the acts of the person's spouse only if: (1) the spouse acts as an agent for the person, or (2) the spouse incurs debts for necessities. A spouse does not act as an agent for the other spouse solely because of the marriage relationship.")

273. *Martinek Grains*, 366 S.W.3d at 808.

274. *Aduli v. Aduli*, 368 S.W.3d 805, 814 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

275. *Id.* at 813.

276. *Id.*

277. *Id.* at 821.

well as the trial court's denial of the husband's motion for continuance and new trial.<sup>278</sup>

Fardad Aduli, an Iranian citizen, married his wife Valerie, a French native, in Louisiana in 2003, and the couple resided in New Orleans under work visas.<sup>279</sup> In 2008, Valerie moved into a Houston condominium that Fardad purchased and furnished.<sup>280</sup> Fardad fully supported the move.<sup>281</sup> Fardad also sent Valerie a monthly living allowance and paid the mortgage and utilities for her.<sup>282</sup> According to Fardad, he had no intention of moving to Houston to be with his wife because the couple had decided to separate.<sup>283</sup> According to Valerie, Fardad had every intention of moving to Houston after receiving his green card.<sup>284</sup>

When Valerie learned Fardad was having an affair she promptly filed for divorce.<sup>285</sup> A Houston trial court set temporary orders and injunctions shortly thereafter, under which the discovery provisions dictated both parties were to provide sworn inventories of both their separate and community property.<sup>286</sup> The trial court also ordered Fardad to pay for Valerie's attorney fees.<sup>287</sup> The trial court found clear evidence of domestic abuse as well,<sup>288</sup> and issued a restraining order against both parties barring them from withdrawing monies from any financial accounts.<sup>289</sup>

Over the next few years, Fardad repeatedly violated the orders by withdrawing account monies, refusing to pay Valerie's attorney, and failing to submit discovery.<sup>290</sup> Moreover, his work visa expired, so he left the United States and went to Paris.<sup>291</sup> Nine days before his trial, Fardad's attorney asked and was granted a withdrawal, citing an inability to effectively communicate with his client.<sup>292</sup>

Two days prior to trial, Fardad requested a continuance, arguing he had filed for bankruptcy, had no monies to pay an attorney, and needed time to secure the proper visa before returning to the United States.<sup>293</sup> When his request was denied, Valerie appeared in court at the agreed time and date for the divorce with her property inventories; Fardad was a no-show.<sup>294</sup> The trial court granted the divorce that day, and divided the couple's property according to the evidence available which Valerie

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278. *Id.*

279. *Id.* at 810.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 817.

289. *Id.* at 811.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 811-12.

294. *Id.* at 812-13. Fardad, having lost his work visa, went to Paris and tried to apply for a new visa from there. *Id.* at 812.

presented. Fardad appealed.<sup>295</sup>

Fardad first argued the trial court had no jurisdiction over him to grant a divorce, maintaining his last marital residence was in New Orleans.<sup>296</sup> The appeals court, recognizing that "more and more frequently one spouse may, by choice or necessity, work in a state . . . apart from the family unit,"<sup>297</sup> ultimately decided that it did have personal jurisdiction with minimum contacts over Fardad because of his extensive maintenance and ownership of the Houston condo.<sup>298</sup> The court agreed with Valerie's testimony about how her husband visited her in Texas regularly despite Fardad's claims that he never came to Houston.<sup>299</sup>

The court also found no error when the trial court denied the husband's special appearance, because Fardad never presented evidence or represented at the time he made this motion for a special appearance that he could not be physically present in the United States.<sup>300</sup> He never presented evidence that it would be an excessive burden to travel to Houston for the divorce proceedings, especially after his pattern of visiting Houston many times to see his wife.<sup>301</sup> Prior to his bankruptcy, he earned over \$160,000 per year.<sup>302</sup> Valerie, an abused spouse who had no earning potential, had an especially strong "interest in obtaining convenient and effective relief in Texas."<sup>303</sup>

The Houston Court of Appeals also examined the trial court's refusal to grant Fardad a new trial.<sup>304</sup> He argued that he conclusively established all the elements required to get a new trial under the equity principals in *Craddock v. Sunshine Bus Lines, Inc.*<sup>305</sup> In a post-answer default judgment, Fardad, who was the defaulting party, had the burden to prove he

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295. *Id.* at 813.

296. *Id.* at 814.

297. *Id.* at 815.

298. *Id.*

299. *Id.* at 815; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (holding that a state may establish personal jurisdiction over a nonresident defendant if the defendant has purposefully established minimum contacts with the forum state); Phillips v. Phillips, 826 S.W.2d 746, 748 (Tex. App.—Houston [14th Dist.] 1992, no writ) (holding that a single act can support jurisdiction as long as there is substantial connection with the forum state).

300. *Aduli*, 368 S.W.3d at 817.

301. *Id.* Mr. Aduli never asked the Court to appear via video or via telephone, a specific right. *Id.* *See also* Johnson v. Handley, 299 S.W.3d 925, 929 (Tex. App.—Dallas, 2009, no pet.) (commenting that "[w]hen [an inmate's] request to appear by . . . effective means [*i.e.* telephone or video conference] is made, a trial court's denial of [his] motion to appear is an abuse of discretion unless the court allows the inmate to proceed by some other effective means").

302. *Aduli*, 368 S.W.3d at 818.

303. *Id.*

304. *Id.* at 818.

305. *Id.* (citing *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939)). "Under *Craddock*, default judgment should be set aside when [(1)] the defendant establishes that the failure to appear was not intentional or the result of conscious indifference, but the result of an accident or mistake; (2) [the new trial motion] sets up a meritorious defense; and (3) granting [a new trial] will occasion no undue delay or otherwise injure the plaintiff." *Id.* at 819.

had no notice of the default judgment hearing.<sup>306</sup> If Fardad could have proved this, he would not have been required to present proof of the last two elements under *Craddock*.<sup>307</sup> However, Fardad never argued failure to receive a notice and thus he needed to prove the remaining two elements.<sup>308</sup> Because it was Fardad's burden to bring a sufficient record to show the trial court's error and he brought nothing to the appeal, the court was obligated to support the trial court's decision.<sup>309</sup> The appellate court had only Fardad's affidavit to review, which revealed he was aware of his trial date.<sup>310</sup> Additionally, his affidavit did not establish a meritorious defense to the property division, nor did it describe how a new trial would not harm Valerie.<sup>311</sup>

Lastly, Fardad's complaint about the marital property division was reviewed under an abuse of discretion standard.<sup>312</sup> Fardad argued that his ex-wife's proposed information sheets and financials were never formally admitted into evidence at the trial and that there was no testimony to support her valuation of assets, not to mention the amount Valerie claimed he wasted of their community estate.<sup>313</sup> The appeals court disagreed with Fardad, noting he too was required to provide inventories and failed to do so.<sup>314</sup> He repeatedly violated the temporary orders by withdrawing money from his accounts and not paying attorney's fees.<sup>315</sup> Despite the fact that Valerie's inventories were never formally entered into evidence, the record revealed the trial court took "judicial notice of [it] for evidentiary purposes."<sup>316</sup> Valerie's discovery inventories contained stated values for all of Fardad's assets, both in Iran and in the United States, as well as life insurance policy values that were, as a whole, acknowledged "as a shorthand rendition of her testimony."<sup>317</sup> It was Fardad's burden to show adequate evidence of his valuation of the community estate to help the trial court make a fair division.<sup>318</sup> According to the court of appeals, the trial court warned Fardad that his pleadings would be struck, and therefore he could not subsequently complain that the trial court judge lacked good information to justly divide the property.<sup>319</sup>

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306. *Id.*; see also *Almendarez v. Valentin*, No. 14-10-00085-CV, 2011 WL 2120115, at \*4 (Tex. App.—Houston [14th Dist.] May 24, 2011, no pet.) (mem. op.) (per curiam) (citing *Mathis v. Lockwood*, 166 S.W.3d 743, 744 (Tex. 2005) (per curiam)).

307. *Aduli*, 368 S.W.3d at 819.

308. *Id.*

309. *Id.* (citing *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990)); see also *In re D.A.P.*, 267 S.W.3d 485, 487 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

310. *Aduli*, 368 S.W.3d at 819.

311. *Id.*

312. *Id.*

313. *Id.* at 820.

314. *Id.*

315. *Id.* at 820–21.

316. *Id.* at 820.

317. *Id.*

318. *Id.*

319. *Id.* at 820–21; see also *Deltuva v. Deltuva*, 113 S.W.3d 882, 887 (Tex. App.—Dallas 2003, no pet.) ("When a party does not provide values for property to be divided, that

In a second case, Susana Knight added her husband Geoff's business, Knight Corporation, as a party in their divorce.<sup>320</sup> She further alleged Knight Corporation and its subsidiaries, Knight Filter and Grasslyn, L.L.C., were Geoff's alter egos when he acted fraudulently to squander and misappropriate community assets from accounts.<sup>321</sup>

Knight Corporation filed a special appearance with the trial court that was denied.<sup>322</sup> The company then appealed, filing a writ of mandamus based on the assertion that the district court abused its discretion in denying the special appearance.<sup>323</sup> The Houston Fourteenth District Court of Appeals, citing *Ogletree v. Matthews*,<sup>324</sup> agreed that the case was ripe for a mandamus review,<sup>325</sup> but noted that in general Texas appellate courts only have appellate jurisdiction over appeals from final judgments when a statute "specifically allows a particular kind of interlocutory appeal."<sup>326</sup> However, there is no such right to an interlocutory appeal if a family law matter is involved.<sup>327</sup>

Susana argued that the trial court had jurisdiction over Knight Corporation and that the company waived its special appearance when Geoff, an employee, filed a motion to quash service before Knight Corporation, as a company, filed.<sup>328</sup> The trial court overruled this argument, finding Geoff filed his motion to quash individually and not on behalf of the company, and therefore that there was no special appearance made by Knight Corporation.<sup>329</sup>

The Houston Court of Appeals, reviewing *de novo*, agreed.<sup>330</sup> Knight Corporation did not waive its special appearance because the company, as a party, never acknowledged the trial court's jurisdiction nor took any action inconsistent with challenging personal jurisdiction.<sup>331</sup>

In her amended complaint, Susana alleged that Knight Corporation committed fraud in Texas by entering into a stock purchase agreement, transferring company stock to her husband, Geoff, and misappropriating

party may not complain on appeal that the trial court lacked sufficient information to properly divide the property.").

320. *Knight Corp. v. Knight*, 367 S.W.3d 715, 722 (Tex. App.—Houston [14th Dist.] 2012, reh'g denied no pet.).

321. *Id.*

322. *Id.* at 723.

323. *Id.* at 722.

324. *Ogletree v. Matthews*, 262 S.W.3d 316, 319 n.1 (Tex. 2007).

325. *Knight*, 367 S.W.3d at 723; *see also In re J.W.L.*, 291 S.W.3d 79, 83 (Tex. App.—Fort Worth 2009, mand. denied) (determining a denial of a special appearance in a family law case was subject to mandamus review).

326. *Knight*, 367 S.W.3d at 723.

327. *See, e.g., TEX. CIV. PRAC. & REM. CODE ANN.* § 51.014(a)(7) (West 2008); *In re Loya*, 290 S.W.3d 920, 921 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

328. *Knight*, 367 S.W.3d at 723.

329. *Id.* at 724.

330. *Id.*

331. *Id.*; *see, e.g., Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998) (seeking a ruling on a jurisdictional discovery dispute was not a waiver); *Angelou v. African Overseas Union*, 33 S.W.3d 269, 276 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (filing a Rule 11 agreement with the court before an assertion of a special appearance is not a waiver).

corporate funds in a conspiracy to deprive her of community property.<sup>332</sup> She attempted to pierce the corporate veil of Geoff's companies to get to the business assets.<sup>333</sup> The appeals court, noting "[d]ue process will not permit the plaintiff to use insignificant acts in the forum to assert jurisdiction over all co-conspirators,"<sup>334</sup> observed that the Texas Supreme Court had previously refused to recognize the contention of specific jurisdiction over nonresident defendants based only on the effects of suspected conspiracy involving a Texas resident.<sup>335</sup> It carefully examined the trial court's jurisdictional contacts with the Knight Companies and found no connection between them, the forum, and the litigation.<sup>336</sup>

Although Susana argued that Knight Corporation maintained an interactive website that permitted Texas consumers to "submit their specific needs" and the company purchased products from Texas, the appeals court declined to find even general jurisdiction because Knight Corporation's sales in Texas "cannot weigh as a contact" to support jurisdiction in Texas.<sup>337</sup>

Finally, remarking that it was Susana's burden to prove the corporation imputed its contacts to Texas,<sup>338</sup> the appeals court found no alter ego and therefore no ability to pierce the veil, noting Susana failed to prove that the parent company was fused with its subsidiaries for jurisdictional purposes.<sup>339</sup> In other words, she failed to prove Knight Corporation controlled any internal business operations of its subsidiaries "greater than that normally associated with a common ownership and directorship."<sup>340</sup> The appeals court conditionally granted Knight Corporation's writ of mandamus, "confident [that] the trial court [would] vacate its order denying the special appearance."<sup>341</sup> The writ of mandamus would only apply if the trial court failed to do this.<sup>342</sup>

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332. *Knight*, 367 S.W.3d at 727.

333. *Id.* at 729.

334. *Id.*; see also *Nat'l Indus. Sand. Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) ("Conspiracy as an independent basis for jurisdiction . . . [distracts] from the ultimate due process inquiry.").

335. *Knight*, 367 S.W.3d at 727 (citing *Nat'l Indus. Sand. Ass'n*, 897 S.W.2d at 773).

336. *Id.*

337. *Id.* at 729; see also *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 808 (Tex. 2002) ("When a nonresident defendant purposefully structures transactions to avoid the benefits and protections of a forum's laws, the legal fiction of consent [to being sued there] no longer applies."); but cf. *Experimental Aircraft Ass'n Inc. v. Doctor*, 76 S.W.3d 496, 507 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (finding general jurisdiction existed based partly on the defendant's website); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265–66 (6th Cir. 1996) (finding jurisdiction exists where one clearly does business over the internet by entering into contracts and repeatedly transmitting computer files).

338. *Knight*, 367 S.W.3d at 730; see *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 798 (Tex. 2002).

339. *Knight*, 367 S.W.3d at 730.

340. *Id.*

341. *Id.* at 730–31.

342. *Id.* at 731.

## B. MAKING THE DIVISION

A wife's evidence of her husband's adultery and cruelty is reason enough for a court to award a disproportionate amount of community property to the wife in a divorce proceeding. In *Newberry v. Newberry*, the 171st District Court in El Paso ordered the husband to pay 95% of the community debts and awarded the wife \$80,000 worth of marital assets, while leaving him a mere \$11,000 in assets.<sup>343</sup> Here, the wife successfully presented strong evidence that the husband was addicted to pornography and continued to communicate to other females that he was "available" despite family counseling.<sup>344</sup> The husband appealed, arguing legally and factually insufficient evidence to support the trial court's finding, based on only the wife's testimony that he was adulterous.<sup>345</sup> The wife testified in court that her husband was alone with his high school sweetheart in a room with the door closed and lights off for more than twenty minutes.<sup>346</sup> The El Paso Court of Appeals affirmed.<sup>347</sup>

Reviewing only the evidence and inferences supporting the trial court's verdict, the appellate court found "more than a scintilla of evidence" to support the lower court's ruling, and therefore the husband's challenge failed.<sup>348</sup> Because adultery can be shown by circumstantial evidence, when the husband admitted to his wife (after they separated) that he attended a friend's party and stayed in a room with his sweetheart with the door closed, he sealed his own fate when the court of appeals deferred to the fact-finder's determination of her testimony and the amount of weight given to it.<sup>349</sup> Unfortunately for the husband, the court may still grant a divorce on cruel treatment grounds,<sup>350</sup> especially where there is evidence of an accumulation of several different cruel acts.<sup>351</sup> Despite attempts to reconcile and attend counseling, the husband had an ongoing problem with viewing pornographic materials on the Internet and televi-

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343. *Newberry v. Newberry*, 351 S.W.3d 552, 558 (Tex. App.—El Paso 2011, no pet.).

344. *Id.* at 557–58.

345. *Id.* at 555.

346. *Id.* at 556.

347. *Id.*

348. *Id.*; see also *Minn. Min. and Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 738 (Tex. 1997); *Henry v. Henry*, 48 S.W.3d 468, 474 (Tex. App.—Houston [14th Dist.] 2001, no pet.) ("More than a scintilla of evidence exists where the evidence supporting the finding, as a whole, rises to the level that would enable reasonable and fair-minded people to differ in their conclusions.") (citing *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

349. *Newberry*, 351 S.W.3d at 556; see also *Morrison v. Morrison*, 713 S.W.2d 377, 380 (Tex. App.—Dallas 1986, writ dismissed); TEX. FAM. CODE ANN. § 6.704(b) (West 2006) ("If the husband or wife testifies, the court or jury trying the case shall determine the credibility of the witness and the weight to be given the witness's testimony.")

350. See TEX. FAM. CODE ANN. § 6.002 (West 2006); *Finn v. Finn*, 185 S.W.2d 579, 582 (Tex. Civ. App.—Dallas 1945, no writ.) (holding that a spouse's conduct rises to the level of cruel treatment when his or her conduct renders the couple's living together insupportable).

351. See, e.g., *Hester v. Hester*, 413 S.W.2d 448, 450 (Tex. Civ. App.—Tyler 1967, no writ.); *Emerson v. Emerson*, 409 S.W.2d 897, 900 (Tex. Civ. App.—Corpus Christi 1966, no writ.).

sion, which he blamed on his wife's lack of intimacy.<sup>352</sup> In fact, the husband had become quite shrewd about his pornography habit by purchasing and hiding a new laptop, and creating new email addresses and aliases by which to communicate with pornographic websites.<sup>353</sup>

Regardless of the cruelty or abuse grounds, the husband's largest contention on appeal was the trial court's unbalanced property division.<sup>354</sup> Under an abuse of discretion review for this issue, the El Paso Court of Appeals affirmed.<sup>355</sup> After re-examining the record, the court found that the husband admitted on the record that he made "frequent unnecessary expenditures," had no familiarity with several outstanding community credit card debts, and had withdrawn all money from his 401K retirement account (valued at \$32,362.00) when he was fired from his job for stealing computers from his employer.<sup>356</sup> The court found the trial court's original property division—albeit disproportional—was thoroughly supported by "evidence of substantive and probative character."<sup>357</sup>

According to the "acceptance of benefits doctrine," once a party accepts the benefits of a trial court judgment distributing a couple's marital property, that same party cannot appeal and complain of an unjust and unfair division.<sup>358</sup> James Richard accepted five boats as part of the community property distribution during his divorce.<sup>359</sup> He then sold two boats to pay down loans and had a third boat under a sales contract.<sup>360</sup> Nevertheless, James appealed the trial court's property division.

James tried to use the narrow exception found in *Waite v. Waite*<sup>361</sup> to overcome the acceptance of benefits doctrine with little success, arguing the sale of the two boats, a thirty-nine foot 2002 Mainship and a twenty-nine foot 1994 Proline, was a "matter of economic necessity" to keep him out of bankruptcy.<sup>362</sup> He complained his expenses were far greater than his income, but was incapable of expounding on this with any actual proof of his monthly income or bills.<sup>363</sup> James was unable to convince the trial court to reconsider his plight and his appeal was quickly dismissed as

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352. *Newberry*, 351 S.W.3d at 557.

353. *Id.* at 557–58.

354. *Id.*

355. *Id.* at 564.

356. *Id.* at 563–64.

357. *Id.* at 563; *see also* *Garcia v. Garcia*, 170 S.W.3d 644, 649 (Tex. App.—El Paso 2005, no pet.).

358. *Richards v. Richards*, 371 S.W.3d 412, 413 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *see also* *Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950) ("A litigant cannot treat a judgment as both right and wrong, and if he has voluntarily accepted the benefits of a judgment, he cannot afterward prosecute an appeal therefrom.").

359. *Richards*, 371 S.W.3d at 413.

360. *Id.* at 415.

361. *Waite v. Waite*, 150 S.W.3d 797, 803 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (detailing the "economic necessity" exception to the acceptance of benefits doctrine, which "applies when the acceptance of benefits is not voluntary because of financial duress or other economic circumstances").

362. *Richards*, 371 S.W.3d at 415.

363. *Id.* at 415.



moot.<sup>364</sup>

Another case illustrates that appointing a receiver for an ex-husband's separate property is one way a trial court can protect divorcing parties' assets.<sup>365</sup> During a divorce, a wife filed a motion asking for appointment of a receiver after the husband refused to follow the trial court's temporary orders.<sup>366</sup> Throughout contentious litigation, the husband was ordered to pay child support and attorney's fees, and to hand over discovery during the divorce process. After four enforcement hearings and court-ordered sanctions, he still failed to "get out of the red."<sup>367</sup> Judge Lori Hockett of the 255th District Court ordered a receiver for the husband's separate property and specifically explained that the husband's refusal to disclose his asset information, together with this admission to the court that he had disposed of property within his possession, led the court to this outcome.<sup>368</sup> Unhappy with this decision, the husband launched an interlocutory appeal, arguing that the trial court used an incorrect standard in appointing a receiver.<sup>369</sup> He argued that the court had no authority to appoint a receiver and that the court sought "to 'punish' him for his failure to comply with his . . . obligations."<sup>370</sup>

The Dallas Court of Appeals, under an abuse of discretion standard of review, upheld Judge Hockett's decision.<sup>371</sup> The court found the appointment appropriately "necessary and equitable to protect the parties and their property."<sup>372</sup> A receiver can assure that no inappropriate transfers of a party's property are made without approval.<sup>373</sup> And although the husband argued vehemently that the trial court had no authority to place his separate property under receivership, he failed to show any clear and convincing evidence to the trial court of owning separate property.<sup>374</sup> Additionally, the court of appeals noted that Texas law would not limit a trial court to appointing a receiver only to community property, even if this husband had been successful at identifying separate assets.<sup>375</sup> Section 6.502 of the Texas Family Code speaks of "properties of the parties" without describing any assets as "separate" or "community."<sup>376</sup> The Texas Family Code does not expound further by using either term, and if the legislature had intended to limit receivership to just community property,

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364. *Id.* at 413.

365. *In re C.F.M.*, 360 S.W.3d 654, 658 (Tex. App.—Dallas 2012, no pet.).

366. *Id.* at 656.

367. *Id.*

368. *Id.* at 657.

369. *Id.* at 655.

370. *Id.* at 658.

371. *Id.* at 661.

372. *Id.* at 658-59; *see also* TEX. FAM. CODE ANN. § 6.502 (West 2006).

373. *In re C.F.M.*, 360 S.W.3d at 659.

374. *Id.*

375. *Id.*

376. *See* TEX. FAM. CODE ANN. § 6.502(a)(5) (West 2006) ("While a suit . . . is pending . . . the court may render an appropriate order, including the granting of a temporary injunction . . . and including . . . an order . . . appointing a receiver for the preservation and protection of the property of the parties.") (emphasis added).

it would certainly have done so by defining it further.<sup>377</sup>

### C. EX-SPOUSAL MAINTENANCE

The issue of what constitutes an ex-spouse working on a “full-time” basis arose in *In re C.P.Y.*<sup>378</sup> In this case, a former husband that was initially required to pay his ex-wife alimony petitioned the court to have his support duty stopped, alleging that his ex-wife, a contract attorney, was now working full-time.<sup>379</sup> Judge Cherry of the 301st Judicial District Court in Dallas County sided with the husband and ordered the ex-wife to pay back \$22,000 for paid, but unearned, alimony and \$13,500 in attorney’s fees. The ex-wife appealed.<sup>380</sup>

The Dallas Court of Appeals held there was a “genuine issue of material fact” as to the parties’ meaning of what a “full-time basis” meant in their original divorce decree, and therefore, it reversed and remanded.<sup>381</sup> The court found the original decree language ambiguous when applied to the facts of the couple’s case.<sup>382</sup> When the wife originally divorced her husband, the latter agreed to pay the former until June 1, 2010 or until the wife remarried, returned to work full-time, died, or another court order modified the alimony.<sup>383</sup>

The ex-wife, Lisa, took a job as a contract attorney that generally had her working less than forty hours per week.<sup>384</sup> She claimed the trial court incorrectly granted summary judgment to her ex-husband, Lawrence, based on evidence that she worked over forty hours on a mere three occasions.<sup>385</sup> She argued the term “full time basis” should be based on a person working forty hours or more per week and further argued she was generally a contractual, part-time attorney, and a full-time caregiver for the couple’s son.<sup>386</sup>

Lawrence, eager to end his alimony obligations, argued the Texas Labor Code definition of “full time”<sup>387</sup> controlled in his summary judgment affidavit.<sup>388</sup> He contended “full time” meant “at most” a forty-hour work week.<sup>389</sup> He further testified that it is his “experience and belief” as an

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377. *In re C.F.M.*, 360 S.W.3d at 656; see e.g., TEX. FAM. CODE ANN. § 3.202(d) (West 2006) (“All community property is subject to tortious liability of either spouse incurred during marriage.”); TEX. FAM. CODE ANN. §6.707(a) (West 2006) (“A transfer of real or personal community property or a debt incurred by a spouse while a suit for divorce or annulment is pending that subjects the other spouse or the community property to liability is void with respect to the other spouse if the transfer was made . . . with the intent to injure the rights of the other spouse.”).

378. *In re C.P.Y.*, 364 S.W.3d 411 (Tex. App.—Dallas 2012, no pet.)

379. *Id.* at 412.

380. *Id.*

381. *Id.* at 415.

382. *Id.*

383. *Id.* at 412.

384. *Id.*

385. *Id.*

386. *Id.* at 413–14.

387. TEX. LAB. CODE ANN. § 408.042(L) (West 2006).

388. *In re C.P.Y.*, 364 S.W.3d at 413–14.

389. *Id.* at 414.

attorney himself, that when an attorney bills for forty hours, that attorney “must work *more* hours than he/she is actually able to bill.”<sup>390</sup>

The Dallas Court of Appeals first looked for a common meaning of the term “full time” and found none that expressly defined the number of hours worked.<sup>391</sup> The Texas Insurance Code defines an “eligible employee” as one who works “on a full time basis and who usually works at least 30 hours a week.”<sup>392</sup> Moreover, this definition does not include any person who is a seasonal, temporary, or substitute employee.<sup>393</sup> To complicate matters, a full-time police officer is defined as an officer working “on average at least 32 hours per week, exclusive of paid vacation.”<sup>394</sup> In sum, the court could not successfully determine the meaning of the words “full time” by the decree’s writing itself, and, because it remained an issue of fact as to the parties’ intent, the Dallas Court of Appeals found that it had to remand for a new trial.<sup>395</sup>

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390. *Id.* (emphasis in original).

391. *Id.*; see WEBSTER’S THIRD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 919 (1981). “Full-time,” as an adjective, is defined as “employed for and involving full time,” and as a noun, is defined as “the amount of time considered the normal or standard amount for working during a given period.” *Id.*

392. *In re C.P.Y.*, 362 S.W.3d at 414 (citing TEX. INS. CODE ANN. § 1501.002(3) (West 2009)).

393. *Id.*

394. *Id.* (citing TEX. GOV’T. CODE ANN. § 614.121 (West Supp. 2011)).

395. *Id.* 415; see also *Italian Cowboy Partners Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323, 333 (Tex. 2011) (“In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself.”); *Milner v. Milner*, 361 S.W.3d 615, 619 (Tex. 2011).