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Family Law: Husband and Wife

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I. STATUS

A. SAME-SEX UNIONS

SAME-SEX unions, whether formal or informal, are unrecognized under Texas law.[1] Nevertheless, from late 2009 through the winter of 2010, Texas appellate courts dealt with disputes concerning same-sex marriages recognized by other states and their proprietary consequences. Of these cases, *State v. Naylor* dealt with the proprietary aspects

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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).

of divorce proceedings involving a same-sex couple.[2]

B. Informal Marriage

In *Smith v. Deneve*,[3] the Dallas Court of Appeals was concerned with issues involving informal marriage and a constructive trust.[4] The alleged husband sued for divorce after a relationship lasting fourteen years (during which time the couple lived together) and the alleged wife took title to a home and boat in her name only.[5] The trial court granted summary judgment for the alleged wife on the ground that no marriage ever existed between the couple.[6]

The court of appeals concluded that the alleged husband did not offer sufficient evidence that he and his alleged wife had represented to others in Texas that they were married, and thus they did not demonstrate publicly that they were married to each other.[7] Occasional references to each other in public as "husband" and "wife" were not enough.[8] The court of appeals compared the evidence in this case to that in *Danna v. Danna*,[9] where the Dallas Court of Appeals found no informal marriage between a couple who have held themselves out as married only four times over a period of approximately two years.[10] Representations of marriage must be consistent in order to raise a genuine issue of fact.[11] Based on the evidence, and in light of the holding in *Danna*, the court of appeals 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.[12] The court of appeals further held that instances when the couple is listed as "husband" and "wife" must be supported by evidence that both parties were aware that the marital representation was being made.[13] Moreover, there was no evidence that anyone in the community was shown those contractual representations.[14] Although the alleged husband asserted the existence of a constructive trust based on an informal relationship, the trial court rejected this as showing an informal marriage.[15] The court of appeals affirmed that conclusion.[16] The husband failed to show evidence that he

2. State v. Naylor, No. 03-10-00237-CV, 2011 Tex. App. LEXIS 166, at *1–3 (Tex. App.—Austin Jan. 7, 2011, pet. filed).
3. Smith v. Deneve, 285 S.W.3d 904, 909, 911 (Tex. App.—Dallas 2009, no pet.).
4. *Id.* at 908.
5. *Id.*
6. *Id.* at 908–09.
7. *Id.* at 910.
8. *Id.*
9. Danna v. Danna, No. 05-05-00472-CV, 2006 Tex. App. LEXIS 2368, at *3 (Tex. App.—Dallas Mar. 29, 2006, no pet.) (mem. op.).
10. *Id.* at *5.
11. *Id.*
12. *Id.*
13. *Id.* at *4.
14. *Id.* at *5.
15. Smith v. Deneve, 285 S.W.3d 909, 910–11 (Tex. App.—Dallas 2009, no pet.).
16. *Id.*

was at any time guided by the alleged wife's financial judgment and advice or that she had otherwise assumed the role of a fiduciary.[17] Although he offered evidence that they both contributed to household expenses, the court of appeals found that such evidence did not necessarily show that the husband had placed any trust in his alleged wife or that such evidence was consistent with an agreement to share living expenses.[18] As the husband had not entrusted his alleged wife with his financial affairs, the court of appeals concluded that the couple's longstanding cohabital relationship simply did not give rise to an informal union and duty between them.[19]

II. CHARACTERIZATION

A. PARTITIONS AND EXCHANGES

In *Martin v. Martin*, the wife appealed the trial court's grant of summary judgment for the husband with respect to interpretation and enforcement of their marital pre-agreement entered into between the parties.[20] At trial, the wife testified that prior to signing the agreement, the husband had assured her that he would never use the agreement against her and that it was needed "solely to protect the family" from possible financial ruin as a result of the husband's bad business judgment.[21] Because of his constant assertions that unless she signed the agreement the family would be financially ruined, the wife sought the legal counsel of a neighbor who reluctantly assisted her in signing it in 1990.[22] In the 2003 divorce proceeding that followed, the wife asserted that the agreement was unconscionable and that she did not sign it voluntarily.[23] The trial court nevertheless granted summary judgment in the husband's favor without stating the basis for its ruling and held the agreement valid and enforceable.[24] Based on the alleged threats of "financial ruin," and because the wife's previous attorney testified that "obvious pressure was . . . placed on [her]" to sign the agreement, the Dallas Court of Appeals found that the ex-wife had produced more than a scintilla of evidence to raise an issue of fact.[25] This precluded judgment as a matter of law on the wife's statutory defense of involuntary execution of the agreement.[26] Thus, the court of appeals concluded that the trial court had erred in granting the husband's no-evidence motion for summary judgment.[27]

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17. *Id.* at 912.
18. *Id.*
19. *Id.*
20. Martin v. Martin, 287 S.W.3d 260, 261 (Tex. App.—Dallas 2009, pet. denied).
21. *Id.* at 264.
22. *Id.* at 264–65.
23. *Id.* at 261–62.
24. *Id.* at 265.
25. *Id.*
26. *Id.* at 263.
27. *Id.* at 264–65 (internal quotations omitted).

In *Martin*, the wife also asserted that the husband was guilty of fraud on the community estate under the marital property agreement.[28] The husband's motion for summary judgment seeking to enforce the agreement was nevertheless granted by the trial court.[29] The appellate court went on to say that the statute of limitations for ordinary fraud does not apply to a claim of "fraud on the community" in a divorce proceeding when the party asserting the fraud-defense claims it is a result of an obligation induced by fraud.[30] In *Martin*, subsequent to signing the marital agreement partitioning and exchanging the couple's assets, the wife produced financial documents purporting to show valuations of the husband's assets that were drastically different from those recited in the agreement.[31] In the 2003 divorce action, the wife asserted the statutory common-law affirmative defenses available under the statute for marital property agreements executed prior to September 1, 1993, which included fraud and fraudulent inducement.[32] On appeal, the husband asserted that the trial court had properly granted his motion for summary judgment because the wife was precluded by the statute of limitations from asserting fraud on the community.[33] However, since a claim of fraud against the community "may not be asserted as an independent tort cause of action . . . it must be litigated as part of a "just and right division" of the community property upon divorce."[34] Thus, until the husband asserted the agreement against her in the divorce proceeding, the ex-wife's claim "for fraud on the community was not ripe."[35] Furthermore, the ex-wife was not precluded by the statute of limitations from asserting fraud as a defense to enforcement of the agreement.[36] The statute of limitations does not apply to a fraud claim pleaded defensively to defeat liability of an obligation induced by fraud.[37]

In *In re Noonan*, the wife alleged that her husband had "committed fraud because he was only able to obtain her signature on the postnuptial agreement by overcoming her free will, and this post-nuptial agreement thus became an agreement incident to divorce."[38] The couple was married in 1973 and executed the agreement in 2001.[39] In January 2003, the husband filed for divorce, and an agreed decree (which included an agreement incident to divorce) was entered at the final hearing on March 17, 2003.[40] Subsequently, the ex-wife filed her first bill of review in November 2003; non-suited it in January 2004; and "[o]n July 30, 2004, Lori

28. *Id.* at 266.
29. *Id.* at 261.
30. *Id.* at 266.
31. *Id.*
32. *Id.* at 261.
33. *Id.* at 262.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *In re* Noonan, 280 S.W.3d 339, 343 (Tex. App.—Amarillo 2008, pet. ref'd).
39. *Id.* at 341.
40. *Id.*

and Thomas filed an informal marriage registration."[41] However, "[i]n June 2005, Lori filed a petition for divorce."[42] After the trial court for the second divorce entered a partial summary judgment against Lori on matters regarding the property of the parties, Lori filed her second bill of review attacking the first divorce decree agreed to by the parties in November of 2003.[43] The wife argued that the agreement incident to divorce and the portion of the judgment which incorporated the agreement should be set aside because the agreement was procured by fraud.[44] She further requested a new division of the property previously divided in the original decree.[45] The wife's bill of review was dismissed by summary judgment and she appealed.[46] Mere assertion of a community estate presupposes a marriage, which, in this instance, was denied.

On appeal she alleged that her husband committed fraud by forcing her to sign the postnuptial agreement.[47] Because the agreement became an agreement incident to divorce that was embodied in the final divorce decree, she argued that the decree should be set aside and a new division of marital property should be made.[48] However, all of the evidence presented to show that coercion and duress were used to overcome her free will pertained to events that occurred during the marriage, prior to the first divorce in 2003, and dealt with the original postnuptial agreement.[49] In particular, the record reflected that at the final hearing for divorce, the wife's attorney acknowledged communications he had made with his client concerning a possible defense to the postnuptial agreement in order to provide her with a fair property division.[50] Consequently, the Amarillo Court of Appeals found that these issues could have been presented to the trial court,[51] and that at best the evidence showed "intrinsic fraud and would not support a bill of review."[52] When relying on fraud to attack a judgment in a bill of review, a petitioner must rely on extrinsic fraud.[53] "Extrinsic fraud is fraud that denied a party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted. Intrinsic fraud, by contrast, relates to the merits of the issues that were presented."[54] The court of appeals stated that because intrinsic fraud includes such matters as fraudulent instruments and perjured testimony,[55] a party must take care to guard against adverse find-

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 341–42.
45. *Id.*
46. *Id.* at 341.
47. *Id.* at 343.
48. *Id.* at 341.
49. *Id.* at 344.
50. *Id.*
51. *Id.* at 343.
52. *Id.*
53. *Id.* (citing Tice v. City of Pasadena, 767 S.W.2d 700, 702 (Tex. 1989)).
54. *Noonan*, 280 S.W.3d at 343 (citing *Tice*, 767 S.W.2d at 702).
55. *Id.*

ings on issues directly presented, because issues underlying the judgment "have no probative value on the fraud necessary to a bill of review."[56]

Finally, the wife alleged that her husband's threats to exhaust all available money on attorney's fees, if she fought the divorce, overcame her free will.[57] Again, however, the events she complained of occurred prior to the entry of the original decree issued in 2003. The court of appeals found it hard to believe that the wife's will was so overwhelmed that she felt unable to bring this issue to light while participating in the trial.[58] The court of appeals concluded that she had presented "nothing more than allegations that the decree of divorce provided an inequitable and unfair division of the marital estate."[59] Such an "injustice in a final order will not support relief for a party by a bill of review."[60]

B. Reimbursement and Economic Contribution

1. Reimbursement

In *Phillips v. Phillips*, the El Paso Court of Appeals laid out, in painstaking detail, the reasons for the husband's entitlement to an offset from his wife's judgment for constructive fraud.[61] At trial, the wife prevailed on a constructive fraud claim alleging that the husband had committed economic torts against the community estate.[62] The wife recovered a reimbursement claim of over $400,000 but appealed the award for a quantity over that amount.[63] She asserted that, based on the jury's findings, the husband was not entitled to reimbursement, and alternatively that he was judicially estopped from asserting his reimbursement claims because he had admitted judicially that he was not seeking reimbursement.[64]

Although treating his right of reimbursement as an offset against a right of reimbursement is not ordinarily an element of a reimbursement claim, the court of appeals granted the husband's request as allowed by the trial court as tried by consent.[65] The husband had offered evidence in support of his reimbursement claims while informing the jury that he did not want his wife to reimburse him for the claims.[66] Instead, he sought a *credit* against any reimbursement awarded to his wife.[67]

The couple in *Knight v. Knight* had entered into an informal marriage in 1994.[68] On appeal, the former wife contended that the trial court's

56. *Id.* at 344.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. Phillips v. Phillips, 296 S.W.3d 656, 662 (Tex. App.—El Paso 2009, pet. denied).
62. *Id.*
63. *Id.*
64. *Id.* at 663.
65. *Id.* at 667.
66. *Id.* at 664.
67. *Id.*
68. Knight v. Knight, 301 S.W.3d 723, 725 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

division of the community estate constituted an abuse of discretion because the trial court erroneously refused to grant her reimbursement claims.[69] The undisputed evidence showed, however, that a judgment against the husband's separate interest had been paid with community funds.[70] Therefore, the Houston Fourteenth Court of Appeals found that the trial court's refusal to reimburse the community for half of the community funds used to pay the judgment debt was unsupported by the evidence and an abuse of discretion.[71] In *Knight*, the court of appeals also found that the trial court should have reimbursed the community on the basis of constructive fraud.[72] During the first year of their informal marriage, the wife had discovered that her husband had been making gratuitous payments to his ex-wife in the amount of $500 a month for approximately one year.[73] Although he had testified that his wife was aware of the payments to his ex-wife long before their marriage, he later admitted that he had lied to her in saying that he had stopped making payments during this time.[74] Because his wife did not consent to the payments, and since he had admitted to deceiving her about making them, the court of appeals found that the trial court should have granted reimbursement to the community estate for the payments made over a period of one year. The court of appeals awarded the wife community assets of half of the value of the reimbursement amount to rectify the constructive fraud.[75]

2. *Economic Contribution*

In a decree of divorce or annulment, a court shall determine the rights of both spouses claimed as economic contribution that a court considers just and right.[76] Such economic contribution is measured by the reduction of the principal amount of debt secured by a lien on property owned before marriage to the extent that the debt existed at the time of marriage.[77] Prior to September 1, 2009, section 3.403 of the Texas Family Code provided that "[a] marital estate that makes an economic contribution to the property owned by another marital estate has a claim for economic contribution with respect to the benefitted estate."[78] Furthermore, section 3.403 provided a formula for calculating the economic contribution.

"[A] claim for equitable contribution is a statutory remedy designed to compensate a contributing estate for the reduction in principal amount of

69. *Id.*
70. *Id.* at 727.
71. *Id.* at 733.
72. *Id.* at 732.
73. *Id.*
74. *Id.*
75. *Id.*
76. TEX. FAM. CODE ANN. § 7.007(2) (West 2006); *Id.* § 7.001.
77. *Id.* § 3.402(3).
78. *In re* Cigainero, 305 S.W.3d 798, 800 (Tex. App.—Texarkana 2010, no pet.) (quoting repealed TEX. FAM. CODE ANN. § 3.403 (Vernon 2006)).

debt secured by a lien on property owned by the benefitting estate."[79] 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."[80] In *In re Ciainero*, the Texarkana Court of Appeals affirmed the trial court's award of economic contribution to the community estate under former section 3.403 of the Family Code.[81] In that case, community rental income generated by the husband's separate property duplexes was used to pay down the mortgages of the husband's separate property duplexes.[82] The economic contribution to the husband's benefitted estate (the duplexes) could be measured by a reduction in its debt.[83] Thus, the trial court did not err in awarding the community an amount to be split between the divorcing parties.[84]

Furthermore, the court of appeals found that the trial court did not err by refusing to allow for an offset against the economic contribution claim for the community rental income (of the duplexes) that benefitted the community estate.[85] The husband argued that he was entitled to an offset because the parties' income tax records showed that the community estate had benefitted from tax deductions taken each year as a result of the duplexes' depreciation.[86] However, the postnuptial income from the husband's separate property was community property, and although the community estate benefitted from the rental income, it was not due to contributions made by the husband's separate estate.[87] The court of appeals did, however, affirm the trial court's consideration of the benefits received by the community for tax deductions from depreciation of the husband's separate property in offsetting them against the wife's claims for reimbursement.[88] The court of appeals, nevertheless, refused to apply this offset to economic contribution, as doing so would have allowed the husband a double recovery.[89] The court of appeals concluded that there was no authority in the Family Code suggesting that offsets, which are equitably determined, could be applied to claims for economic contribution.[90]

79. *Cigainero*, 305 S.W.3d at 802.
80. *Id.* (internal citations omitted).
81. *Id.* at 803.
82. *See id.* at 801–02.
83. *Id.* at 799.
84. *Id.* at 801–02.
85. *Id.* at 803.
86. *Id.*
87. *Id.* at 802.
88. *Id.* at 803.
89. *Id.*
90. *Id.*

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

A. LIABILITY OF MARITAL PROPERTY IN BANKRUPTCY

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) expands a court's ability to dismiss a Chapter 7 bankruptcy case by establishing a presumption of abuse against the debtor when a debtor seeking relief under Chapter 7 is above a median income. Whereas before the adoption of BAPCPA, "an individual debtor with primarily consumer debts [enjoyed] a presumption in favor of receiving discharge relief, BAPCPA reversed that process," and under § 707(b) the Bankruptcy Court for the Eastern District of Texas in *In re Dumas*[91] inserted a means test for a debtor with an above-median income.[92] The presumption of abuse is strictly enforced, and "[w]hen the presumption of abuse applies, a debtor's ability to rebut that presumption is extremely limited."[93] Even when such a presumption does not apply, a trial court may find dismissal warranted either because the petition was filed in bad faith or because, under the "totality of the circumstances," awarding a debtor relief under Chapter 7 would constitute an abuse.[94] The totality test in § 707(b)(3)(B) is an amalgamation of various tests developed by courts to determine the existence of substantial abuse in the pre-BAPCPA era.[95] Basically, the courts have "sought to identify those factors which, when combined with a demonstration of a debtor's ability to pay debts from future earnings, would reveal an abuse of the privilege to obtain a Chapter 7 discharge."[96] However, as noted in *In re Dumas*, "in its adoption of the totality test, BAPCPA did not specify nor did it endorse any particular means by which to identify the existence of abuse."[97] Thus, courts have continued to use the various totality factors identified in the pre-BAPCPA jurisprudence in order to evaluate current dismissal motions based upon § 707(b)(3)(B)."[98] The list of factors considered generally includes the circumstances surrounding a debtor's finances in the past and future, whether the debtor had legitimate need for filing.[99]

In *Dumas*, there was no issue of bad faith, and all parties recognized that the couple filing for Chapter 7 bankruptcy had a legitimate need due to the husband's continuing employment problems.[100] There the bankruptcy court focused on the debtor's future finances and considered whether the amount of a monthly house payment "singularly support[ed]

91. *See In re* Dumas, 419 B.R. 704, 707 (Bankr. E.D. Tex. 2009); *see* 11 U.S.C. § 707(b)(3)(B).
92. *Dumas*, 419 B.R. at 707.
93. *Id.*
94. *Id.*
95. *Id.* at 708.
96. *Id.*
97. *Id.*
98. *Id.*; *see In re* King, No. 08-41975, 2009 WL 62252, at *3 (Bankr. E.D. Tex. 2009).
99. *See id.*
100. *Dumas*, 419 B.R. at 709.

a finding of abuse under the totality of circumstances test of § 707(b)(3)."[101] The debtor's monthly mortgage payment at the time of filing for bankruptcy was consuming almost thirty-six percent of the couple's gross income, "thereby creating a sustainable foundation for the accusation that the [d]ebtors are maintaining [a very] expensive home at the expense of their unsecured creditors."[102]

It would appear under all the circumstances that the bankruptcy court would reach a fair and just result in finding the debtor's monthly housing expenses to be unreasonably large. However, the bankruptcy court recognized that "just results in bankruptcy cases must find their root in the provisions of the Bankruptcy Code."[103] Despite the United States Trustee's allegations that the debtor's mortgage payments were unreasonable and better suited to a Chapter 13 filing, in reading the plain language of the statute, the bankruptcy court noted that § 1325(b)(3) provides that "[a]mounts *reasonably necessary* to be expended . . . shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)."[104] Whether or not it was aligned with Congress's intent, the bankruptcy court failed to find in § 707(b)(2) "any limit on the amount of debt which can be legitimately secured by a principal residence for Chapter 7 purposes."[105] Thus, the trustee was precluded from attacking the reasonableness of the debtor's mortgage payment.[106] Without any other evidence that would indicate an abuse under the "totality" of the circumstances, the bankruptcy court held in *Dumas* that "the housing payment has been effectively immunized from scrutiny on the basis of reasonableness in a Chapter 13 or Chapter 11 case" because both chapters rely on § 707(b)(2), which has no cap for secured debt obligations of a primary residence.[107]

B. EXEMPTIONS

1. Homestead

In their joint Chapter 13 petition, the husband and wife in *In re Villarreal*, claimed that the restaurant they owned and operated was their homestead residence.[108] The Chapter 13 trustee objected to the exemption on the ground that the debtor couple did not use the property as their residence.[109] The trustee for the holders of a lien on the property also objected to the homestead claim and asserted that the debtors did not own the property as a consequence of a pre-petition foreclosure.[110]

101. *Id.*
102. *Id.* at 710.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 711.
107. *Id.*
108. *In re* Villareal, 401 B.R. 823, 827–28 (Bankr. S.D. Tex—2009).
109. *Id.* at 828.
110. *Id.* at 827.

In 2007, several years before the couple's bankruptcy filing, the husband settled several lawsuits by giving a promissory note payable to the trustee and secured by a deed of trust, which constituted a lien on the couple's property.[111] Neither the note nor the deed of trust made any mention of the property's homestead character apart from a disclaimer in the trust that specifically stated that the property was not used for residential purposes.[112] After defaulting on their note, the trustee foreclosed his lien on the couple's home.[113] The couple responded with a suit for wrongful foreclosure, but before the Bankruptcy Court for the Southern District of Texas could rule on the matter, the couple filed for bankruptcy and claimed the property as their homestead.[114]

In support of their homestead claim, the couple and their daughter testified that, since 2005, the family had occupied the restaurant portion of the building behind a black curtain in an attempt to maintain a professional atmosphere.[115] A friend of the wife also testified that even though it was never stated to her, she understood that the restaurant was the couple's home.[116] Despite their concealed living arrangements, the bankruptcy court concluded that the debtors' use of the property was sufficient to constitute a homestead because "[a]ctual use is the most satisfactory and convincing evidence of intention."[117] The bankruptcy court rejected the argument that overt acts of homestead use must be "open to view" or "open to public view," as determined by the Fifth circuit in *In re Bradley*.[118]

Turning to the question of the validity of the lien created to secure payment of the note given as part of the settlement agreement, the bankruptcy court noted that the lien did not fit within any of the eight instances provided under the Constitution and was therefore invalid.[119] The bankruptcy court, nonetheless, found that the debtors were equitably estopped from invalidating the lien.[120] Even though courts have not estopped a claimant from asserting a homestead exemption based simply on declarations made in a mortgage contract, in this instance the debtors' use of the property was secret, "ambiguous," and insufficient to notify a reasonably prudent person, such as in this instance the lien trustee, that the property was a homestead.[121] The bankruptcy court also found that because the lien was an essential part of the settlement agreement that was announced in open court and on the record, the husband was judi-

111. *Id.* at 829.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 830.
116. *Id.*
117. *Id.* at 832 (internal citations and quotations omitted).
118. *In re* Bradley, 960 F.2d 502, 507 (5th Cir. 1992).
119. *Villareal*, 401 B.R. at 833.
120. *Id.* at 836.
121. *Id.* at 834–36.

cially estopped from invalidating the lien.[122] The wife, however, was not a party to the proceeding, and the bankruptcy court found it unclear whether she was represented by the same counsel as her husband.[123] The bankruptcy court found that the burden was on the trustee to demonstrate that judicial estoppel applied to her.[124] The bankruptcy court nevertheless concluded that both spouses were equitably estopped from claiming a homestead exemption, but if the couple should prevail in their adversary proceeding, the pre-petition foreclosure would be invalid, though the lien would remain on the property as a secured claim in the bankruptcy case.[125] The bankruptcy court further noted that if the pre-petition foreclosure should be finally set aside in the adversary proceeding, the debtors might still claim their homestead exemption except for the secured claim.[126] If, on the other hand, the pre-petition foreclosure should be upheld, the property would not be part of the bankruptcy estate.[127]

In *In re Norra*,[128] the debtor's assertion of a homestead exemption was contested by Harris County and two state agencies: the Texas Commission on Environmental Quality ("TCEQ") and the Department of State Health Services (collectively, "the State").[129] The debtor claimed two mobile home parks, Reidland and Lauder, as her rural homestead despite the fact that they were located about twenty miles apart.[130] As her source of income, she rented mobile homes and spaces on both properties to tenants by a month-to-month oral lease arrangement.[131] Norra resided on the Reidland property, on which she owned many of the mobile homes,[132] but she had never lived on the Lauder property.[133] However, she asserted that she had used numerous mobile homes on the Lauder property for various purposes, such as storage space for her personal belongings and sometimes as a place to stay overnight.[134] Though she did not live on the property, Norra claimed it as her homestead.[135] In addition, she claimed that four of the mobile homes on the Lauder property were a portion of her homestead.[136] The State did not object to her claim of a homestead exemption for the four trailers on the Reidland property that Norra *did* use as her home but did object to the claim that other homes at Reidland and all the property and homes on the Lauder prop-

122. *Id.* at 837–38.
123. *Id.* at 838.
124. *Id.*
125. *Id.* at 839.
126. *Id.*
127. *Id.*
128. *In re* Norra, 421 B.R. 782, 782 (Bankr. S.D. Tex. 2009).
129. *Id.* at 785.
130. *Id.* at 785–86.
131. *Id.* at 786.
132. *Id.* at 787.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 788.

erty were her homestead.[137] Except for the trailer on Reidland where Norra lived, Harris County objected to her claim that both properties constituted her homestead.[138] Both the State and Harris County argued that "the permanent renting of the remaining mobile homes at Reidland and lack of [a] residence at Lauder 'depriv[ed] the respective properties of homestead status."[139]

With respect to the Lauder property, the Bankruptcy Court for the Southern District of Texas compared this dispute to the landmark case of *Autry v. Reasor*.[140] In *Autry*, the debtor had rented thirty-nine acres of non-contiguous, rural land in exchange for a portion of his tenant's crop. The Texas Supreme Court held that "renting non-contiguous land "depriv[ed] [the land] of its homestead character.'"[141] Building on *Autry*, later courts have held that "the act of renting non-contiguous land, alone, is insufficient to impress homestead status upon th[at] land, even though the rental income is used by the debtor for financial support."[142] Even though the Fifth Circuit has recently held that in some cases, non-contiguous property may enjoy homestead status (such as a garage, lot, or playground),[143] "the Fifth Circuit made [it] clear that non-contiguous rent[ed] property does not enjoy the same treatment,"[144] and that "[s]eparate land . . . devoted *primarily* to generating income for the family . . . is not used principally for home purposes and thus it is not included in the rural homestead."[145]

Norra used the trailers on the Lauder property as a place to keep spare parts primarily for business use, and her only other use of the premises was as a place of relaxation during working hours, as opposed to traveling to the property with the specific intent of relaxing there.[146] Therefore, the bankruptcy court held that the Lauder property, as a whole, was primarily used as an additional means of generating rental income—a use insufficient to impress upon the property an independent homestead character as non-contiguous property.[147]

Because Harris County wished to sever the Reidland property into homestead and non-homestead sections,[148] the bankruptcy court considered whether Norra had abandoned the property. The court reasoned that, as "[a]bsent abandonment, the [forced] severance of a tract of land from the homestead is permissible only if there is *no* evidence that the

137. *Id.*
138. *Id.*
139. *Id.*
140. *See* Autry v. Reasor, 108 S.W. 1162, 1162 (Tex. 1908); *In re Norra*, 421 B.R. at 791.
141. *In re* Norra, 421 B.R. at 791 (alteration in original) (citing *Autry*, 108 S.W. at 1162).
142. *Id.*; *see also In re* Baker, 307 B.R. 860, 863 (Bankr. N.D. Tex. 2003) ("The payment of rent is not the type of 'support' that Texas homestead law recognizes as providing 'comfort, convenience, or support of the family.'").
143. *In re* Perry, 345 F.3d 303, 318 n.22 (5th Cir. 2003).
144. *Norra*, 421 B.R. at 791.
145. *Perry*, 345 F.3d at 318 n.22 (emphasis added).
146. *Norra*, 421 B.R. at 792.
147. *Id.*
148. *Id.* at 793.

severed tract is used for homestead purposes."[149]

In *In re Perry*, a debtor owned and operated an RV park on a tract of twenty-six rural acres adjoining a small, rural tract that the debtor and his wife made their home.[150] The circuit court was faced with resolving the issue of whether a rural resident could satisfy the homestead exemption requirement by conducting a "'business or calling'" on the same tract as his residence, which was used for non-agricultural purposes.[151] The issue ultimately turned on whether the property was "temporarily or permanently rented" by the tenant.[152] The court stated:

> In order to determine whether property has been rented on a temporary or permanent basis, . . . the court should determine whether, and if so, over what portions of property, the debtor released possession and control. Then, the court should consider [the debtor's] intent with respect to that portion of the property. If [the debtor] intended to resume control over the property, the property will not lose its homestead character.[153]

The court based its determination of temporarily and permanently rented property on factors applied in *Hollifield v. Hilton*.[154] There the court of appeals found that factors such as the renting of property adjoining the residence to tenants on a month-to-month basis and the ability to restore the land to its agricultural state with "a minimum of effort," of primary significance in determining the property's homestead status.[155]

As in *Hollifield*, the tenants at Reidland rented on a month-to-month basis, and thus Norra only temporarily "released possession and control" over a portion of her residence.[156] Because vacancy levels fluctuated, Norra was able to resume control and frequently did so.[157] Norra testified that she did not intend to abandon that portion of the residence by renting it.[158] Because after reviewing the evidence the bankruptcy court found that she could restore the land to its agricultural state "'with minimal of effort,'" she established the requisite "intent to resume control."[159]

Even though the Reidland property had been used as a rental property for over twenty years and would likely continue to be so used in the future, the bankruptcy court did not limit its holding regarding what consti-

149. *Id.*
150. *Perry*, 345 F.3d at 307.
151. *Id.* at 318; *see also Norra*, 421 B.R. at 794.
152. *Norra*, 421 B.R. at 794.
153. *Id.* at 795.
154. *Id. See also Hollifield v. Hilton*, 515 S.W.2d 717, 719–21 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.) (holding that where appellants owned and resided on a contiguous sixty-acre rural farm and used eighteen acres as a mobile home park, the eighteen-acre tract was part of the rural homestead).
155. *Norra*, 421 B.R. at 796.
156. *Id.* at 797.
157. *Id.*
158. *Id.*
159. *Id.* at 797–98.

tutes temporary rentals of homestead property.[160] As noted by the court, "*Hollifield* and *Perry* both focused upon the temporary nature of the leases[,] . . . not the overall duration in which the [mobile home] park was in operation."[161] Texas homestead laws are to be construed liberally.[162] Thus, the bankruptcy court felt it was of primary significance that a claimant in Texas be protected by the homestead laws so as not to have "to expend inordinate resources litigating over whether a particular rental ([such as], a home rented on a month-to-month basis while a serviceman was overseas for an extended tour of duty) constituted [a] temporary or permanent rental."[163]

In *Mitchell v. Stringfellow*, the United States Bankruptcy Court for the Eastern District of Texas found that an evidentiary hearing was needed in order to determine whether the use of a mobile home on a sand pit primarily used for commercial purposes constituted the defendant's homestead.[164] The Chapter 7 Bankruptcy Trustee sought enforcement of a non-appealable judgment against the defendant in order to make distributions to creditors in a related bankruptcy suit by foreclosing a judgment lien against the sand pit property owned by the defendant.[165] When the bankruptcy proceeding was commenced, and until the judgment was entered, the defendant was residing in Oklahoma.[166] Shortly after the bankruptcy proceeding was commenced, the defendant and his wife moved their motor home onto the Texas sand pit property.[167] Each party filed a motion for summary judgment seeking a determination as to whether the sand pit qualified as a homestead.[168] The bankruptcy court denied both motions and found that from the facts, it could not make a determination at the summary judgment phase of the case.[169] Although the defendant claimed in his affidavit that he and his wife had moved from Oklahoma in order to make their home in Texas the bankruptcy court found that more evidence was needed in order to make a determination of whether he had truly abandoned the Oklahoma property.[170] The trustee submitted evidence that the defendant's employer used the sand pit primarily for commercial purposes and that the majority of the property located on the land belonged to his employer.[171] However, the bankruptcy court found that the conflicting testimony regarding the land's use created a sufficient fact issue to make summary judgment inappropriate.[172] In light of the significant constitutional character of a resi-

160. *Id.* at 798.
161. *Id.*
162. *Id.*
163. *Id.* at 799.
164. Mitchell v. Stringfellow, 434 B.R. 412, 417–19 (Bankr. E.D. Tex. 2010).
165. *Id.* at 415.
166. *Id.* at 417.
167. *Id.*
168. *Id.* at 415.
169. *Id.* at 418.
170. *Id.* at 418–19.
171. *Id.* at 418.
172. *Id.* at 419.

dent's right to claim a homestead, an assessment of the defendant's intentions could not be made on the record in the absence of an evidentiary hearing to assess the credibility of the witnesses and the evidence regarding the two parcels of land.[173]

2. Liens on Homesteads

The Texas Constitution requires that a lien on a homestead be given voluntarily,[174] and the 2003 amendments to the Texas Constitution "allow the Texas Finance Commission to promulgate interpretative regulations of the home equity loan provisions."[175] The Texas Finance Commission has interpreted section 50(a)(6)(Q)(i) of those provisions "to mean that '[a]n owner may apply for a home equity loan for any purpose.'"[176] Thus, "'[a]n owner is not precluded from voluntarily using the proceeds of an equity loan to pay on a debt owed to the lender.'"[177] Whether the debtor acts voluntarily is to be determined on the facts of each case.[178] In *In re Chambers*, the bankruptcy court found that the couple's financial difficulties necessitated the refinancing of a loan and that the lender's exercising its right to foreclose on the property rendered the debtor's actions involuntary.[179] Further, the economic duress required to show an involuntary agreement must be based on some act of the lender and "not merely on the financial circumstances of the purported victim."[180] The bankruptcy court found that the couple in *Chambers* enjoyed above-average accommodations by the lender and did not enter into the loan agreement until more than three weeks after being made aware of the lender's intention to foreclose.[181] The fact that the couple was facing the loss of their home by foreclosure did not preclude them "from voluntarily entering into a refinancing agreement."[182]

A debtor who utilizes fraudulently-obtained funds as a means of reducing debt on the debtor's homestead cannot invalidate an agreed judgment to provide the injured party with an equitable lien on the property by claiming an exemption in bankruptcy under § 552(f) of the Bankruptcy Code or any other device.[183] In *In re Gamble-Ledbetter*, the debtor had performed bookkeeping services for the creditor for several years.[184] After an extensive investigation indicated that the debtor-bookkeeper had embezzled a large amount of funds, the creditor sued the debtor in state

173. *See id.*
174. TEX. CONST. art. XVI, § 50(a)(6)(A).
175. *In re* Chambers, 419 B.R. 652, 671 (Bankr. E.D. Tex. 2009) (citing TEX. FIN. CODE § 11.308 (West 2010)).
176. *Id.* (alteration in original) (quoting 7 TEX. ADMIN. CODE § 153.18(2) (2006)) (Joint Fin. Regulatory Agencies, Home Equity Lending).
177. *Id.* (alteration in original).
178. *Id.*
179. *Id.* at 671–72.
180. *Id.* at 672.
181. *Id.*
182. *Id.*
183. *In re* Gamble-Ledbetter, 419 B.R. 682, 699–702 (Bankr. E.D. Tex. 2009).
184. *Id.* at 688.

court.[185] On the eve of trial, however, the creditor reached a settlement with the debtor whereby the creditor was awarded an equitable interest in the debtor's homestead.[186] On the same day that the settlement was reached, the debtor filed for a Chapter 7 discharge.[187] The equitable lien was granted to the creditor through an agreed judgment, after the creditor showed substantial evidence indicating that the debtor had made mortgage payments using the embezzled funds. The United States Bankruptcy Court for the Eastern District of Texas found that the creditor held superior equitable title to the property and that title did not constitute an improper impairment of any exemption right of the debtor under § 522(f).[188] Thus, a debtor may not rely on a homestead exemption to invalidate an equitable interest in property in a bankruptcy proceeding when stolen funds of the equitable interest-holder are used for the purchase of the homestead.[189]

In *Fairfield Financial Group, Inc. v. Synnott*,[190] the Austin Court of Appeals joined other courts' interpretations of a statutory homestead exemption and held, contrary to the Third District's previous holding, that "other than the types listed in property code section 41.001(b), judgment liens that have been properly abstracted nevertheless cannot attach to a homestead while that property remains a homestead:"

> A judgment debtor may sell property claimed as homestead and pass title free of any judgment lien, and the purchaser may assert that title against the judgment creditor. A judgment lien may attach to the judgment debtor's interest, however, if he abandons the property as his homestead while he owns it and while there is a properly abstracted judgment lien against him.[191]

In *Fairfield*, the judgment creditor had successfully obtained and abstracted a judgment against the husband's homestead interest.[192] Although the husband later conveyed his interest to his wife pursuant to their final divorce decree, the judgment creditor argued that its interest had properly attached to the husband's ownership interest before the divorce and thus could not pass to the wife.[193] The court of appeals concluded, however, "that the timing and effect of [the husband's] actions [were] irrelevant because the property remained at all relevant times protected by [the wife's] undivided homestead interest in the property."[194] Whether the husband "abandoned his homestead interest before divesting his ownership interest" did not matter because it was undisputed that the wife "had a homestead interest" that "protected the entire property

185. *Id.* at 689.
186. *Id.* at 690.
187. *Id.* at 691.
188. *Id.* at 701.
189. *Id.* 701–02.
190. 300 S.W.3d 316, 316 (Tex. App.—Austin 2009, not pet.).
191. *Id.*
192. *Id.* at 318.
193. *Id.*
194. *Id.* at 321.

and the judgment liens did not attach to any portion of the property."[195]

The Austin Court of Appeals went on to say that although attorney's fees may not be awarded in suits to quiet title, the ban tends to "be limited to cases that [are] essentially trespass to try title suits."[196] Even though the judgment in *Fairfield* had an effect similar to that of a suit to quiet title, the central issue was "whether the homestead had been abandoned such that an encumbrance other than one of those listed in property code § 41.001(b)" could be properly fixed onto the property.[197] Since attorney's fees are recoverable in a declaratory judgment action, the trial court in *Fairfield* did not err in awarding fees to the wife.[198]

IV. DIVISION ON DIVORCE

A. DIVISION PROCEEDINGS

In order for a Texas appellate court to review an appellant's brief, the brief must contain "a clear and concise argument for the contentions [asserted], with appropriate citations to authorities and to the record."[199] In the absence of cited supporting legal authority, a Texas appellate court is under no duty to review the appellant's brief.[200] In *Hernandez v. Hernandez*, the appealing husband argued that the trial court erred when it held him in contempt and awarded monies and arrearages to his wife.[201] On appeal, however, the El Paso Court of Appeals refused to address the appellant's complaints based on the finding that his arguments were unsupported by citations to any relevant legal authority, and therefore failed to support his contentions by applying the law to the facts established in the record.[202] Thus, the court of appeals concluded that the husband had waived these issues.[203]

"[A] default judgment of divorce is subject to an evidentiary attack on appeal."[204] Thus, if a respondent does not appear or answer, the petitioner is still obligated to support material allegations listed in the petition with evidence at trial.[205] In *Vazquez v. Vazquez*, the husband appealed a default divorce decree arguing that the evidence offered at trial was insufficient to support the relief granted to the wife by the trial court.[206] The Houston Court of Appeals agreed; it reversed and re-

195. *Id.* at 323.
196. *Id.*
197. *Id.*
198. *Id. See also* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2008).
199. Hernandez v. Hernandez, 318 S.W.3d 464, 466 (Tex. App.—El Paso 2010, no pet.) (quoting TEX. R. APP. P. 38.1(i)).
200. *Id.* (citing Valdez v. Avitia, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.)).
201. *Id.*
202. *Id.*
203. *Id.*
204. Vazquez v. Vazquez, 292 S.W.3d 80, 84 (Tex. App.—Houston [14th Dist.] 2007, no pet.).
205. *See id.*
206. *Id.* at 82.

manded in part and affirmed in part.[207]

Specifically, the court of appeals found that the appellee-wife had failed to produce evidence to support a divorce on the ground of cruelty.[208] The wife merely referred to an affidavit attached to a petition for a protective order issued prior to the trial.[209] The affidavit alleged that her husband had pulled her out of her car by her hair and forced her to the ground in the presence of their children.[210] The court of appeals pointed out that the wife had cited no authority stating that a party may rely on an affidavit attached to a pretrial motion to satisfy its burden to present evidence at a hearing.[211] Similarly, the wife failed to offer evidence sufficient to support the property division as "just and right."[212] The record was devoid of any specifics regarding the nature or value of the property or debts.[213] Due to the material influence that the property division may have on child-support payments, the issues of child support and insurance were remanded.[214] The husband also contested his obligation to pay attorney's fees, which the court of appeals reversed as the wife failed to offer any evidence regarding the reasonableness of her attorney's fees.[215] Finally, the court of appeals sustained the husband's challenge to the purported agreement between the parties.[216] The contested provisions dealt with alternative dispute resolution, party acknowledgments "about signing the divorce decree," and indemnification "regarding debts incurred by one party for which the other party [might] be liable."[217] Because the husband had never agreed to the contested provisions, the court of appeals sustained his petition.[218]

In *In re Provine*,[219] the couple had agreed to incorporate a mediated settlement agreement into their divorce decree. Their agreement stated that any disputes arising due to performance of the agreement would be settled by binding arbitration.[220] After their divorce, the former wife petitioned for enforcement of the agreement, contending that her former husband had not properly performed his obligations pursuant to the property division set forth in the agreement.[221] The ex-husband moved to compel arbitration according to the arbitration clause in the agreement.[222] The trial court found that the mediation and arbitration provi-

207. *Id.*
208. *Id.* at 84.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 85.
213. *Id.*
214. *Id.* at 86.
215. *Id.*
216. *Id.* at 87.
217. *Id.*
218. *Id.* at 86.
219. 312 S.W.3d 824, 826 (Tex. App.—Houston [1st Dist.] 2009, no pet.).
220. *Id.* at 827.
221. *Id.*
222. *Id.* at 827–28.

sions were merged into the decree of divorce and that post-divorce matters would be determined by the trial court.[223] The Houston First Court of Appeals reversed.

The court of appeals found that, under its continuing jurisdiction, it could only enforce or clarify the decree.[224] The original divorce court's plenary power was not in dispute, and therefore the court of appeals could not amend, modify, or alter the decree.[225] Thus, as the agreement to arbitrate any dispute arising from the performance of the divorce decree was incorporated into the parties' agreement, the court of appeals determined that such an agreement to arbitrate the dispute should be enforced.[226] Finding that the agreement contemplated post-divorce disputes because it related to "performance" of the agreement, the court determined that the former wife's claims in her motion to enforce fell within the scope of the agreement.[227] The court of appeals concluded that the trial court erred in refusing to compel arbitration of the dispute.[228]

In *Chavez v. McNeely*,[229] the Houston First District Court of Appeals affirmed that the trial court granting a divorce does not have exclusive jurisdiction to hear a suit brought to enforce a property settlement agreement entered into upon divorce."[230] As noted by the court of appeals, "[a] suit to recover missed payments does not involve matters incident to divorce, but is instead more akin to an independent action on a contract."[231] Section 9.001 of the Family Code provides that "[a] party affected by a decree of divorce . . . *may* request enforcement of that decree by filing suit to enforce as provided by this chapter in the court that rendered the decree."[232] The language of section 9.001 "is permissive in nature rather than mandatory," and "had the legislature intended § 9.001 . . . to provide exclusive jurisdiction, it could have done so by using clear statutory language."[233] Thus, the court of appeals in *Chavez* found that "the breach of . . . an agreement incorporated into a final divorce decree . . . [in which money damages were sought] invoke[d] the general jurisdiction of the district court."[234]

The court of appeals in *Chavez*, concluded that the support agreement incorporated into the divorce decree, which required the former wife to pay "as much as possible," with amounts limited only by her "personal

223. *Id.* at 828.
224. *Id.* at 829–30.
225. *Id.* at 830.
226. *Id.* at 831.
227. *Id.*
228. *Id.*
229. 287 S.W.3d 840 (Tex. App.—Houston [1st Dist.] 2009, no pet.).
230. *Id.* at 845.
231. *Id.* (citing Underhill v. Underhill, 614 S.W.2d 178, 180 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).
232. TEX. FAM. CODE ANN. § 9.001 (West 2006) (emphasis added).
233. *Chavez*, 287 S.W.3d at 844.
234. *Id.* at 845.

financial situation," toward the former husband's "needs," was too indefinite to be enforced.[235]

In a brief opinion in *Chrisman v. Chrisman*,[236] the El Paso Court of Appeals held that an individual in a dissolution of marriage proceeding does not enjoy a "constitutional right to effective assistance of counsel."[237] After a year of marriage, the husband had filed for divorce and his wife counter-petitioned.[238] The final decree, grounded on insupportability, awarded the "marital home, its contents," and two vehicles to the husband.[239] "The wife was awarded spousal maintenance in the [total] amount of $5,000 . . . [over a period of ten months] . . . and $750 in attorney's fees.[240] The wife appealed the judgment on the ground that she was denied the effective assistance of counsel.[241] "She cite[d] no authority for her" position, nor did the court of appeals find any such support.[242] The court of appeals noted that "while the constitutional right of effective counsel has been extended to certain civil proceedings," this case was not one of them.[243] This case was neither a termination of parental rights nor was the wife a subject of an involuntary civil commitment proceeding.[244] Thus, the wife was not a litigant afforded the right to effective assistance of counsel.[245] Because no Texas court has recognized a constitutional right to effective assistance of counsel in a dissolution proceeding, the court of appeals affirmed the trial court's holding.[246]

To prevail on a restricted appeal, an appellant must demonstrate that: (1) the notice of restricted appeal was filed within six months of the date of the judgment or order; (2) he was a party to the suit; (3) he did not participate in the hearing and did not timely file a post-judgment motion or request findings of fact and conclusions of law; and (4) error is apparent on the face of the record.[247] In determining the non-participation requirement of a restricted appeal, the Texas Supreme Court asked "whether the appellant took part in the decision making event that result[ed] in the adjudication of [his] rights."[248] Because "[t]he decision

235. *Id.*
236. Chrisman v. Chrisman, 296 S.W.3d 706, 706 (Tex. App.—El Paso 2009, no pet.).
237. *Id.* at 706–07.
238. *Id.* at 707.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*; *see In re* M.S., 115 S.W.3d 534, 544 (Tex. 2003) (finding that parents are entitled to effective assistance of counsel in termination proceedings); *see also In re* Protection of H.W., 85 S.W.3d 348, 355–56 (Tex. App.—Tyler 2002, no pet.) (finding that individuals in involuntary civil commitment proceedings have the right to effective assistance of counsel).
244. *Chrisman*, 296 S.W.3d at 707.
245. *Id.*
246. *Id.*
247. *See* TEX. R. APP. P. 30; *see also* Alexander v. Lynda's Boutique, 134 S.W.3d 845, 848 (Tex. 2004).
248. Texaco, Inc. v. Cen. Power & Light Co., 925 S.W.2d 586, 589 (Tex. 1996); Parsons v. Dallas Cnty., 182 S.W.3d 451, 453 (Tex. App.—Dallas 2006, no pet.).

making event is the proceeding in which the questions of law and fact are decided . . . [i]n a divorce case, it follows that the decision-making event is the event in which the final divorce decree is proven up."[249]

In *Cox v. Cox*, the Austin Court of Appeals found that when there are substantive differences between a settlement agreement and the final divorce decree, "those differences make the hearing where the final decree was proven up and entered the decision-making event."[250] Prior to the hearing in *Cox*, the parties had signed a negotiated settlement agreement for temporary orders.[251] However, at the default judgment hearing (from which the husband was absent) the divorce decree contained substantive differences from the written settlement agreement.[252] These differences included provisions for the division of marital property, custody of the children, and attorney's fees—none of which were included in the written settlement agreement.[253] Thus, the court of appeals found that the husband "did not participate in the decision-making event by participating in the settlement negotiations and signing the settlement agreement where the final divorce decree [was] substantively different from the written settlement agreement."[254]

Further, the court of appeals examined whether there was error on the face of the record in accordance with the fourth requirement of a restricted appeal.[255] The husband contended that he was not properly served with the first amended petition.[256] Addressing this issue, the court of appeals found that because the wife did not serve the husband with the amended petition until the morning of the default hearing, and because the address at which she served him was the address of the marital property that was awarded to her by the temporary order, the husband "was not [properly] served in strict compliance with the rules of civil procedure."[257] Moreover, because the amended petition requested more onerous relief than the written settlement agreement, the court of appeals found that the husband could not have been given "constructive notice such that [she] did not have to serve him [with the amended petition] in accordance with Rule 21(a)."[258]

In general, when a party to a suit dies the suit will not abate if the cause of action survives the death of that party.[259] "[I]t is well settled that a cause of action for a divorce is purely personal and the cause of action for

249. Cox v. Cox, 298 S.W.3d 726, 731 (Tex. App.—Austin 2009, no pet.); *see* Barnett v. Barnett, 750 S.W.2d 881, 883 (Tex. App.—Dallas 1988, no writ).
250. *Id.* at 730, 732.
251. *Id.* at 729.
252. *Id.*
253. *Id.*
254. *Id.* at 732.
255. *Id.*
256. *Id.*
257. *Id.* at 732–33; *see* TEX. R. CIV. P. 21 (requiring service at least three days before the hearing unless the time is shortened by the court); TEX. R. CIV. P. 63 (requiring leave of the court before filing an amended pleading within seven days of date of trial).
258. *Id.* at 734.
259. TEX. R. CIV. P. 150.

a divorce terminates on the death of either spouse prior to the rendition of a judgment granting a divorce."[260] Furthermore, "[t]he death of either party to the divorce action prior to entry of the divorce decree withdraws the court's subject matter jurisdiction over the divorce action."[261] Although seemingly simple, such a rule can have very significant consequences as illustrated by *Pollard v. Pollard*.

In *Pollard*, the wife had filed for divorce from her husband in 1992 (*Pollard I*).[262] The trial court signed a final decree of divorce in 1996 (First Decree), and the husband appealed the judgment.[263] As the trial court had entered a judgment based on a repudiated settlement agreement, the cause was remanded.[264] Neither ex-spouse filed a motion for rehearing regarding the opinion.[265] Following the remand of *Pollard I*, the ex-wife filed and received a final divorce decree signed by the trial court in May 2001 (Second Decree).[266] The husband appealed and the appellate court "concluded that the trial court abused its discretion when it denied [his] motion to disqualify [his ex-wife's] attorney" and again, the judgment was reversed and remanded to the trial court.[267] However, before litigation proceeded on remand, and unknown to the trial court or the husband, the wife died in October 2004.[268] A probate action was then instituted in Dallas County, and the Pollards' son was appointed independent executor of the estate of his mother in February 2005.[269] Shortly thereafter, the husband learned of his wife's death and filed a number of unsecured claims against her estate in the probate proceeding.[270] However, still unaware of the wife's death, the trial court in the divorce case dismissed it for want of prosecution in February 2005.[271] No appeal of the dismissal was filed until August 2007, when the husband filed a motion to vacate the trial court's dismissal for want of prosecution and a motion to dismiss the divorce case for lack of subject matter jurisdiction. The couple's son, who was his mother's executor, filed a notice of appear-

260. Pollard v. Pollard, 316 S.W.3d 246, 250 (Tex. App.—Dallas 2010, no pet.) (quoting Garrison v. Tex. Commerce Bank, 560 S.W.2d 451, 453 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.)).

261. *Id.* (citing Garcia v. Daggett, 742 S.W.2d 808, 810 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding [leave denied]) (the death of wife immediately deprived the court of jurisdiction over the divorce action, and temporary custody orders entered after the death of wife were void); Parr v. White, 543 S.W.2d 445, 448 (Tex. Civ. App.—Corpus Christ 1976), *writ ref'd n.r.e. by per curiam op.*, 559 S.W.2d 344, 344 (Tex. 1977) (death of either party prior to entry of divorce decree withdraws court's subject matter jurisdiction of underlying divorce litigation)).

262. *Id.* at 247.

263. *Id.*

264. *Id.*

265. *Id.* at 247–48.

266. *Id.* at 248.

267. *Id.* (citing Pollard v. Merkel, 114 S.W.3d 695 (Tex. App.—Dallas 2003, pet. denied) (*Pollard* II)).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

ance in September 2007.[272] A year later, the trial court signed an order vacating as void the February 2005 order of dismissal for want of prosecution and, in light of the wife's death, dismissed the divorce action for want of jurisdiction.[273] The executor-son's appeal followed.[274]

The central issue on appeal in determining the trial court's jurisdiction was whether the couple were divorced at the time of the wife's death.[275] According to her son, the executor, they were divorced as of the date of the First Decree and the subsequent reversal of the First Decree applied only to the division of the marital property.[276] The husband took the position "that because he [had] not file[d] a notice of limitation of appeal, pursuant to the former Rule of Appellate Procedure 40(a)(4), . . . the entire case was [before the Dallas Court of Appeals] on appeal."[277] The executor "admitt[ed] in his appellate brief in *Pollard I*" that ["the husband had] limited his notice of appeal" by not contesting the dissolution of the marriage.[278] The court of appeals nevertheless found that "[t]he only way Pollard could have limited the scope of his appeal in *Pollard I* was by filing the notice under former Rule 40(a)(4)."[279] Thus, the court stated that the "appeal was not limited to the division of marital property, and the statements in [the husband's] brief did not restrict the court of appeal's jurisdiction over the trial court's judgment."[280] In cases in which an appellate court has severed the issue of divorce and remanded for re-division of the property alone, the court of appeals has done so explicitly with clear instructions to the trial court regarding the severance.[281] In this case, the wife's death in 2004 meant that after the court of appeals reversed and remanded *Pollard II*, the couple were still married.[282] Thus, the trial court lacked jurisdiction to decide the question of divorce in 2005.[283] Because the proper procedural disposition is to dismiss the divorce case when one of the parties to a divorce dies, the trial court's February 2005 dismissal was proper.[284]

The Dallas Court of Appeals in *Smith v. Deneve*, addressed the issue of awarding attorney's fees in an alleged informal marriage dispute.[285] The trial court awarded attorney's fees to the alleged wife when the alleged husband filed for divorce, and the trial court issued summary judgment denying the existence of an informal marriage.[286] The alleged husband

272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* at 249.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at 250.
283. *Id.* at 251.
284. *Id.*
285. 285 S.W.3d 904, 908, 916 (Tex. App.—Dallas 2009, no pet.).
286. *Id.* at 917.

appealed, claiming that his alleged wife "specifically pled for recovery of fees under Texas Rule of Civil Procedure 13 but [had] not prove[d] the elements of that rule."[287] As a general rule, "[w]hen a party pleads a specific ground for recovery of attorney's fees, that party is limited to that ground and cannot recover attorney's fees on another, unpleaded ground."[288]

The court of appeals held that the alleged wife's pleadings were sufficiently general to permit her to argue any available legal basis to support an award of attorney's fees.[289] The court distinguished *Kreighbaum v. Lester*, stating:

> In *Kreighbaum*, the plaintiff sued the defendants for breach of contract, fraud, and violation of the Deceptive Trade Practices Act (DTPA). The defendants asserted a counterclaim that the plaintiff's DTPA claims were groundless and that defendants were therefore entitled to attorney's fees under § 17.50(c) of the Texas Business & Commerce Code.". . . Because the defendants' subsequent motion for attorneys' fees relied on a fee-shifting clause in the parties' contract and not the DTPA, the jury did not award attorney's fees.[290]

In contrast, "[the respondent] in *Smith* "did not cite any specific rule . . . as [the] sole ground for [her attorney's fees]."[291] With her general pleadings, she was allowed to rely on any particular provision of law to support an award for attorney's fees.[292]

The alleged husband also contended that his alleged wife could not rely on the Family Code section 6.708(a) as a basis for her award of attorney's fees.[293] He argued that the statute required a finding of a marriage relationship before an award could be made.[294] The alleged husband also asserted that the award would only cover the divorce claim, not the entire suit. The court of appeals denied both of his claims.[295] The court of appeals found that section 6.708(a) does not require that a marriage be proved as a prerequisite for an award of attorney's fees.[296] That statute also "authorizes the recovery of all attorneys' fees incurred in a 'suit' for dissolution of a marriage, [not merely those for the] defense of a 'claim' for dissolution."[297]

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287. *Id.* at 916.
288. *Id.* (quoting Kreighbaum v. Lester, No. 05-06-01333-CV, 2007 WL 1829729, at *2 (Tex. App.—Dallas June 27, 2007, no pet.) (mem. op.)).
289. *Id.* at 917.
290. *Id.* at 916–17.
291. *Id.*
292. *Id.* at 917.
293. *Id.*
294. *Id.*
295. *Id.* at 917–18.
296. *Id.*
297. *Id.* at 918.

B. Making the Division

In *Mandell v. Mandell*, the "primary issue [addressed by the Fort Worth Court of Appeals was] whether the trial court erred by excluding [the former wife's] evidence valuing [the former husband's] interest in (a professional association)."[298] The couple, both physicians, were married in 1989.[299] During their marriage, the husband entered into an employment agreement and a stock purchase agreement with Oncology-Hermatology Consultants, P.A. (the Association).[300] Under that agreement, the Association agreed to sell the husband 22,000 shares of common stock at fifty cents per share for a total purchase price of $11,000.[301] By their agreement, the Association required the husband and wife to sign a shareholders' agreement. That agreement specifically addressed voluntary and involuntary stock transfers in the event of divorce.[302] It went on to provide that if any of the Association's shares were divided between the couple by a divorce court, the divorced shareholder was required to purchase "all but not less than all" of his stock from the former spouse at fifty cents per share.[303] Although the Association also required both spouses to sign a shareholders' agreement, neither spouse actually signed it.[304]

"Approximately three years after [the husband] had executed the stock purchase agreement, [the wife] filed for divorce."[305] The district court divided the parties' property but refused to allow the wife to present expert testimony concerning the value of her husband's shares in the Association.[306] The trial court found "that the Stock Purchase Agreement between [the husband] and the Association was subject to the terms of the Shareholders Agreement and that, as a matter of law, the Shareholders Agreement between [the husband] and the Association was valid and enforceable [against the wife].[307]

On appeal, the wife argued that the trial court erred when it used the shareholders' agreement to value the husband's 22,000 shares in the Association at $11,000.[308] She asserted that the stock should have been valued at its fair market value and that the trial court had erred when it did not allow her to support the fair market value through expert testimony and other evidence.[309] The husband, however, offered evidence that

298. 310 S.W.3d 531, 533 (Tex. App.—Fort Worth 2010, pet. denied), *remanded by* no. 02-09-0032-CV, 2010 Tex. App. LEXIS 9961 (Tex. App.—Fort Worth 2010, no pet.) (mem. op.).
299. *Id.*
300. *Id.*
301. *Id.* at 533.
302. *Id.* at 533–34.
303. *Id.*
304. *Id.* at 534.
305. *Id.*
306. *Id.* at 535.
307. *Id.* at 534.
308. *Id.* at 535.
309. *Id.*

"conclusively established that when three of the Association's seven physician-shareholders retired or had left the practice [in the past], they were each paid [fifty cents] per share . . . pursuant to the shareholders agreement" and that the same treatment was his right.[310]

By statute, Texas professional associations have the same powers, privileges, duties, restrictions, and liabilities as for-profit corporations.[311] Accordingly, the court of appeals found that "[t]he Association's property, accounts receivable, retained earnings, and surplus funds [were] not assets of [the couple's] community estate,"[312] and "[therefore] were not subject to division by the trial court."[313]

As the partnership was a closely held corporation, "the assets and profits of a professional association belong[ed] to the entity,"[314] and the shareholders' agreement specifically addressed stock ownership and value in the event of divorce. The court of appeals therefore overruled the wife's argument that she was entitled to prove the fair market value of her husband's interest in the Association through expert testimony.[315]

Finally, the court of appeals upheld the trial court's decision to grant the husband's motion for judgment notwithstanding the verdict concerning his attorney's fees.[316] The trial court merely found that his attorney's fees were reasonably calculated at $200,000 rather than "zero," as determined by the jury.[317] The trial court did not order the wife to pay for her husband's attorney's fees, and nothing in the record indicated that if the husband's motion for judgment *non obstante veredicto* had not been granted, the wife would have been awarded attorney's fees to be paid by the husband.[318] As noted by the court of appeals, the "trial court possesses broad discretion to award either spouse attorney's fees as a part of the just and right division of the marital estate."[319]

In *Swaab v. Swaab*, the husband "challenge[d] the trial court's final judgment in his suit for divorce."[320] The trial court had ordered that the husband assume full responsibility for repayment of any loans owed to the husband's mother, who had provided financial assistance over the course of the marriage.[321] The husband argued that the wife's proposed property division, as well as his own, outlined an equal allocation of payments for the loans to his mother.[322] Finding that the settlement agreement made no particular mention of the loan to the husband's mother,

310. *Id.* at 538.
311. *Id.* at 539.
312. *Id.*
313. *Id.*
314. *Id.* at 539–40 (*Cf.* TEX. BUS. ORGS. CODE ANN. § 152.202(c)).
315. *Id.* at 541.
316. *Id.*
317. *Id.* at 542.
318. *Id.*
319. *Id.*
320. 282 S.W.3d 519, 522 (Tex. App.—Houston [14th Dist.] 2008, pet. dism'd w.o.j.).
321. *Id.* at 527.
322. *Id.*

but that the agreement required each party to assume debts in the respective parties' names, the Houston Fourteenth District Court of Appeals found no abuse of discretion in the trial court's decision to hold the husband solely responsible for the debt.[323] "Moreover, [the mother] testified that if the loans were not repaid, the debt would be taken out of [the husband's] inheritance."[324] Thus, the trial court reasonably concluded that the loans were made only to the husband.[325]

The husband also contended that the trial court had failed to make a "just and right" division of the marital property.[326] The husband's contention on appeal that the lack of explanation as to how the divorce decree differed from the settlement agreement failed to show evidence of his repudiation or objection to the agreement.[327]

In response to the husband's complaint that the trial court did not allow a reasonable time for review of the final decree proposed by the wife, the court of appeals reviewed the transcript of an exchange discussing when documents were presented.[328] The court of appeals found that nowhere in the record had the husband or his attorney established when they received the proposed judgment from the wife's attorney.[329] Accordingly, the trial court had not failed to offer the husband "a reasonable time to review the proposed decree before it entered its order."[330] Finally, in *Swaab*, the court of appeals affirmed the trial court's requirement for the parties to attempt mediation.[331] The husband argued that the trial court exceeded its authority in mandating mediation.[332] On appeal however, the divorce decree was found to require an "*attempt* to mediate" and was found to be within the trial court's power to order.[333]

On appeal in *Knight v. Knight*,[334] the former wife in an informal marriage contended on appeal "that the trial court failed to factor in [a] $65,000 home equity loan in its valuation" against the community assets.[335] Although originally purchased by the couple in 1995, the former husband "deeded 100% of his interest in the property to [his former wife] via a special warranty deed" in 1999. And "[i]n 2006, [she] borrowed $65,000 and granted a home equity lien against the . . . property to secure the loan." The trial court found that "[the former husband] had gifted the . . . property to his [former wife]" by conveying all of his interest to

323. *Id.* at 527–28.
324. *Id.* at 528.
325. *See id.*
326. *Id.*
327. *Id.* at 528–29.
328. *Id.*
329. *Id.*
330. *Id.* at 530.
331. *Id.* at 532.
332. *Id.* at 531.
333. *Id.* at 531–32.
334. Knight v. Knight, 301 S.W.3d 723, 723 (Tex. App.—Houston [14th Dist.] 2009, no pet.).
335. *Id.* at 732.

her, and thus the $65,000 loan was her separate property.[336] The Houston Fourteenth Court of Appeals affirmed the trial court's assessment but found that the trial court nonetheless "fail[ed] to factor in the debt in its valuation of the. . . property . . . [since] the court valued the . . . property at $72,383.00 without considering the outstanding $65,000 loan."[337] Because the value of the wife's separate estate was reduced by two-thirds when the loan was taken into account, the trial court erred in its determination of a just and right division of the community estate.[338]

Because "[p]roceeds of an insurance policy are by statutory definition nontestamentary in nature,"[339] a personal representative of the estate does not have standing to pursue a claim on behalf of the estate or himself when neither is a named beneficiary of the policy.[340] In *Irwin v. Irwin*,[341] the San Antonio Court of Appeals reversed a trial court's summary judgment which had granted the decedent's estate a constructive trust over all life insurance proceeds received by the decedent's ex-wife in a policy that named her as a beneficiary.[342] Although the divorce decree entered into between the decedent and his ex-wife provided that he was to be awarded "any and all policies insuring his life," and even though the decedent had stated in his will that it was his "specific intent not to provide" for his ex-wife, he had "never changed the designation of his life insurance beneficiaries."[343] The court of appeals therefore found that the trial court had erred in providing the estate a claim to the proceeds.[344]

In affirming the trial court's division of assets in *Leax v. Leax*,[345] the Houston First District Court of Appeals found that, although the record supported the wife's argument that she had a lower potential for future earning than the husband due to a disability, the trial court might consider the wife's fraud and fault when ordering an unequal division of the community property.[346] Although seemingly routine in its division of the marital estate, the court of appeals in *Leax* was "unable to find any cases from Texas courts specifically articulating the proof necessary to warrant annulling a marriage on the basis of fraud."[347] Decisions from other jurisdictions have generally "held that marriages can be annulled on the basis of fraud only if the fraud concerns an issue essential to the mar-

336. *Id.*
337. *Id.*
338. *Id.*
339. Tramel v. Estate of Billings, 699 S.W.2d 259, 262 (Tex. App.—San Antonio 1985, no writ).
340. Irwin v. Irwin, 307 S.W.3d 383, 385–86 (Tex. App.—San Antonio 2009, pet. denied).
341. *Id.* at 383.
342. *Id.* at 384–85.
343. *Id.* at 384.
344. *Id.* at 386.
345. Leax v. Leax, 305 S.W.3d 22, 25 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).
346. *Id.* at 34–35.
347. *See id.* at 29.

riage."[348] Although "[s]everal courts have held that the nondisclosure of a prior marriage and divorce does not qualify as an extreme enough fraud to annul a marriage,"[349] in *Leax*, the husband found out that his wife had previously been married eight times only after she initiated a suit for divorce.[350] The husband testified that prior to marrying her, the wife "told him that she had only been married [three times]" before.[351] Even though the wife had told him about the three previous marriages, the husband testified "that if he had known [that she] had actually been married eight times previously, he would not have married her."[352] The court of appeals found that the wife's concealment of five previous marriages was "extreme" and that it was "sufficient to justify annulment based on [the wife's] use of fraud 'to induce [the husband] to enter into the marriage' under section 6.107 of the Family Code."[353]

The Uniformed Services Former Spouses' Protection Act (USFSPA) "provides state courts the authority to treat 'disposable retired pay' as community property."[354] The United States Supreme Court has held, however, that USFSPA bars state courts from treating military retirement pay that has been waived to receive VA disability benefits as property divisible upon divorce.[355] Moreover, Texas courts have held that "only military disability pay that was an earned property right can be divided upon divorce."[356] The Texas Supreme Court has held that VA "disability benefits are is not an earned property right."[357] Further, "a divorce decree cannot restrict a service member's future right to waive retirement and elect disability Veteran's Administration benefits."[358] Thus, even a spouse's "military retirement pay, even after it is a vested right and [is therefore] part of the community, is subject to defeasance."[359]

In *Hagen v. Hagen*, the ex-wife nevertheless argued that at the time that the final decree of divorce was entered in 1976, Texas courts had regarded disability pay as an earned property right.[360] The ex-wife also argued that the ex-husband's post-divorce election to waive military retirement pay in favor of receiving VA disability benefits amounted to a collateral attack on the decree and was barred by res judicata.[361]

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348. *Id.* at 29–30 (citing numerous cases in which fraud was found to affect the essential nature of the marriage).
349. *Id.* at 30.
350. *Id.* at 25.
351. *Id.* at 30.
352. *Id.*
353. *Id.* at 31.
354. Hagen v. Hagen, 282 S.W.3d 899, 901 n.1 (Tex. 2009); *see* 10 U.S.C. § 1408(c)(1) (2006).
355. *Id.* (citing Mansell v. Mansell, 490 U.S. 581, 594–95 (1989)).
356. Busby v. Busby, 457 S.W.2d 551, 552–53 (Tex. 1970); Dominey v. Dominey, 481 S.W.2d 473, 474 (Tex. Civ. App.—El Paso 1972, no writ); Ramsey v. Ramsey, 474 S.W.2d 939, 940–41 (Tex. Civ. App.—Eastland 1971, writ dism'd).
357. *Hagen*, 282 S.W.3d at 903.
358. Gillin v. Gillin, 307 S.W.3d 395, 398 (Tex. App.—San Antonio 2009, no pet.).
359. *Id.*
360. *Hagen*, 282 S.W.3d at 903.
361. *Id.*

In *Hagen*, the trial court had awarded the wife "[o]ne-half of 18/20ths of *all* Army Retirement Pay or Retirement Military Pay."[362] The decree made no mention of VA disability compensation.[363] Because the decree did not define "Army Retirement Pay" or "Military Retirement Pay," the supreme court was left to interpret the decree based on the plain meaning of the words used.[364] Thus, the supreme court examined whether, at the time the decree was entered, military retirement pay included VA disability compensation.[365] The supreme court began by noting that in 1976, federal law provided two means by which a former service member could receive disability-related compensation: retirement pay for a physical disability under Title 10 of the United States Code (USC) and VA disability compensation under Title 38.[366] Under Title 10, if a member meets the requirements for disability, the member can be placed in retirement status with "retired pay."[367] Title 38, on the other hand, does not retire the member but *compensates* the member for a disability as a result of his service.[368] Thus, unlike military disability pay, "VA disability benefits were characterized as a gratuity based upon a service-connected disability rather than an earned property right based upon years of service."[369]

In analyzing the ex-wife's contention that the ex-husband's post-divorce election to waive military retirement pay in favor of VA disability pay was a collateral attack on the decree, the Texas Supreme Court stated that "asserting the USFSPA as justification for violating provisions of a final divorce decree could constitute a collateral attack under some circumstances."[370] However, under the circumstances of *Hagen*, the supreme court found that, rather than making an assertion that required the decree to be altered or modified, the husband sought enforcement of the specific language used in the decree, which was not barred by res judicata or inconsistent with the Texas Family Code.[371] Relying on precedent, the supreme court distinguished between decrees in which the non-service member spouse was awarded a portion of the service member spouse's *gross* retirement or disability benefits from decrees in which the literal language used only pertained to a portion of the service member's retire-

362. *Id.* at 901 (emphasis added).
363. *Id.* at 906.
364. *Id.* at 902.
365. *Id.* at 902–03.
366. *Id.*; *see* Act of 1956, ch. 61, 70A Stat. 91 (current version codified as amended at 10 U.S.C. § 1201 (2006)) (armed forces); Act of Sept. 2, 1958, subch. II, 72 Stat. 1119 (current version codified as amended at 38 U.S.C. § 1110 (2006)) (veterans' benefits).
367. *Hagen*, 282 S.W.3d at 902.
368. *Id.* at 903; *see* Ramsey v. Ramsey, 474 S.W.2d 939, 941 (Tex. Civ. App.—Eastland 1971, writ dism'd).
369. *Hagen*, 282 S.W.3d at 903 (citing *Ramsey*, 474 S.W.2d at 941); *see also* Milliken v. Gleason, 332 F.2d 122, 123 (1st Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965) (holding that because the payment of VA disability compensation is at the discretion of the United States Congress, such compensation is not considered property).
370. *Id.* at 903–04.
371. *Id.*; TEX. FAM. CODE ANN. §§ 9.006–.007 (a trial court may not modify or amend the substantive division of property set out in a final decree but may construe and clarify a decree to achieve proper enforcement).

ment pay.[372] For instance, in *Baxter v. Ruddle*, the decree specifically referenced and divided *gross* retirement benefits and VA disability benefits.[373] The husband remained in the service after the divorce and later failed to pay his former wife the percentage, provided for in the divorce decree, in proportion to the growth of the amount he received after the divorce. Consequently, the Supreme Court of Texas held that the trial court erred when it determined that the wife was only entitled to a percentage valued at the time of divorce.[374] Similarly in *Berry v. Berry*, the wife was awarded 25% of the husband's *gross* pay, not net pay.[375] When the husband "later elected to accept VA disability benefits . . . . [t]he wife began receiving a percentage of the reduced retirement pay and sought to enforce the decree's literal language that awarded her a portion of the husband's gross retirement pay."[376] The trial court found that "the wife was [only] entitled to a twenty-five percent of the husband's net . . . disability pay," and "[t]he court of appeals affirmed."[377] On final review, the Texas Supreme Court held that the decree should be enforced according to its literal language, and unless the decree was void, "the subsequent adoption of the USFSPA cannot be used to collaterally attack the . . . final divorce decree."[378] Thus, the wife was entitled to "a percentage of what she proved was the husband's gross retirement pay."[379] In *Jones v. Jones*,[380] the San Antonio Court of Appeals similarly held that a husband's "attempt to apply the USFSPA to alter the substantive provisions of the (divorce) decree" amounted to a collateral attack on the "unappealed decree."[381] As in *Berry*, "the decree was enforced according to its original language."[382]

Unlike the approach in *Baxter*, *Berry*, and *Jones*, the ex-husband in *Hagen* was not attempting to modify, alter, or change the prior final decree's provisions.[383] "Only an attempt to judicially alter or change the substantive provisions of a final decree constitutes a prohibited collateral attack."[384] As previously noted, "military pay" is not and does not include VA disability pay.[385] "The literal language employed [by the decree] does not specify division of *gross* military pay."[386] Nor does the decree "specify a division of VA disability benefits."[387]

372. *Hagen*, 282 S.W.3d at 903–06.
373. *Id.* at 903-04; *see* Baxter v. Ruddle, 794 S.W.2d 761, 762–63 (Tex. 1990).
374. *Hagen*, 282 S.W.3d. at 904.
375. *Id.* at 904–05; *see* Berry v. Berry, 780 S.W.2d 846, 849–50 (Tex. App.—Dallas 1989), *rev'd per curiam*, 786 S.W.2d 672 (Tex. 1990).
376. *Hagen*, 282 S.W.3d at 904.
377. *Id.* at 905.
378. *Id.* at 904–05.
379. *Id.*
380. 900 S.W.2d 786, 789 (Tex. App.—San Antonio 1995, writ denied).
381. *Hagen*, 282 S.W.3d at 905.
382. *Id.*
383. *Id.*
384. *Id.*; *see* Reiss v. Reiss, 118 S.W.3d 439, 442 (Tex. 2003).
385. *Hagen*, 282 S.W.3d at 905–06.
386. *Id.* at 906 (emphasis added).
387. *Id.*

Contrary to the dissenting judge's view that the decree in *Berry* divided VA disability benefits, the supreme court again focused on the literal language employed and held that because the decree in *Berry* stated that the wife was to receive "the *gross amount thereof before any deductions*," VA disability was not divided.[388] The ex-wife simply received her community share of the ex-husband's retirement pay before the VA disability offset the husband's amount.[389] Therefore, the trial court in *Berry* was merely clarifying the decree and enforcing it as written.[390] The decree in *Hagen*, on the other hand, did not specifically address or compute the ex-wife's amount based on any similar computations of the husband's *gross* pay.[391] Although the dissent urged that *Berry* should be overruled in order to address the issue of VA disability properly, the majority concluded *Berry* did not divide VA disability benefits and therefore *Berry* should not be overruled.[392]

Similar to the VA benefits at issue in *Hagen*, Combat-Related Special Compensation (CRSC) is statutorily defined as different from retired pay and may be received in lieu of full retirement pay.[393] In *Sharp v. Sharp*, the former husband had applied for and had begun to receive CRSC that reduced the former wife's share of the ex-husband's retirement benefits "substantially."[394] In her motion to enforce and clarify the decree, the ex-wife alleged that such an election violated the terms of the decree by reducing her share of the husband's military retired pay.[395] On appeal, she did not dispute that the husband, whose disability was calculated at 100%, was entitled to receive CRSC in lieu of retirement pay.[396] She argued, however, that such an election "obligated [her husband] to reimburse her for her loss."[397] Much like the divorce decree in *Hagen*, the decree in *Sharp* only awarded the wife "a percentage of [the husband's] military retirement pay if, as, and when he received it."[398] "The statute [authorizing CRSC] specifically states that 'payments under [the statute] are not retired pay.'"[399] Because the decree in *Sharp* only awarded the wife military retirement pay, the San Antonio Court of Appeals held that the decree was unambiguous.[400] Despite the inequity worked on the ex-wife, the language used in the divorce decrees had to be read literally because there is a presumption that the divorce court chooses its words carefully.[401]

388. *Id.* at 906–07.
389. *Id.* at 906.
390. *Id.* at 907.
391. *Id.*
392. *Id.* at 907–08.
393. 10 U.S.C. § 1413a(g) (2006).
394. 314 S.W.3d 22, 25 (Tex. App.—San Antonio 2009, no pet.).
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*

The Edinburg Court of Appeals in *Thomas v. Piorkowski*[402] reversed the trial court's clarification order by which the former wife was awarded a portion of the ex-husband's disability benefits based on a final divorce decree's calculation of "disposable pay."[403] Although both cases involved similar resolutions of the language used in the decree which divided the husband's service-related retirement pay, the circumstances at issue in *Thomas* were quite different from those in *Hagen*. The former husband, in *Thomas*, had not made a voluntary election to reduce the amount of retirement pay awarded to the wife in the divorce decree. Thomas and Piorkowski had been divorced in 2004.[404] The divorce decree had awarded Piorkowski, the former wife, 50% of Thomas's disposable retired pay accrued between May 25, 1996 and the day the couple signed the decree.[405] In 2006, "Thomas was placed on the Temporary Disability Retirement List (TDRL) . . . with a thirty percent disability rating."[406] After "Thomas began receiving benefits [as] computed under § 1401,[407] . . . Piorkowski sought to recover, as disposable retire[ment] pay, her share of Thomas's TDRL benefits."[408] In clarifying the decree, the trial court found that the payments that Thomas had received since being placed on the TDRL were disposable retirement pay.[409] As previously noted, however, Thomas did not voluntarily elect to be classified as retired.[410] Nor did he meet the requisite eligibility "for . . . . retirement based on longevity" of service.[411] "Thomas was not eligible for any retired pay other than that based on his disability."[412] Under USFSPA, "disposable retired pay" specifically excludes temporary disability benefits.[413] Since Thomas's "*gross* pay . . . was computed using the percentage of disability *on the date* he was placed on the TDRL," the entire amount "was not disposable retired pay[414] and therefore was not divisible as marital property."[415]

C. Ex-Spousal Maintenance

A trial court may not order income withholding for alimony payments pursuant to chapter 8 of the Texas Family Code when the divorce decree merely restates a party's contractual alimony agreement entered into

402. Thomas v. Piorkowski, 286 S.W.3d 662, 622 (Tex. App.—Corpus Christi 2009, no pet.).
403. *Id.* at 665–66.
404. *Id.* at 664.
405. *Id.*
406. *Id.*
407. 10 U.S.C. § 1401 (2006).
408. *Thomas*, 286 S.W.3d at 664.
409. *Id.* at 664–65.
410. *See id.* at 666–67.
411. *Id.* at 667.
412. *Id.*
413. *Id.* at 666.
414. *Id.* at 666–67 (emphasis added) (citing Bullis v. Bullis, 467 S.E.2d 830, 836 (Va. Ct. App. 1996) (en banc)).
415. *Id.* at 666.

prior to entry of the divorce decree.[416] In *Kee v. Kee*, the parties entered into a partition or exchange agreement which provided that, if they should separate, the husband would provide monthly financial support for the wife and their two children in the amount of $3,400.[417] When the parties divorced, the trial court ordered the husband to pay child support and alimony in accordance with the agreement.[418] Within less than one year, the wife filed a notice of application for a writ of withholding for the alimony payments.[419] "The associate judge denied the [husband's] motion to abate" the proceeding, but after appealing to the district court, "[t]he trial court terminated the writ of withholding."[420] The Dallas Court of Appeals affirmed the trial court's termination of the writ and found that the husband did not have a duty to support the wife beyond his contractual obligation.[421] Rather than making reference to the specific statutory framework of alimony payments in accordance with chapter 8, the divorce decree simply restated the agreement.[422] Moreover, the decree provided that alimony payments were to be made over a period of seventeen years—which is a direct violation of the three-year limitation period set out in chapter 8.[423] Thus, the court of appeals found that the husband's promise to pay alimony created nothing more than a private debt unenforceable by a writ of withholding.[424]

D. Enforcement

Without decretal language making clear that a party is under order, agreements incorporated into divorce decrees are enforced only as contractual obligations.[425] Obligations that are merely contractual cannot be enforced by contempt.[426] For example, the Supreme Court of Texas in *In re Coppock*,[427] set aside an order of contempt as void "[b]ecause the underlying judgment . . . lack[ed] decretal language necessary for enforcement by contempt."[428]

"The trial court's final [divorce] decree . . . incorporated a mediated settlement agreement [that] permanently enjoined [the couple] from communicating with each other 'in a coarse or offensive manner.' "[429] After the ex-wife allegedly violated this provision in telephone and e-mail

416. *See* McCollough v. McCollough, 212 S.W.3d 638, 648 (Tex. App.—Austin 2006, no pet.).
417. 307 S.W.3d 812, 813 (Tex. App.—Dallas 2010, pet. denied).
418. *Id.*
419. *Id.*
420. *Id.*
421. *Id.* at 815.
422. *Id.*
423. *See* Tex. Fam. Code Ann. § 8.054 (West 2006).
424. Kee v. Kee, 307 S.W.3d 812, 815–16 (Tex. App.—Dallas 2010, pet. denied).
425. Tex. Const. art. I, § 18.
426. *See* Kee, 307 S.W.3d at 816.
427. 277 S.W.3d 417, 417 (Tex. 2009).
428. *Id.* at 420.
429. *Id.* at 418.

communications, the ex-husband sought to have the decree enforced.[430] "Finding eighty-four separate violations of the decree [by the ex-wife], the trial court held [her] in contempt."[431]

In order to invoke civil contempt in Texas, clear command language must be used.[432] Moreover, "[m]erely incorporating an agreement into the recitals of a divorce decree, without a mandate from the court, is not sufficient."[433] The Supreme Court of Texas, in this case, found that the language of the divorce decree was insufficient to "advise the parties that refraining from or engaging in the described conduct [was] mandatory."[434] As the supreme court has routinely found, "[w]ithout decretal language making clear that a party is under order, agreements incorporated into divorce decrees are enforced only as contractual obligations."[435] In this case, the judgment stated the agreement was "enforceable as a contract," and therefore the parties' "[mere] contractual [obligations] [were] not . . . enforce[able] by contempt."[436]

In *In re Provine*, a couple agreed to incorporate a mediated settlement agreement into their divorce decree.[437] The agreement stated that any disputes arising due to performance of the agreement would be settled by binding arbitration.[438] Post-divorce, the former wife petitioned for enforcement of the agreement, contending that her former husband had not properly performed his obligations pursuant to the property division, as set forth in their agreement.[439] The former husband moved to compel arbitration according to the arbitration clause in the agreement.[440] The trial court found that "the mediation and arbitration provisions [were] merged into the decree of divorce and that post-divorce matters [would] be determined by the trial [c]ourt."[441] The Houston First Court of Appeals reversed[442] and found that under continuing jurisdiction, the trial court could only enforce or clarify its decree.[443] The divorce court's plenary power was not in dispute.[444] Thus, the court of appeals could not amend, modify, or alter the decree.[445] Because the agreement to arbitrate any disputes arising from the performance of the divorce decree was incorporated into the agreement, the court of appeals determined that the agreement to arbitrate the dispute should be enforced.[446]

430. *Id.*
431. *Id.*
432. *Id.* at 419.
433. *Id.*
434. *Id.*
435. *Id.* at 420 (citations omitted).
436. *Id.* at 419–20.
437. *See* 312 S.W.3d 824, 826 (Tex. App.—Houston [1st Dist.] 2009, no pet.).
438. *Id.*
439. *Id.*
440. *Id.* at 827–28.
441. *Id.* at 828.
442. *Id.* at 831.
443. *Id.* at 830.
444. *Id.*
445. *Id.*
446. *Id.* at 830–31.

Finding that the agreement "contemplate[d] post-divorce disputes, as it . . . related to the "performance" of the agreement," the former wife's "claims in her motion to enforce fell within the scope of the agreement."[447] Further, the court of appeals concluded that "the trial court erred in refusing to compel arbitration of [the] dispute."[448]

In *Shumate v. Shumate*, the trial court ordered the former husband to transfer certain credit card accounts into his name only and to remove the former wife's name from those accounts.[449] Three months later, the former wife sought enforcement of the decree and "alleged that the [former husband] had violated the terms of the decree by failing to pay the amounts due on the . . . credit cards" over a period of five consecutive months.[450] "She requested that [the former husband] be held in contempt, jailed, and fined for the alleged violations" in addition to "a money judgment for the unpaid balance."[451] "Alleging [that] he was entitled to judgment as a matter of law because there were no genuine issues of material fact," the former husband filed a motion for summary judgment.[452] "He further alleged that the credit card obligations were not enforceable by contempt."[453] The trial court awarded the former husband's motion for summary judgment.[454] On appeal, the former wife contended that the trial court erred in granting summary judgment and that it should have enforced or clarified the decree.[455] In its analysis, the Amarillo Court of Appeals distinguished this case from situations in which an order of contempt may be enforced when "a person . . . willfully disobeys a valid court order" and therefore is "subject to imprisonment for a prescribed period and until he complies with the order."[456] *Ex parte Hall*, for example, "involved an order to pay spousal and child support which is statutorily enforceable by contempt."[457] Moreover, relying on Article I, § 18 of the Texas Constitution, the court of appeals distinguished this case from "situations [in which the] specific funds to pay the debt existed, or where particular community property from which the debt was to be paid was specified."[458] Because the spouse holding the property would become a constructive trustee, the "failure to surrender that property pursuant to the divorce decree would be enforceable by contempt because it is not considered payment of a debt."[459]

This case, however, involved a failure to pay debts owed to third-party creditors in which the funds to be used were not specified in the divorce

447. *Id.* at 831.
448. *Id.*
449. 310 S.W.3d 149, 150 (Tex. App.—Amarillo 2010, no pet.).
450. *Id.* at 151.
451. *Id.*
452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.* at 152.
457. *Id.* (citing *Ex Parte* Hall, 854 S.W.2d 656, 658 (Tex. 1993)).
458. *Shumate*, 310 S.W.3d at 152. *See* TEX. CONST. art. I, § 18.
459. *Id.* at 153.

decree.[460] "Without identification of existing funds, Appellee is not a constructive trustee holding property that rightfully belongs to appellant."[461] Consequently, the appellee's "obligation to make credit card payments [was] merely a debt owed to [those] companies."[462] The former husband's failure to meet his credit card obligations, as required by the divorce decree, did not justify enforcement by contempt.[463] Although the divorce decree provided for indemnification, the court of appeals denied the former wife a money judgment because she had failed to demonstrate that she had actually paid any of the credit card debt.[464]

In *In re Jacobson*, the debtor's ex-wife had spent fifteen years seeking to clarify and obtain the property interests precisely awarded to her in a final decree of divorce.[465] In 1993, the district court had awarded the ex-wife a one-half interest of all oil and gas interests of the parties.[466] "A protracted and bitter dispute arose over the exact property interests awarded in the . . . [d]ecree."[467] From 1993 until 2008, the debtor ex-husband had prudently believed that his interpretation of the divorce decree was correct because it was supplied by several decisions of the family court.[468] The ex-wife asserted that the debt of approximately $1,200,000 should not be discharged by the Bankruptcy Court for the Southern District of Texas because the ex-husband had breached his fiduciary duty to her by failing to segregate and protect funds that were ultimately adjudicated to her.[469] The ex-wife "relie[d] heavily on [the] Texas Family Code" to support her conclusion that the ex-husband-debtor breached his fiduciary duty while holding the funds as a constructive trustee.[470] While the Bankruptcy Code does not define defalcation, "defalcation is broadly characterized as an abuse of a fiduciary position."[471] Under the Bankruptcy Code, however, the term "fiduciary" is limited to instances involving express or technical trusts.[472] Thus, a constructive trust will not suffice to meet the requirements of defalcation.[473] In its examination of the statutory trust created by the Texas Family Code, the bankruptcy court concluded that section 9.011(b) imposes only a constructive trust on property.[474] Thus, the wife's reliance on the Family Code was misplaced as it was insufficient to create the requisite trust for purposes of defalca-

460. *Id.*
461. *Id.*
462. *Id.*
463. *Id.*
464. *Id.*
465. 433 B.R. 183, 185 (Bankr. S.D. Tex. 2010).
466. *Id.* at 186.
467. *Id.*
468. *See id.* at 186–191.
469. *Id.* at 185.
470. *Id.* at 190.
471. *Id.* at 191.
472. *Id.* at 191–92.
473. *Id.* at 194.
474. *Id.* at 192.

tion.[475] The bankruptcy court concluded that "whatever trust position the debtor has held does not rise to the level of an express or technical trust that the Fifth Circuit requires for obtaining a judgment of non-dischargeability . . . for defalcation."[476]

In reversing the conclusion of the trial court in *Durden v. McClure*,[477] the San Antonio Court of Appeals held that the provision of a divorce decree in which the ex-wife relinquished her entitlement to federal tax exemptions for the couple's dependent children was obtained by a consent judgment and not, as the ex-wife contended, as an order of the trial court.[478] Although the federal "tax code allows a parent, who is otherwise entitled to [a tax] exemption [for his or her dependent children], to voluntarily relinquish that exemption,"[479] a trial court may not order a "custodial parent 'to release a dependency exemption allocated to her by the federal government.'"[480]

In *Durden*, the parties' 2005 divorce decree provided that in odd-numbered years, the ex-husband would claim tax exemptions for two of the couple's three children, and in even years, the ex-wife would do so.[481] Even though the divorce decree contained a stipulation that "the provisions contained herein are part of a Court Order, and are not contractual," when read with the entire decree, the San Antonio Court of Appeals concluded that such a provision would not be inconsistent with a finding that the parties had entered into a consent judgment.[482] The court of appeals therefore found that this stipulation "merely evidences the parties' agreement to not seek contractual remedies or defenses to any future action to enforce the decree."[483]

In *Hidalgo v. Hidalgo*,[484] the Supreme Court of Texas held that "a party who relies on a then-valid procedural argument in the court of appeals [should] be able to assert substantive arguments if [the] Court invalidates the procedural argument while the case is pending."[485] The parties in *Hidalgo* were divorced in California in 2002. The "decree required [the ex-husband] to obtain life insurance with [the ex-wife] as the beneficiary."[486] In 2005, the former wife sought to enforce the decree in Texas after the former husband had ceased to pay premiums on his policy."[487] The ex-husband argued that he was then "retired and no longer required to carry the policy.

475. *Id.*
476. *Id.* at 193.
477. 281 S.W.3d 137, 142 (Tex. App.—San Antonio 2008, no pet.).
478. *Id.*
479. *Id.* at 140; 26 U.S.C. § 152(e)(2) (2006).
480. *Durden*, 281 S.W.3d at 139 (*citing* In the Int. of C.C.N.S., 955 S.W.2d 448, 451 (Tex. App.—Fort Worth 1997, no pet.)).
481. *Id.* at 138.
482. *Id.* at 138, 142.
483. *Id.* at 142.
484. 310 S.W.3d 887, 887 (Tex. 2010).
485. *Id.* at 888.
486. *Id.*
487. *Id.*

What followed were three separate proceedings in which the trial court entered three orders. The first order (Order 1) "denied [the former wife's] motion for enforcement of the . . . decree [and] state[d] [that the former husband]" was no longer required to maintain the insurance coverage previously ordered.[488] The ex-wife then "filed a motion for rehearing and asked the . . . trial court to amend the order" requiring the ex-husband to resume insurance payments if he returned to work before attaining the age of sixty-five.[489] The second order (Order 2), issued "ninety-one days later, vacated Order 1 and . . . directed [the ex-husband] to pay all [insurance] premiums then due." The supreme court went on to hold that because the ex-wife sought a substantive change to the first order, the modification would extend the trial court's plenary power to vacate the final order under rule 329(b).[490] In effect, Order 2 granted the ex-wife a new trial.[491] Roughly three months later (183 days after Order 1 and 92 days after Order 2), however, the trial court issued its third order (Order 3) in which the trial court set aside Order 2 and reinstated Order 1 in favor of the ex-husband as its final order.[492] The ex-wife appealed in reliance on *Porter v. Vick*, which held that a trial court may only retract a motion for new trial within seventy-five days after a new trial is granted.[493] The ex-wife also filed a writ of mandamus, which the court of appeals initially granted on its finding that Order 3 was "void because it was signed outside the time period within which a trial court may revive a prior judgment by vacating the order granting a new trial."[494] While the case was pending before the court of appeals, however, the Supreme Court of Texas decided *In re Baylor Medical Center at Garland*.[495] The supreme court held that "when a new trial is granted, the case stands on the trial court's docket the same as though no trial had been had . . . . Thus a trial court has power to set aside an order granting a motion for new trial any time before a final judgment is entered."[496] Consequently, Order 3 was not a void judgment because, under the supreme court's holding, a trial court may set aside a motion for new trial "*any time* before a final judgment is entered."[497] Order 3 thus "constituted a final order subject to appeal."[498] Because the ex-wife's brief with respect to Order 3 had "made a legally meritorious procedural argument" under the then-controlling law, the supreme court remanded the case to the court of

488. *Id.*
489. *Id.*
490. *Id.*
491. *Id.*
492. *Id.*
493. *Id.* at 889 (citing Porter v. Vick, 888 S.W.2d 789, 789–90 (Tex. 1994) (internal quotations omitted)).
494. *Hidalgo*, 310 S.W.3d at 889.
495. *In re* Baylor Med. Ctr. at Garland, 280 S.W.3d 227, 227 (Tex. 2007).
496. *Hidalgo*, 310 S.W.3d at 899 (internal quotations omitted) (quoting *Baylor*, 280 S.W.3d at 230–31).
497. *Id.* (emphasis added).
498. *Id.*

appeals so that she could put forth her substantive arguments.[499]

499. *Id.* at 889–90.