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## **Family Law: Husband and Wife**

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# FAMILY LAW: HUSBAND AND WIFE

*Joseph W. McKnight\**

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## I. STATUS

## A. SAME-SEX UNION

SAME-sex unions, whether formal or informal, are unrecognized under Texas law.<sup>1</sup> The Houston appellate courts are equally resolute in that regard.<sup>2</sup> In a matter before the First Court of Appeals a man accused of sexual assault of a male child asserted that the child was his spouse. In rejecting that argument, the court stated that under Texas law persons of the same sex cannot be issued a marriage license, nor can they be considered informally married.<sup>3</sup> In a case before the Fourteenth Court of Appeals, the court rejected the argument that a marriage-like relationship existed between the accused and his alleged victim: "Our State's public policy is unambiguous, clear, and controlling on the question of creating a new equitable remedy akin to marriage[;] we may not create such a remedy."<sup>4</sup> Despite this unwavering position in most American jurisdictions, the issue of same-sex marriage continues to be the subject of academic debate and discussion.<sup>5</sup> Informal marriages of heterosexual couples,<sup>6</sup> however, often present little difficulty of recognition.

## B. INFORMAL MARRIAGE

In *Joplin v. Borusheski*,<sup>7</sup> the court considered the factual sufficiency of evidence that a couple had agreed to a common law marriage. As a general rule, unless divorce proceedings are commenced within two years of the date on which the parties to the alleged informal marriage ceased living together, Texas law recognizes a rebuttable presumption that the parties did not enter into an agreement to be married.<sup>8</sup> This presumption may be rebutted by proof (1) that the couple agreed to be married, (2) that after the agreement they lived together in Texas as husband and wife, and (3) that they represented to others that they were married.<sup>9</sup> The *Joplin* case illustrates that an agreement sufficient to rebut the presumption must be more than a vague assertion. In that case, the former cohabitants

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1. See TEX. FAM. CODE ANN. § 2.001(b) (Vernon 2006) (persons of the same sex may not be issued a license for a ceremonial marriage); § 2.401(a) (an informal marriage may be contracted by a man and a woman).

2. *Billodeau v. State*, 263 S.W.3d 318, 329 (Tex. App.—Houston [1st Dist.] 2007), *rev'd on other grounds*, 277 S.W.3d 34 (Tex. Crim. App. 2009).

3. *Id.*

4. *Id.*; *Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

5. See, e.g., Ronald S. Allen & Michael Clarkson, *Same-Sex Marriage & Civil Unions: 'Til State Borders Do Us Part?*, 36 THE BRIEF 54 (2007); Vanessa A. Lavelly, Comment, *The Path to Recognition of Same-Sex Marriage and Adoption Cases*, 55 UCLA L. REV. 247 (2007); Roger Severino, *Or For Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939 (2007).

6. See TEX. FAM. CODE ANN. § 2.401.

7. 244 S.W.3d 607 (Tex. App.—Dallas 2008, no pet.).

8. *Id.* at 611.

9. *Id.* at 610.

attempted to prove the agreement to be married with evidence that the couple had come to an oral understanding shortly after the female former cohabitant was diagnosed as having a brain tumor.<sup>10</sup> He testified that “[s]he asked me to be there for the last piece of dirt, to make sure she had lilies put on her grave and I promised her that.”<sup>11</sup> Although a more precise oral agreement to be married would have been sufficient, the court concluded that the male former cohabitant’s promise to stay with the female former cohabitant through her illness could not be construed as an agreement to be married.<sup>12</sup>

Proof of an informal marriage was also at issue in *Freeman v. State*.<sup>13</sup> In that instance a criminal prisoner argued that the trial court erred by compelling his wife to testify contrary to the applicable rule of spousal privilege. Freeman and his alleged wife were ceremonially married on February 22, 2002,<sup>14</sup> six days after Freeman was alleged to have shot a man in retribution for stealing crack cocaine from his apartment.<sup>15</sup> At his trial Freeman sought to disqualify his wife from testifying on the basis of spousal privilege. There was conflicting evidence concerning whether at the time of the shooting Freeman and his alleged wife had agreed to be married and were representing to others that they were married. Several witnesses produced by the prisoner testified that they understood that he and his alleged wife were married, that they conducted themselves as a married couple, and that the man treated the woman’s son as his own.<sup>16</sup> Other evidence, however, was inconsistent with the alleged intent to form an informal marital union: when questioned by the police two days after the shooting, the woman referred to Freeman as her boyfriend, and although she admitted that the two lived together, in all other correspondences with the police she referred to Freeman merely by name rather than as her husband. Further, in an apartment lease executed by Freeman’s alleged wife in August 2001, she indicated “not applicable” in the space allotted for spouse.<sup>17</sup> The court, therefore, found that the trial court did not go astray in ruling that no common law marriage existed before the ceremonial marriage on February 22, 2002.<sup>18</sup>

### C. MARRIAGE IN SERIES

“When two or more marriages of a person to different spouses are alleged, the most recent marriage is presumed to be valid as against each marriage that precedes the most recent marriage until one who asserts the validity of a prior marriage proves [its] validity.”<sup>19</sup> Thus, the women

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10. *Id.* at 611.

11. *Id.*

12. *Id.* at 611–12.

13. 230 S.W.3d 392 (Tex. App.—Eastland 2007, pet. ref’d).

14. *Id.* at 402.

15. *Id.* at 397.

16. *Id.* at 402.

17. *Id.*

18. *Id.* at 403.

19. TEX. FAM. CODE ANN. § 1.102 (Vernon 2006).

who claimed a common law marriage to the same decedent in *Romano v. Newell Recycling of San Antonio, LP* were required to rebut that presumption.<sup>20</sup> In such a case one might expect a seamy record of lies and betrayal, but the facts in *Romano* are far cleaner and simpler. The former husband's relationship with his first alleged wife spanned the nine-year period from 1990 to 1999, during which time the couple lived together.<sup>21</sup> The second alleged wife claimed that her relationship with him began in 1998 and lasted until the man's death in 2005.<sup>22</sup> The man had died intestate after an on-the-job accident on the premises of his employer, the defendant.<sup>23</sup> Following his death, both the first alleged wife and the second alleged wife claimed to be the sole heir of his estate.<sup>24</sup> After the second alleged former wife filed an application to determine heirship, the employer intervened because of litigation related to the incident in which the former husband was killed.<sup>25</sup> The court stated that though the presumption of validity of a recent marriage is "one of the strongest . . . known to law,"<sup>26</sup> the presumption may be rebutted by proof of a prior valid marriage that had been established and not dissolved.<sup>27</sup> With respect to the asserted first marriage, the court considered evidence of (1) the couple's agreement to be married, (2) cohabitation as husband and wife, and (3) whether the couple represented to others that they were married.<sup>28</sup> According to the first alleged wife, she and the man had agreed to be married shortly after beginning to live together in 1990.<sup>29</sup> "[Such] testimony, if unchallenged [is] sufficient to establish an agreement to be married," but, in this case, the second alleged wife contested the truth of the testimony.<sup>30</sup> She contended that documents such as the man's loan application, a deed of trust, and a non-beneficiary affidavit all described him as single.<sup>31</sup> These facts alone, however, were not sufficient to negate the agreement to enter into a common law marriage.<sup>32</sup> There was also extensive evidence of cohabitation between the alleged first wife and the man she asserted was her deceased husband.<sup>33</sup> Although the second alleged wife indicated that she and the man had begun to live together in 1998, the court determined that the man's absences from his "first wife" were temporary and were consistent in time to alleged fights

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20. No. 04-07-00084-CV, 2008 WL 227974, at \*3 (Tex. App.—San Antonio Jan. 30, 2008, no pet.) (not designated for publication).

21. *Id.* at \*1.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at \*3 (quoting *Bailey-Mason v. Mason*, 122 S.W.3d 894, 898 (Tex. App.—Dallas 2003, pet. denied)).

27. *Id.*

28. *Id.* at \*4–5.

29. *Id.* at \*4.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at \*5.

between the first couple.<sup>34</sup> The court observed that brief absences from the marital home do not negate cohabitation and that the first alleged wife had therefore satisfied the cohabitation requirement.<sup>35</sup> Although there were conflicts with respect to evidence of public representations of marriage, the court concluded that the evidence was sufficient to support a finding that the first couple had been married.<sup>36</sup> In the absence of evidence of a divorce dissolving the first marriage, that marriage subsisted until the man's death.<sup>37</sup> Therefore, an informal marriage between the former husband and his alleged second wife could not have occurred.<sup>38</sup> As a result, the alleged first wife was the proper beneficiary of the deceased husband's intestate estate.<sup>39</sup>

#### D. CONTRIVED DIVORCE

In *Hall v. Hall*,<sup>40</sup> the issue was not the validity of a marriage, but the validity of a divorce.<sup>41</sup> In response to his former wife's claim for delinquent child-support, the former husband sought an offset for the amounts he had expended to support his wife *after* their divorce. According to his testimony, his only notice of the divorce proceedings was a card he received in the mail from the district clerk.<sup>42</sup> Although the former wife indicated that her former husband had always been aware of the divorce proceeding, the ex-husband testified that he had neither signed a waiver of citation nor agreed to the divorce.<sup>43</sup> According to the former husband, his former wife had simply obtained an ex-parte divorce to protect her assets from judgment creditors.<sup>44</sup> The former wife stated that she had explained to her former husband that no child support had been ordered, joint custody of the children had been awarded to her, all debts were placed in the former wife's name, and that it was understood that they would remarry once the judgment creditors were taken care of.<sup>45</sup> The couple had continued to live together and the former husband continued to support his former wife and children. When the former wife initiated suit to recover back child-support payments, the former husband asserted a common law marriage as a defense. But he was unable to show proof of a declaration or registration of an informal marriage and ultimately did not contest the legitimacy of the divorce proceedings.<sup>46</sup> On the wife's appeal, the court relied on estoppel to grant the former husband an offset

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34. *Id.*

35. *Id.*

36. *Id.* at \*6.

37. *Id.*

38. *Id.*

39. *Id.*

40. No. 09-06-206-CV, 2007 WL 2127133, at \*3 (Tex. App.—Beaumont July 26, 2007, no pet.) (not designated for publication).

41. *Id.* at \*1.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at \*2 n.3.

for sums expended while he lived with his former wife.<sup>47</sup>

## II. CHARACTERIZATION

### A. INCEPTION OF TITLE

While the couple in *In re Kluth*<sup>48</sup> were living together prior to their marriage, the man deposited about \$3,800 of his future wife's money into an account that held his funds and then purchased a car using that account. In the divorce that followed some months after the marriage, the trial court held that the car was community property and the husband appealed.<sup>49</sup> On appeal the wife argued that she was entitled to a refund of her deposited funds but did not assert ownership of the car.<sup>50</sup> In this confused posture of the case, the Texarkana Court of Appeals, without commenting on the wife's claim, reversed the trial court's decree and remanded the case for a new division of the property.<sup>51</sup>

The wife argued in *Marriage of Jordan* that the court abused its discretion by imposing an owelty lien in the husband's favor in order to satisfy the husband's claim for economic contribution under section 3.403, utilizing the statutory formula that the husband's interest in the farm was based on his separate property estate's contributions to the extent of seventy-two percent of the fair market value of the land.<sup>52</sup> The trial court had awarded him seventy-two percent of the farm's fair market value and half of the claimed community interest for a total of \$15,930.<sup>53</sup> The appellate court found that the husband's calculations were not supported by the evidence because he had commingled certain funds from which he claimed to have made a separate contribution and had failed to provide evidence of the net equity interest in the farm at the time of marriage.<sup>54</sup> To demonstrate a perceived flaw in the formula in section 3.403, the court conducted its own analysis of the separate and community contributions to the purchase, finding that the husband's economic contribution amounted to seventy-five percent of the fair market value of the five acres.<sup>55</sup> The court also calculated the community estate's economic contribution, with the husband's resulting share equaling sixty-nine percent of the fair market value. Therefore, the court wondered how the husband's separate property interest and the community interest could total more than one hundred percent.<sup>56</sup> The court held that this conclusion resulted from a failure of the section 3.403 formula to take into account

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47. *Id.* at \*4.

48. No. 06-07-00129-CV, 2008 WL 2150961 (Tex. App.—Texarkana May 23, 2009, no pet.) (not designated for publication).

49. *Id.* at \*1.

50. *Id.* at \*2.

51. *Id.* at \*3.

52. 264 S.W.3d 850, 858–59 (Tex. App.—Waco 2008, no pet.).

53. *Id.* at 860, 860 n.12.

54. *Id.* at 860–61.

55. *Id.* at 862.

56. *Id.*

situations in which *both* the community property estate and a separate property estate make economic contributions.<sup>57</sup> The court concluded that when two marital estates make an economic contribution to a third marital estate, the formula established by section 3.403 should be modified by including the economic contributions made by *both* of the contributing marital estates into the denominator of the formula in section 3.403(b) and (b-1).<sup>58</sup> Applying this formula to the issue at hand, the court determined that the husband's separate property contribution was forty-nine percent of the land's fair market value (\$9,739), while the community estate's contribution was thirty-six percent of the farm's fair market value (\$7,130). Thus, a total claim for the husband's entitlement for economic contribution amounted to \$13,304 (\$9,739 plus one-half of the community, \$3,565).<sup>59</sup> As the court previously noted, however, the husband had failed to provide sufficient evidence for the calculation of his claim for contribution. As a result, the court of appeals held that the trial court had erroneously imposed a lien on the wife's separate property.<sup>60</sup> The case was reversed and remanded.<sup>61</sup>

## B. PARTITIONS AND EXCHANGES

### 1. Premarital Agreements

In *Ahmed v. Ahmed*,<sup>62</sup> the ex-husband appealed a decision granting a divorce and awarding the ex-wife \$50,000 pursuant to an Islamic marriage contract. The Houston Fourteenth District Court of Appeals reversed and remanded.<sup>63</sup> The spouses in this case were married in a civil ceremony in November 1999, but it was not until six months later that they went through the Islamic marriage ceremony. Part of the ceremony required the spouses to sign an Islamic marriage certificate, including a so-called Mahr agreement.<sup>64</sup> A Mahr agreement is an Islamic-law device which essentially creates a contractually obligated marriage dower with two parts.<sup>65</sup> The first part of the dower is paid to the wife by the groom upon marriage. The second part, and the one at issue in this case, is paid to the wife upon divorce. The purpose of this second part is to create a disincentive to divorce and to provide for the wife should a divorce occur.<sup>66</sup> In this case, the Mahr agreement stipulated that should divorce occur, the husband would pay the wife \$50,000.<sup>67</sup> The couple divorced

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57. *Id.*

58. *Id.*

59. *Id.* at 863.

60. *Id.*

61. *Id.*

62. 261 S.W.3d 190 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

63. *Id.*

64. *Id.* at 193.

65. Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 197 (2002).

66. *Id.* at 200–01.

67. *Ahmed*, 261 S.W.3d at 193.



five years after the marriage and the trial court awarded the wife the \$50,000 as liquidated damages, holding that the Mahr agreement was a valid marital contract executed "in contemplation of a forthcoming marriage."<sup>68</sup>

On appeal, the former husband argued, and the court agreed, that the Mahr agreement could not be enforced as a premarital agreement because the parties signed the agreement after the civil ceremony.<sup>69</sup> In doing so, the court rejected the former wife's argument that the date of the religious ceremony should control.<sup>70</sup> In response to the wife's argument, the court noted that Texas "does not distinguish between civil and religious marriage ceremonies."<sup>71</sup> As far as the State of Texas is concerned, the couple achieved their marital status upon completion of their civil ceremony.<sup>72</sup> As a result, any contract formed after that point could not possibly have the character of "premarital" or "in contemplation of a forthcoming marriage."<sup>73</sup> Accordingly, the court of appeals held that the trial court erred in enforcing the contract.<sup>74</sup>

The former wife argued, alternatively, that the agreement could be enforced as a marital partition and exchange agreement under section 4.102.<sup>75</sup> In response, the ex-husband argued that the terms were too vague or uncertain to be enforced as either a premarital or marital agreement.<sup>76</sup> The court rejected the husband's argument, reasoning that because both parties were reared in the Islamic faith and because the agreement was a custom of faith, both parties had sufficient understanding of the terms.<sup>77</sup> However, the court held that the evidence was too slight to conclude that the agreement constituted a valid marital partition and exchange agreement.<sup>78</sup> Statutory requirements for such agreements require, among other things, intent to convert community property into separate property.<sup>79</sup> In order to best serve justice, the court reversed the \$50,000 award and remanded the case to allow the former wife to prove that the agreement was enforceable on whatever grounds she could.<sup>80</sup>

## 2. *Marital Agreements*

The executor of a wife's estate brought suit against the executor of her husband's estate seeking a declaratory judgment that certain securities were not owned by the spouses with a right of survivorship and, there-

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68. *Id.*

69. *Id.* at 194.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (citing TEX. FAM. CODE ANN. § 4.102 (Vernon 2006)).

76. *Id.* at 195.

77. *Id.*

78. *Id.* at 196.

79. *Id.* at 195.

80. *Id.* at 195-96.

fore, did not pass from the wife to the husband upon the wife's death.<sup>81</sup> The Houston Fourteenth District Court of Appeals held that a right of survivorship did not exist in a brokerage account and in certain other stocks held on his account certificates.<sup>82</sup> In *Beatty v. Holmes* and its companion case, *Holmes v. Beatty*,<sup>83</sup> the court considered several issues of first impression relating to whether or not a right of survivorship was created in a brokerage account and certain securities which originated in it, but were subsequently removed from other brokerage accounts. The executor of the wife brought an appeal, arguing that the trial court erred in ruling that a right of survivorship had been created.<sup>84</sup>

The wife and the husband died in 1999 and 2000 respectively. During their marriage they had acquired a number of brokerage accounts using community funds. Together the spouses also owned several securities that had been removed from their brokerage accounts. The value of these holdings was in the millions of dollars.<sup>85</sup> The wife's executor sued the husband's executor seeking judgment that the holdings at issue were not owned with a right of survivorship and, thus, did not pass to the husband's estate upon his wife's death. Accordingly, the wife's executor argued that the holdings were community property and sought a one-half interest in them.<sup>86</sup> The husband's executor filed a counterclaim, arguing that a right of survivorship did exist and filed a motion for partial summary judgment. The trial court granted that motion in part, declaring that a right of survivorship existed and thus, that the wife's estate had no interest in either the brokerage account or the thirty-six securities issued out of various securities accounts that were subsequently held during the marriage in certificate form.<sup>87</sup> The wife's executor appealed on the ground that the securities were not subject to a right of survivorship.<sup>88</sup>

Sections 451 and 452 of the Probate Code provide for spousal survivorship agreements of their community property and the formalities for achieving that result.<sup>89</sup> The couple had each executed a "Joint Account Agreement" using a printed form provided by the broker and signed by both spouses.<sup>90</sup> In doing so, however, the spouses failed to follow the instructions embodied in the instrument by which the creation of a joint tenancy would be achieved. The court agreed with the wife's executor's argument that the spouses' failure to make an affirmative choice of the

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81. *Beatty v. Holmes (Beatty I)*, 233 S.W.3d 475, 478 (Tex. App.—Houston [14th Dist.] 2007), *aff'd in part, rev'd in part*, No. 07-0784, 07-0785, 2009 WL 1817398 (Tex. Jun. 26, 2009).

82. *Id.* at 494.

83. *Holmes v. Beatty (Beatty II)*, 233 S.W.3d 494 (Tex. App.—Houston [14th Dist.] 2007).

84. *Beatty I*, 233 S.W.3d at 479.

85. *Id.* at 478.

86. *Id.*

87. *Id.*

88. *Id.* at 479.

89. *Id.* at 479-80 (citing TEX. PROB. CODE ANN. §§ 451-452 (Vernon 2003 & Supp. 2006)).

90. *Id.* at 480.

results sought demonstrated the absence of the mutual intent necessary to create a right of survivorship in the account.<sup>91</sup> Thus, because the "agreement did not clearly reflect intents to own the account with a right of survivorship," no right of survivorship was created.<sup>92</sup>

The deceased wife's estate argued that the situation was analogous to a line of cases which reached the same conclusion involving section 439(a) in Part 1 of Chapter XI, "Multiple-Party Accounts."<sup>93</sup> The court noted that the cases cited presented situations different from the one under consideration, but nonetheless found two of the cited cases informative.<sup>94</sup> The cases of *Estate of Graffagnino*<sup>95</sup> and *Ephran v. Frazier*<sup>96</sup> involved signature cards on which joint account holders failed to mark either the checkbox for right of survivorship or the checkbox for ownership without such a right. The court observed that the cases of *Graffagnino* and *Ephran* differed from *Beatty* in that those two cases presented an option for marking a box rather than marking out a passage in order to effect a choice, but it found that the former cases were nonetheless informative to the point that they "instruct that the parties clearly express within the written agreement their intent to choose a survivorship option."<sup>97</sup> The court found that such an intent was not clearly demonstrated in the account for their agreement and, thus, a right of survivorship was not created in accordance with section 452.<sup>98</sup>

The husband's estate argued alternatively that the right of survivorship was demonstrated by the inclusion of the abbreviation "JT TEN" preceeding the name of each spouse in the title of the agreement.<sup>99</sup> The court rejected that argument, observing that property may be owned as joint tenants without rights of survivorship and that the inclusion of the term was insufficient to make a determination of intent to create a right of survivorship.<sup>100</sup> As a result, the court held that the trial court erred in ruling that a right of survivorship was created in their account.<sup>101</sup>

The deceased spouses had also held securities in certificate form and, as to those, the court also agreed with the wife's executor's argument that no right of survivorship existed.<sup>102</sup> The security-certificates had been issued out of various securities accounts, and thirty-four of those included the term "JT TEN" preceding each spouses' name. On the back of these certificates the meaning of the term: "JT TEN—as joint tenancy with

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91. *Id.* at 480-81.

92. *Id.* at 481, 483.

93. *Id.* at 481-82 n.7.

94. *Id.* at 483.

95. No. 09-00-434-CV, 2002 WL 31126901 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied) (not designated for publication).

96. 840 S.W.2d 81 (Tex. App.—Corpus Christi 1992, no writ).

97. *Beatty I*, 233 S.W.3d at 482.

98. *Id.* at 483.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 482.

right of survivorship and not as tenancy in common.”<sup>103</sup> None of the certificates were signed by the spouses, which is not unusual as such instruments are not usually signed until they are about to be sold.<sup>104</sup> The direction of the spouses with respect to the survivorship of the account applied only to the securities while they were held in the account. That was the account in which the securities were held in certificate-form when removed from the account. The securities were not themselves held with a right of survivorship because section 450 of the Probate Code (located in Part 2) cannot be used to create such a right in the community property, and the agreements applicable to the certificates did not govern the character of the securities after being removed from the account in certificate form.<sup>105</sup>

Section 452 of Part 3 governs agreements to create rights of survivorship in community property exclusively.<sup>106</sup> No guidance as to its meaning is to be found in Chapter XI of the Probate Code, which addresses interaction between it and section 450 and Part 3.<sup>107</sup> The language of section 450 demonstrates that it is not intended to create a right of survivorship in community property.<sup>108</sup> Nowhere in the section is the creation of a right of survivorship mentioned, nor does the section contain any mention of “survivorship.”<sup>109</sup> The language of section 450 contemplates a single party owning or controlling the property.<sup>110</sup> Section 450 does not require any signature to effect a non-testamentary transfer, while Part 3 “emphatically requires” the signatures of both spouses to create a right of survivorship in their community property.<sup>111</sup> Part 3 contains the controlling provisions.<sup>112</sup> In enacting Part 3, the Legislature amended section 46 of the Texas Probate Code.<sup>113</sup> That section expressly states that Part 3 governs agreements between spouses regarding rights of survivorship in community property.<sup>114</sup> The court also found the San Antonio Court of Appeals’ reasoning in *Haas v. Voigt* persuasive.<sup>115</sup> There, the court held that after 1987 a right of survivorship could only be created by first partitioning the community into separate property prior to creating a right of survivorship or by an agreement as set forth in Part 3.<sup>116</sup> The court also found persuasive testimony before the Senate considering the legislation

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103. *Id.*

104. *Id.* at 484.

105. *Id.*

106. *Id.* at 490.

107. *Id.* at 487.

108. *Id.*

109. *Id.* (citing TEX. PROB. CODE ANN. § 450 (Vernon 2003)).

110. *Id.* at 489.

111. *Id.* at 490 (citing TEX. PROB. CODE ANN. § 450 for the first proposition and §§ 451-52 for the second proposition).

112. *Id.*

113. *Id.*

114. *Id.* (citing TEX. PROB. CODE ANN. § 46(b)).

115. *Id.* at 487 (citing *Haas v. Voigt*, 940 S.W.2d 198, 201 (Tex. App.—San Antonio 1996, writ denied)).

116. *Id.*

that would lead to the enactment of Part 3.<sup>117</sup> That testimony indicated a strong intent on the part of legislators to ensure that spouses go beyond using designations on security certificates by requiring signatures to create rights of survivorship.<sup>118</sup> The court thus concluded that the draftsmen did not consider section 450 as effective towards creating a right of survivorship in community property.<sup>119</sup> The court dismissed an argument by the husband's estate that language in section 450, to the effect that it would not invalidate provisions found on instruments such as the security certificate, demonstrates that failure to comply with Part 3 would not invalidate the securities at issue.<sup>120</sup> The court determined that because section 450 was enacted prior to Part 3, its language could not have been intended to act upon it.<sup>121</sup> Any such language would instead affect the testamentary provisions of the Code and not Part 3.<sup>122</sup>

### C. TRACING

In *Perez v. Perez*<sup>123</sup> three certificates of deposits held in the husband's name were at issue. The evidence showed that all of these deposits had been made prior to marriage and that, until the wife petitioned for divorce, the only activity in those accounts was the accrual of interest.<sup>124</sup> The husband argued, and the court of appeals agreed, that the trial court had erred by mischaracterizing the entire amount on deposit as community property.<sup>125</sup> The court noted that the original amounts deposited should have been characterized as separate and the interest accrued during marriage as community.<sup>126</sup> But these conclusions were not dispositive of the matter.<sup>127</sup> The husband's sister, also named on the accounts as a depositor, had withdrawn the entire amount on deposit immediately after the wife petitioned for divorce.<sup>128</sup> The trial court's decree did not consider any possible claim against the sister. Thus, the value of the accounts in question effectively stood at zero. The court of appeals found that the mischaracterization had only a de minimis effect on the division of the estate, and the husband's appeal was denied.<sup>129</sup>

Tracing property to determine its community or separate character may require a high level of proof to determine the ultimate division on termi-

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117. *Id.* at 491-92 (citing Hearing on Tex. S.B. 1643 Before the Senate Jurisprudence Comm., 71st Leg., R.S. 33-34 (May 4, 1989)).

118. *Id.*

119. *Id.* at 492-93; see also Elizabeth Williams, *Interspousal Agreements and Transfers*, 3 TEX. FAM. L. SERV. § 24:22 (West 1999).

120. *Id.* (citing TEX. PROB. CODE ANN. § 450 (Vernon 2003)).

121. *Id.*

122. *Id.*

123. *Perez v. Perez*, No. 09-06-521-CV, 2007 WL 5187895 (Tex. App.—Beaumont May 22, 2008, pet. denied) (not designated for publication).

124. *Id.* at \*2-3.

125. *Id.* at \*3.

126. *Id.*

127. *Id.*

128. *Id.* at \*1.

129. *Id.* at \*3.

nation of a marriage.<sup>130</sup> *Granger v. Granger* deals with division on the death of a husband who had provided two large insurance policies for the benefit of various members of his family. One of these was wholly paid for with community funds and the proceeds were therefore equally divided between the beneficiaries and the surviving widow.<sup>131</sup> The origin of the funds with which the premiums on the other policy was paid required a substantial sifting of evidence to determine whether the widow would share in the proceeds. The insurance carrier deposited the proceeds of the policy in the registry of the court, and the trial court found that the policy had been purchased with separate funds and therefore, the named beneficiaries took the proceeds.<sup>132</sup> On the widow's appeal, the decision of the trial judge was affirmed.<sup>133</sup> At the time the policy was purchased in 2003, both the bank statements of the late husband and testimony offered at the trial showed that the entire income of the insured was derived from social security benefits.<sup>134</sup> Following the rule of federal supremacy, therefore, the policy paid for with the husband's separate funds passed wholly according to his directions.<sup>135</sup>

In *Von Hohn v. Von Hohn*<sup>136</sup> both parties filed for divorce in July 2004, but could not agree on the extent of their community property interest in the law firm of which the husband was a member. The firm members had entered into a partnership agreement that included a formula for calculating each partner's interest in the partnership at the date of the partner's death, retirement, or withdrawal, but the agreement was silent as to the proper formula for a calculating a partnership interest on divorce. The trial court allowed, in part, testimony by the wife's valuation expert, asserting that the community property interest could be evaluated by means other than those included in the partnership agreement. The trial court allowed the jury to consider two years of the firm's projected future earnings in determining the husband's interest in the firm.

The husband asserted that: (1) the wife's valuation expert did not qualify as such under the Rules of Evidence,<sup>137</sup> (2) the method of valuation proposed by the expert was based on unreliable methods, analysis, and principles, and (3) there was no evidence that the expert's methodology in valuing a law firm was used by other valuation experts.<sup>138</sup> The court overruled these objections after the expert produced evidence at a pre-trial hearing that he had the requisite "knowledge, skill, experience, train-

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130. See, e.g., *Granger v. Granger*, 236 S.W.3d 852, 856 (Tex. App.—Tyler 2007, pet. denied) (noting that the testimonial evidence alone was insufficient proof for tracing).

131. *Id.* at 854.

132. *Id.* at 854, 859.

133. *Id.* at 855, 859.

134. *Id.* at 859.

135. See, e.g., *id.* at 857.

136. 260 S.W.3d 631 (Tex. App.—Tyler 2008, no pet.).

137. See *id.* at 635. TEXAS RULE EVIDENCE 702 contains three requirements for the admission of expert testimony: "(1) the witness must be qualified, (2) the proposed testimony must be scientific, technical, or other specialized knowledge, and (3) the testimony must assist the trier of fact to understand the evidence or to determine a fact in issue."

138. *Von Hohn*, 260 S.W.3d at 635.

ing, or education regarding the specific issue [of valuation]" to satisfy the trial court that he qualified as an expert under rule 702<sup>139</sup> and under the United States Supreme Court's standards for the admission of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>140</sup> He also testified that the income approach to valuation that he had used had also been used with respect to the same firm twenty-five years prior to this case in another suit for divorce.<sup>141</sup> The appellate court therefore concluded that the trial court did not abuse its discretion in allowing the expert to testify regarding his valuation of the husband's interest in the firm.<sup>142</sup>

The husband also argued that his interest in the firm was defined by the partnership agreement and that the community estate was not entitled to a greater interest than that to which he was entitled in the firm's commercial goodwill. Relying on *Finn v. Finn*,<sup>143</sup> the husband argued that the extent of his interest in the firm's goodwill, if any, was governed by the partnership agreement. As in *Finn*,<sup>144</sup> the partnership agreement did not provide any compensation for goodwill accrued to a partner when he ceased to practice law with the firm because of death or voluntary departure, nor did it provide any other mechanism to realize the value of the firm's goodwill. Justice Stewart's concurring opinion in *Finn*<sup>145</sup> was later adopted by another court, providing the precedential basis for the court's analysis in *Von Hohn*. The court noted, however, that a firm's goodwill is an asset of the partnership as it exists as an ongoing business entity in which the husband-partner participates, and when valued as such, it not only has a commercial value but is also considered intangible property that can be valued on divorce.<sup>146</sup> In the court's opinion, the fact that the partnership agreement was silent on a contingency for the valuation of goodwill in the event of divorce merely reinforced the conclusion that other types of valuation could be used.<sup>147</sup> As the court noted, the law firm "was an ongoing partnership as of the time of divorce, [the husband] had not died nor had he withdrawn from the partnership, and, thus, none

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139. *Id.* at 637.

140. 509 U.S. 579 (1993).

141. *Van Hohn*, 260 S.W.3d at 639 (citing *Finn v. Finn*, 658 S.W.2d 735, 741 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)).

142. *Id.* at 638.

143. *Finn*, 658 S.W.2d 735.

144. In *Finn*, the court concluded that a two-part test determines whether goodwill attaches to a professional practice that is subject to division upon divorce: (1) goodwill must be determined to exist independently of the personal ability of the professional spouse and (2) if such goodwill is found to exist, then it must be determined whether that goodwill has a commercial value in which the community estate is entitled to share. *Id.* at 741. The court determined that the community estate was not entitled to a greater interest in the firm's goodwill than that to which the husband (in that case) was entitled and that the extent of his interest was, therefore, governed by the partnership agreement. *Id.*

145. *Id.* at 749 (Stewart, J., concurring). This concurring opinion was adopted by the Fort Worth Court of Appeals in *Keith v. Keith*, 763 S.W.2d 950, 953 (Tex. App.—Fort Worth 1989, no writ).

146. *Von Hohn*, 260 S.W.3d at 639.

147. *Id.* at 640.

of the triggering events specified in the partnership agreement had occurred.”<sup>148</sup> The court therefore concluded that the trial court did not err when it held that forms of valuation other than those listed in the partnership agreement could be used to value the husband’s interests.<sup>149</sup>

The husband also contended in *Von Hohn* that the trial court had erred in allowing future earnings to be computed by using “speculative future income streams” to determine the commercial goodwill of the law firm.<sup>150</sup> Citing the general proposition that a spouse is entitled only to a division of property that the community owns at the time of divorce and not to a percentage of the other spouse’s future earnings, the Tyler appellate court reversed the trial court’s conclusion that the jury could consider potential future income in its calculation of the firm’s commercial goodwill.<sup>151</sup> The husband’s law firm was then involved in a series of cases that were expected to enhance his interest in the law firm by \$4,500,000. Not all of these cases, however, had actually settled at the time of divorce and thus, the court held that the settled value of these cases alone could be used to compute the husband’s increased interest in the firm.<sup>152</sup> The settled cases, the court held, could be included despite the fact that the husband had not yet collected his portion of the settlement. The settlement did not constitute future earnings because payment was contractual and, therefore, did not require future time or labor of the husband.<sup>153</sup> The revenue from the unsettled cases, however, was merely an expectancy interest and was therefore considered to be future earnings that could not be divided on divorce.<sup>154</sup>

On appeal from his divorce decree, in *Wells v. Wells*<sup>155</sup> a former husband asserted that the trial court abused its discretion in making a disproportionate award of marital assets in favor of his former wife. He argued that in characterizing community property as separate property and in valuing the marital estate, the court rendered a judgment that was inherently conflicting. The judgment of the trial court was affirmed. In *Wells* the wife had initiated divorce proceedings and later amended her petition to include allegations of fault and fraud in the husband’s handling of the community assets. She sought a disproportionate division of the marital estate after her husband responded by seeking a disproportionate share. The trial court found that the husband not only threatened his wife with bodily harm and death, but also defrauded the community. As a consequence, the award of a disproportionate division of the community estate

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148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 641–42 (citing *Smith v. Smith*, 836 S.W.2d 688, 692 (Tex. App.—Houston [1st Dist.] 1992, no writ) for the proposition that “[a] spouse is not entitled to a percentage of his or her spouse’s future earnings” and that “[a] spouse is only entitled to a division of property that the community owns at the time of divorce.” (emphasis added)).

152. *Id.* at 642.

153. *Id.*

154. *Id.*

155. 251 S.W.3d 834 (Tex. App.—Eastland 2008, no pet.).



for the wife was deemed appropriate.<sup>156</sup>

As his final issue, the husband argued that the trial court had erred in failing to grant his motion for a directed verdict at the conclusion of both parties' case-in-chief. The appellate court overruled this objection on the basis of its conclusions regarding the husband's other issues.

#### D. ESTATE PLANNING SERVICES

In *Baker Botts, L.L.P. v. Cailloux*,<sup>157</sup> a law firm and a bank assisted a wealthy couple in planning their estates, creating foundations, and making charitable gifts. With written consent the law firm represented both the couple and the bank. On the husband's death the widowed wife followed the law firm's advice and disclaimed any interest in her deceased husband's estate. The wife subsequently suffered from Alzheimer's disease, and her son assumed direction of her affairs. The son asserted that he had uncovered evidence that the bank and the law firm conspired during the family's estate planning process, and he accordingly brought suit against them. The lower court exercised its equity power in awarding the son a constructive trust of over sixty-five million dollars.<sup>158</sup> The appellate court, however, disagreed and rendered its judgment in favor of the bank and the law firm. Finding no evidence to support causation, the court concluded that the son failed to prove that the bank's or the law firm's breach of fiduciary duty proximately caused any damages to the widowed wife.<sup>159</sup> The court also held that the constructive trust was an inappropriate remedy against either the bank or the law firm because neither held legal title to the claimed assets.<sup>160</sup>

#### E. REIMBURSEMENT AND ECONOMIC CONTRIBUTION

When spouses expend separate property for the benefit of the community or the community estate expends community property for the benefit of separate property, the equitable principle of reimbursement provides compensation for the contributing party. The concept of economic contribution was created by statute in 1999<sup>161</sup> as a type of reimbursement but was not to be guided by equitable principles. Its scope was greatly reduced by 2009 legislation, passed at the behest the Family Law Section of the State Bar of Texas.<sup>162</sup>

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156. *Id.* at 843. Thus, the court held that while the assertion that the husband had physically abused his wife and had threatened to kill her were not findings of fact, they nevertheless supported the inference that the trial court had a rational basis for concluding that a disproportionate division of the marital estate was warranted.

157. 224 S.W.3d 723 (Tex. App.—San Antonio 2007, pet. denied).

158. *Id.* at 733.

159. *Id.* at 734–36.

160. *Id.* at 737.

161. Act of June 18, 1999, 76th Leg., R.S., ch. 692, § 1, 1999 Tex. Gen. Laws 692, amended by Act of June 14, 2001, 77th Leg., R.S., ch. 838, § 3, 2001 Tex. Gen. Laws 838.

162. Act of June 19, 2009, 81st Leg., R.S., ch. 768, 2009 Tex. Sess. Law. Serv. (Vernon) (to be codified at scattered sections of TEX. FAM. CODE).

As a practical matter, both equitable reimbursement and economic contribution require a determination of the amount owed by the benefited estate. The calculation of this amount differs according to the nature of the claim.

### 1. *Reimbursement*

If no claim for economic contribution is made, ordinary reimbursement principles apply. This point was illustrated by *In re Rieves*.<sup>163</sup> There, the wife sought reimbursement for the use of her separate funds to refurbish a home owned separately by her former husband.<sup>164</sup> On appeal, the former husband asserted that the trial court erred by not applying the economic contribution formula to his former wife's reimbursement claim.<sup>165</sup> The court of appeals rejected this argument, noting that "[e]veryone agreed and argued that [the former wife] was making a claim for reimbursement, not economic contribution."<sup>166</sup> Even if economic contribution standards could be applied under the facts in *Rieves*, the court of appeals determined that the trial court did not err by refusing to follow a statute that was neither pled nor addressed by the court.<sup>167</sup>

### 2. *Economic Contribution*

The principle of economic contribution does not apply to claims for the dollar amount of expenditures for ordinary maintenance and repair, taxes, interest, insurance, or the contribution by a spouse of time, toil, or effort during marriage.<sup>168</sup> The implication is that all claims not identified by the economic contribution statute are subject to the rules of ordinary equitable reimbursement. Section 3.408 of the Family Code clarifies this implication: "[a] claim for economic contribution does not abrogate another claim for reimbursement in a factual circumstance" not described in the statute.<sup>169</sup> But any conflict between a claim for economic contribution and a claim for reimbursement should be resolved in favor of the claim for economic contribution.<sup>170</sup>

#### a. *Constitutionality of Economic Contribution Claims*

Most of the litigation related to economic contribution relates to application of the statutory formula determining the proper amount of recovery. Additionally, some judges and practitioners question the constitutionality of the economic contribution statute in that the applica-

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163. No. 10-06-00280-CV, 2007 WL 2447239, at \*1 (Tex. App.—Waco Aug. 29, 2007, no pet.) (mem. op., not designated for publication).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. TEX. FAM. CODE ANN. § 3.402(b) (Vernon 2006).

169. § 3.408(a).

170. *Id.*

tion of the formula may result in a change of character of particular property.

b. Recovery for Economic Contribution

In *Mays v. Mays*<sup>171</sup> a former husband challenged the trial court's division of the marital estate, which included ordinary reimbursement and economic contribution to his former wife. The Corpus Christi Court of Appeals affirmed the judgment of the trial court. The husband had purchased a home prior to marriage with \$3,250 and a loan for the rest of the purchase price.<sup>172</sup> In 1995 the couple paid the remaining debt of \$63,000 using the proceeds from a civil lawsuit.<sup>173</sup> Of that sum seventy-one percent was for the wife's emotional distress, which the court noted as constituting her separate property.<sup>174</sup> The wife testified that she had invested another \$10,000 of her separate inherited property to make improvements upon the house.<sup>175</sup> The trial court found that the house was the separate property of the husband and ordered the husband to reimburse the wife for the \$10,000 she had spent on improvements in addition to \$55,000 for economic contribution secured by an equitable lien.<sup>176</sup>

On appeal the husband argued that the trial court erred by not admitting an inventory into evidence to show the assets and liabilities of each party. The court rejected his argument, noting that the husband had failed to comply with the local rules by not filing an inventory and, as a result, found that he should be precluded from complaining.<sup>177</sup> The court also noted that it was presumed that the funds used to pay the mortgage were community property.<sup>178</sup>

With respect to the trial court's award to the wife of \$55,000 for economic contribution, the husband argued that the wife did not provide sufficient evidence to overcome the presumption that the funds used to pay the mortgage were community property.<sup>179</sup> In dividing the property the trial court heard evidence concerning the civil suit from which the wife received a separate award used to discharge the debt. The wife had deposited the check for the award into a checking account and immediately wrote the check to pay the balance of the debt on the house. The wife also testified that she was unable to obtain documents from her husband relating to the purchase and discharge of indebtedness on the house.<sup>180</sup>

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171. No. 13-05-558-CV, 2007 WL 776684 (Tex. App.—Corpus Christi Mar. 15, 2007, pet. denied).

172. *Id.* at \*1.

173. *Id.* at \*4.

174. *Id.* (citing *Licata v. Licata*, 11 S.W.3d 269, 273 (Tex. App.—Houston [14th Dist.] 1999, pet. denied)).

175. *Id.* at \*1.

176. *Id.*

177. *Id.* at \*3.

178. *Id.* (citing *Vallone v. Vallone*, 644 S.W.2d 455, 460 (Tex. 1982); *Saldana v. Saldana*, 791 S.W.2d 316, 319 (Tex. App.—Corpus Christi 1990, no writ)).

179. *Id.* at \*3–4.

180. *Id.* at \*4.

The appellate court affirmed the trial court's division and the wife's \$10,000 reimbursement with a lien against the house to secure the claim.<sup>181</sup>

### III. MANAGEMENT AND LIABILITY OF MARTIAL PROPERTY

#### A. STANDING TO INTERVENE

Disputes concerning interspousal liability of marital property turn on the community or separate nature of marital property.<sup>182</sup> But one spouse does not act as the agent of the other merely "because of the marriage relationship."<sup>183</sup> In *Madison v. Williamson*,<sup>184</sup> the question of spousal agency arose in the context of a suit for negligent failure to prevent sexual assault. The suit was brought on behalf of a minor child, alleging that the child's mother failed to prevent the child's father from engaging in illicit conduct. The court concluded that the marriage relationship did not create a duty to prevent the assault: "[n]othing inherent in this husband-wife relationship gives rise to a fact issue that either spouse had the right to control the other."<sup>185</sup> Therefore, the plaintiff was unable to show that the child's mother had a duty to prevent the assault.<sup>186</sup>

*Wells v. Dotson*<sup>187</sup> was a suit for an alleged breach of contract between a lessor and the lessee. The Tyler Court of Appeals found that the lessee's wife lacked standing to intervene. The wife was not a party to the lease-contract, though she had a presumptive community property interest in her husband's solely-managed community property interest.<sup>188</sup> But if the option was enforceable, only the husband could enforce it.<sup>189</sup>

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

In *In re Wendt*, a former husband failed in his attempt to substitute dischargeable for nondischargeable debt when he declared Chapter 7 bankruptcy.<sup>190</sup> The husband, a veterinarian, retained his veterinary practice after his divorce, but owed the equivalent of "alimony" to his former wife as that term is used in the Bankruptcy Code.<sup>191</sup> After suffering a stroke, the veterinarian could not perform surgery and looked for a substitute source of income. He made an arrangement with a seller of

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181. *Id.* at \*4-5.

182. TEX. FAM. CODE ANN. §§ 3.201-3.202 (Vernon 2006).

183. *Id.* at § 3.201.

184. 241 S.W.3d 145 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

185. *Id.* at 154.

186. *Id.*

187. 261 S.W.3d 275 (Tex. App.—Tyler 2008, no pet.).

188. *Id.* at 285.

189. TEX. FAM. CODE ANN. § 3.003 (Vernon 2006); *Blackman v. Bd. of Adjustment*, No. 05-98-00953-CV, 2000 WL 1239981, at \*3 (Tex. App.—Dallas 2000, pet. denied) (not designated for publication).

190. *In re Wendt*, 381 B.R. 217, 223-24 (Bankr. S.D. Tex. 2007).

191. *Id.* Alimony is a nondischargeable debt under Section 525(a)(5) of the Bankruptcy Code. 11 U.S.C. § 523(a)(5) (2006).

animal medicines to sell flea and tick medicine, with compensation based on a deferred billing arrangement. The veterinarian then engaged two different attorneys, neither of whom had knowledge of the other. He hired the first attorney to prepare for declaring bankruptcy under Chapter 7 of the Bankruptcy Code. Responding to his former wife's demand for overdue alimony, the veterinarian hired the second attorney to negotiate a settlement. The latter was successful in negotiating a settlement for a lump sum payment in return for the release of future alimony obligations, but the veterinarian did not tell his attorneys or his former wife that he planned to file for bankruptcy.<sup>192</sup> The Chapter 7 bankruptcy on behalf of the veterinarian and his business was filed the day after he paid his former wife for releasing his alimony obligation.<sup>193</sup> The trustee of the business's bankruptcy estate proceeded to recover the lump sum distributed to the former wife as a preference. The former wife thereupon sought to deny the veterinarian a discharge and to have the "alimony" debt excepted from discharge.<sup>194</sup>

The Bankruptcy Court agreed that the debt should be excepted from discharge.<sup>195</sup> The court concluded that remaining silent as to his bankruptcy-planning constituted "a knowing false representation as to current facts" upon which the former wife relied in granting his release.<sup>196</sup> The court added that the release did not change the character of the debt.<sup>197</sup> The debt was still "alimony" and could still be excepted under the Code.<sup>198</sup> The court concluded that the debt should be excepted because the veterinarian's pursuit of the alimony release, while intending to file for bankruptcy, created an objective substantial certainty that his actions would harm his former wife.<sup>199</sup> The court nevertheless found that there was insufficient evidence that the veterinarian was a fiduciary for his former wife<sup>200</sup> and that his Chapter 7 petition was deservedly denied.<sup>201</sup>

In the bankruptcy proceeding<sup>202</sup> of a homeowner-mortgagor the debtor and her trustee sought to invalidate the mortgage of her homestead for lack of strict compliance with the provisions of the Texas Constitution,<sup>203</sup> which requires that all information called for in the mortgage-loan documents be supplied in the application. It was asserted that because two of the pieces of required information were omitted in the loan application, the lien on the homestead was constitutionally void. The two blanks in

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192. *Anderson*, 318 B.R. at 220. The defendant accumulated the cash necessary to make a lump sum payment by withholding payment under the deferred billing arrangement applicable to the flea and tick medication. *Id.* at 221-22.

193. *Id.* at 221.

194. *Id.* at 222.

195. *Id.* at 223-24.

196. *Id.* at 223.

197. *Id.* at 224.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 225.

202. *Ortegon v. Ameriquet Mortgage Co.*, 398 B.R. 431, 433 (Bankr. W.D. Tex. 2008).

203. *Id.*; TEX. CONST. art. XVI, § 50(a).

the application that had not been filled in were the date of the transaction and the value of the homestead that was the subject of the mortgage-loan. The Austin Bankruptcy Court concluded<sup>204</sup> that because the homeowner-debtor had not sought correction of the defect within the four-year statute of limitation,<sup>205</sup> the objection to the validity of the mortgage failed.

A loan company that relies on an effective homestead waiver will forfeit the entire principal and interest of a loan. In *In re Cadengo* a husband, his wife and their two children lived in the husband's separate house.<sup>206</sup> In the divorce, the court ordered the husband and wife to transfer the house to their minor children, a daughter and a son, when both were eighteen.<sup>207</sup> The daughter continued residing in the house after she turned eighteen. Before the son had reached his eighteenth birthday the divorced parents found a loan-broker<sup>208</sup> who, for a large fee, arranged a loan. The loan broker and the lender received a copy of the divorce decree and visited the property while the father and daughter were present. The loan-closing lasted less than twenty minutes, and, without any explanation, the broker directed the nineteen year-old daughter to sign a warranty deed purporting to transfer the property from the former spouses to their daughter as well as an affidavit (homestead waiver) that she did not reside on the property and would not claim the property as her homestead.<sup>209</sup> The loan was for \$34,000 due and payable in a year. The proceeds were then distributed: \$12,278.83 to discharge the first mortgage, \$1,189.68 to pay for past due property taxes, \$6,664.61 to the former husband, \$3,866.88 for closing costs, and \$10,000 to the broker and lender.<sup>210</sup> Several months thereafter the daughter sued to invalidate the lien.<sup>211</sup> The bankruptcy court held that (1) the property was her homestead, (2) the broker and lender could not rely on the homestead waiver, and (3) the home-equity-loan violated multiple sections of the Texas Constitution, requiring the lender to forfeit the principal, the interest and to return the pre-suit payments.<sup>212</sup> Relying on the divorce decree, the court also held that the daughter had an equitable title to the property after reaching eighteen and that her equitable interest and continuous residence in the property established her homestead claim.<sup>213</sup>

The broker and lender were not able to refute the homestead claim, nor were they able to rely on the homestead waiver signed at the loan-closing. The waiver was ineffective because the broker and lender had a

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204. *Ortegon*, 398 B.R. at 440.

205. TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 2008). See *Rivera v. Countrywide Home Loans, Inc.*, 262 S.W.3d 834, 839-40 (Tex. App.—Dallas 2008, pet. denied).

206. *In re Cadengo*, 370 B.R. 681, 685 (Bankr. S.D. Tex. 2007).

207. *Id.* at 686.

208. *Id.* The court mentions that three of the last four loans this broker made to the lender resulted in litigation and that all the witnesses, including the lender, described him "as being a small step above a loan shark." *Id.* at 686, 689.

209. *Id.* at 687.

210. *Id.*

211. *Id.* at 685.

212. *Id.* at 699.

213. *Id.* at 694.

copy of the divorce decree showing the daughter's interest, and they had also acted as witnesses to the daughter's presence while inspecting the property.<sup>214</sup> The court relied on the constitutional language that a lender may rely upon a homestead waiver only "if it is without knowledge of the borrower's right to claim a homestead and the borrower is not in actual use and possession of the homestead property."<sup>215</sup> Finally, the court characterized this transaction as a home equity loan, which violates the institutional provisions embodied in section 50(a)(6)(C),(E),(M),(Q)(viii), and 50(g).<sup>216</sup> The court consequently ordered the forfeiture of the entire principal and interest of the loan, including the pre-suit payments made by the borrower.

### C. EXEMPT PROPERTY

#### 1. Homesteads

In *Smith v. Hennington*, the Eastland Court of Appeals affirmed a judgment against an ex-husband who had appealed a trial court's judgment resolving a title dispute to real property.<sup>217</sup> To satisfy a judgment against the ex-husband, the plaintiffs levied on and sold forty acres of the defendant's land, leaving the defendant in possession of ten acres as his urban homestead. The defendant then asserted that the land in dispute was rural and not urban and that he was, therefore, entitled to a homestead exemption of 100 acres, part of which was included in the property sold at the execution sale. The court concluded, however, that the land seized was indeed urban in that it met the test of urban realty provided in Property Code section 41.002(a) and (b).<sup>218</sup>

In *Wilcox v. Marriott*,<sup>219</sup> the Beaumont Court of Appeals considered the effect of the 1999 amendments to the homestead provisions of the Texas Constitution<sup>220</sup> and the Property Code.<sup>221</sup> There, a residential homestead had not been protected in full until after the constitutional amendments expanded the maximum size of an exempt urban homestead to ten acres.<sup>222</sup> The plaintiff creditor abstracted his judgment in August, 1999.<sup>223</sup> The .99 acre homestead at issue was sold in January, 2000 and the defendant-seller netted approximately \$250,000. Two months later a writ of execution was issued covering any real estate owned by him.<sup>224</sup> It was during the time period between judgment and execution that the con-

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214. *Id.* at 696.

215. *Id.*

216. *Id.* at 696-98.

217. *Smith v. Hennington*, 249 S.W.3d 600, 606 (Tex. App.—Eastland 2008, pet. denied).

218. TEX. PROP. CODE ANN. § 41.002(a)–(c) (Vernon 2008).

219. *Wilcox v. Marriott*, 230 S.W.3d 266, 268 (Tex. App.—Beaumont 2007, pet. denied).

220. TEX. CONST. art. 16, § 51.

221. TEX. PROP. CODE ANN. § 41.002 (Vernon 2008).

222. *Wilcox*, 230 S.W.3d at 269.

223. *Id.* at 268.

224. *Id.* at 269.

stitutional definition of urban homestead was expanded<sup>225</sup> and was reflected in the Property Code to cover writs of execution from January 1, 2000.<sup>226</sup> A lien on real property acquired before January 1, 2000 was governed by the law in effect on the date the lien was acquired.<sup>227</sup> When he acquired his judgment, the judgment creditor in *Wilcox* was entitled to execute on non-exempt property only as defined by the law prior to the amendments. On the date of execution the size of the exempt homestead extended the entire parcel from January 1, 2000.<sup>228</sup> Thus, the creditor was barred from enforcing his judgment on it.

Although as a general rule property designated as a homestead is exempt from seizure by creditors, certain types of loans are excluded from that protection. In *Baum v. First Coleman National Bank*, the homestead was not protected from foreclosure because the bank's deed of trust secured a purchase money lien and a mechanic's lien, as purchase money and home improvement indebtedness fall outside the homestead protection.<sup>229</sup>

## 2. *Liens on Homesteads*

In *In re Henderson*, the debtors failed to comply with the statutory requirement that bankruptcy petitioners obtain credit-counseling prior to filing for bankruptcy<sup>230</sup>—a process that can be very helpful to debtors in understanding the status of their homes subject to liens. Instead, they completed credit-counseling immediately after filing.<sup>231</sup> The court found an applicable exemption to such a failure, that section 109(h)(3) of the Bankruptcy Code was ambiguously worded, and that the debtors substantially, if not literally, fell within the parameters of the exemption.<sup>232</sup> Regardless of their strict compliance with the exemption, the court determined that compliance with section 109(h)(3) was a waivable standard, especially given exigent circumstances.<sup>233</sup> Finding no reason to doubt the good faith efforts of the debtors at compliance and that injustice would occur otherwise, the court granted the debtors an extension of time for complying with the counseling requirement.

The trustee in bankruptcy in *In re Palmer*<sup>234</sup> sought to invalidate a homestead claim of sixty four acres of rural land that the debtor had inherited prior to marriage.<sup>235</sup> The debtor and his wife, however, resided on his wife's thirteen separate acres located three miles from the debtor's

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Baum v. First Coleman Nat'l Bank*, 227 F. App'x 414 (5th Cir. 2007); see TEX. CONST. art. XVI, § 50(a).

230. *In re Henderson*, 364 B.R. 906, 908 (Bankr. N.D. Tex. 2007).

231. *Id.*

232. *Id.* at 911.

233. *Id.* at 912.

234. 391 B.R. 386 (Bankr. E.D. Tex. 2008).

235. *Id.* at 388.



tract.<sup>236</sup> The debtor testified that he had never lived on the sixty-four acres nor had he used the property to support himself or his family, but he and his wife intended to use the property for his family support in the future.<sup>237</sup>

The court noted that though a homestead may be owned by the community or may be the separate property of either spouse,<sup>238</sup> a husband and wife cannot enjoy different homesteads.<sup>239</sup> The court also referred to the Texas Constitution and Property Code, as amended in 1999, which provide that a rural homestead of a married claimant can consist of no more than two hundred acres "which may be in one or more parcels."<sup>240</sup> Though under the 1999 amendment the urban homestead property must be contiguous, that requirement is not applicable to the rural homestead. The court concluded in *Palmer*, in reliance on *In re Murray*,<sup>241</sup> that to give homestead protection to the non-contiguous rural acreage, that area must "somehow support the home,"<sup>242</sup> and thus, the debtor must show that the further tract amounts to a non-contiguous extension of the tract where the debtor resides. Though the debtor and his wife testified to their plans to use the tract in their ranching and dog-breeding businesses, no steps towards these intended uses had been taken.<sup>243</sup>

In *Pierce v. Washington Mutual Bank*, a homeowner sued the purchaser of his alleged homestead at a sheriff's sale.<sup>244</sup> The trial court granted the defendant-bank's motion for summary judgment. The Tyler Court of Appeals reversed and remanded. The defendant had filed an abstract of judgment, which clouded the homeowner's title to his home in Canton.<sup>245</sup> The plaintiff then filed suit against the bank to remove the cloud, insisting that the property was entitled to homestead protection.<sup>246</sup> The bank responded that based on the homeowner's own interrogatories, the homeowner's homestead property was in Rockwall and was claimed by the plaintiff as his homestead at the time the bank filed its abstract of judgment.<sup>247</sup> The trial court sustained the bank's motion for summary judgment.

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236. *Id.*

237. *Id.*

238. *Id.* at 389 (citing *Behrens v. Behrens*, 186 S.W.2d 697, 701-02 (Tex. Civ. App.—Austin 1945, no writ); *Wicker v. Rowntree*, 185 S.W.2d 150, 152 (Tex. Civ. App.—Amarillo 1945, writ ref'd w.o.m.)).

239. *Palmer*, 391 B.R. at 389 (citing *Crowder v. Union Nat. Bank of Houston*, 261 S.W. 375, 377 (Tex. Comm'n App. 1924); *In re Mitchell*, 80 B.R. 372, 383 (Bankr. W.D. Tex. 1987)). This observation is accurate under ordinary circumstances, but separated spouses may have individual homesteads.

240. *Id.* (citing TEX. CONST. art. XVI, § 51; TEX. PROB. CODE ANN. § 41.002(b) (Vernon 2008)).

241. 260 B.R. 815, 830 (Bankr. E.D. Tex. 2001).

242. *Palmer*, 391 B.R. at 392 (quoting *PaineWebber, Inc. v. Murray*, 260 B.R. 815, 830 (Bankr. E.D. Tex. 2001)).

243. *Id.* at 391.

244. *Pierce v. Washington Mut. Bank*, 226 S.W.3d 711, 713 (Tex. App.—Tyler 2007, pet. denied).

245. *Id.* at 712.

246. *Id.*

247. *Id.* at 713.

ment, despite an affidavit filed by the plaintiff in response to the motion which contradicted the interrogatories.<sup>248</sup>

The court of appeals began by noting the importance of the homestead institution, the broad purpose of which is to protect families from “dependence and pauperism” and “to promote the stability and welfare of the state.”<sup>249</sup> The court went on to cite authority establishing that a person may not claim two homesteads at the same time.<sup>250</sup> The court also cited authority establishing that the abandonment of one homestead in favor of another cannot succeed by merely changing residences and that proof of abandonment with no intent to return must be “undeniably clear.”<sup>251</sup>

The court found that the homeowner’s affidavit was sufficient to controvert his interrogatory answers and to raise a genuine issue of material fact, and, as a result, the summary judgment was inappropriate.<sup>252</sup> The Texas Supreme Court has explicitly stated that it is a “well-established rule that a deposition does not have controlling effect over an affidavit” in considering a motion for summary judgment.<sup>253</sup> Thus, the court overruled the summary judgment and remanded the case to the trial court to determine whether or not the homeowner had abandoned his Canton property as his home in favor of his Rockwall property.<sup>254</sup>

### 3. Insurance Code Exemptions

In *In re Soza*, one day before filing a Chapter 7 bankruptcy the debtors purchased a large annuity.<sup>255</sup> The debtors claimed that the annuity was exempt under section 1108.051 of the Texas Insurance Code.<sup>256</sup> The trustee asserted that the purchase was a constructive fraud on creditors under section 1108.053.<sup>257</sup> The debtors’ defense was that the purchase had been made to protect their interest in an inheritance of their siblings. The bankruptcy court found fraud in the debtors’ acts and denied the claimed exemption. The district court reversed this conclusion and allowed the exemption. The Fifth Circuit court put aside the dispute and concluded that in passing the Insurance Code, the Texas Legislature “clearly knew”

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248. *Id.*

249. *Id.* at 714 (citing *Estate of Johnson v. Comm’r*, 718 F.2d 1303, 1307 (5th Cir. 1983) (for “dependence and pauperism”), and *Andrews v. Sec. Nat’l Bank of Wichita Falls*, 121 Tex. 409, 417, 50 S.W.2d 253, 256 (1932) (for promotion of state welfare)).

250. *Id.* at 715 (citing *Silvers v. Welch*, 127 Tex. 58, 62, 91 S.W.2d 686, 687 (1936)); see also TEX. CONST. art. XVI, § 50).

251. *Pierce*, 226 S.W.3d at 715 (citing *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 808 (Tex. App.—Austin 2004, pet denied); *Rancho Oil Co. v. Powell*, 142 Tex. 63, 69, 175 S.W.2d 960, 963 (1943) (for the proposition that changing residences is not sufficient to constitute abandonment); *Burkhardt v. Lieberman*, 138 Tex. 409, 416, 159 S.W.2d 847, 852 (1942) (for the proposition that proof of abandonment must be “undeniably clear.”)).

252. *Id.* at 717.

253. *Id.* at 716 (citing *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988)).

254. *Id.*

255. *In re Soza*, 542 F.3d 1060, 1063 (5th Cir. 2008).

256. *Id.*; TEX. INS. CODE ANN. § 1108.051 (Vernon 2009).

257. TEX. INS. CODE ANN. § 1108.053.

the difference between fraud committed with or without an intent to defraud.<sup>258</sup> Thus, omission of that distinction from the Insurance Code indicated that fraud might be found without an intent to defraud within the meaning of “constructive fraud” in section 1108.053,<sup>259</sup> which brought the debtors’ purchase of the annuity within the ambit of constructive fraud.<sup>260</sup> The court recognized that the purpose behind the legislative enactment of statutory shielding of annuities from creditors was to allow debtors to provide for their families in the future. In this case, however, the purpose of the debtors’ purchase was to prevent a bankruptcy court from reaching an inheritance, and, as such, it was “a sham to stave off litigation” and not in keeping with the purpose of the exemption.<sup>261</sup>

#### 4. Individual Retirement Accounts

An individual retirement account (IRA) may not be claimed as exempt from a bankruptcy estate if the IRA is inherited from a non-spouse. In *In re Jarboe*, a man inherited an IRA from his mother, which he left untouched.<sup>262</sup> Subsequently, the man filed for bankruptcy under Chapter 7 of the Bankruptcy Code and claimed that section 42.001 of the Texas Property Code exempted this IRA from his bankruptcy estate.<sup>263</sup> The bankruptcy court disagreed with the bankrupt because the inherited IRA did not qualify as such under the Internal Revenue Code.<sup>264</sup> In considering this issue of first impression, the bankruptcy court relied on case law from other jurisdictions.<sup>265</sup> The court found a trend to deny exempting inherited IRAs and that other bankruptcy courts based the decisions not on similar state property codes, but on the incompatibility of an inherited IRA with an IRA under the Internal Revenue Code.<sup>266</sup> Joining the trend, the bankruptcy court held that the inherited IRA was not a sort of retirement plan.<sup>267</sup> An inherited IRA differed from an ordinary IRA because: (1) the beneficiary could withdraw from the inherited IRA without penalty, (2) the beneficiary must take certain withdrawals after one year or the entire amount within five years, and (3) the beneficiary could not roll-over or contribute to the inherited IRA.<sup>268</sup>

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258. *Soza*, 542 F.3d at 1066.

259. See TEX. BUS. & COMM. CODE ANN. § 24.005(a)(1) (Vernon 2009).

260. *Soza*, 542 F.3d. at 1067–68.

261. *Id.* at 1068.

262. *In re Jarboe*, 365 B.R. 717 (Bankr. S.D. Tex. 2007).

263. *Id.* at 718.

264. The relevant portion of this section protects IRAs from the bankruptcy estate *unless* the accounts do not qualify under the applicable Internal Revenue Code provisions. TEX. PROP. CODE ANN. § 42.0021(a) (Vernon 2000 & supp. 2008).

265. *Jarboe*, 365 B.R. at 723–24.

266. *Id.* at 724.

267. *Id.* at 725.

268. *Id.*

## IV. DIVISION ON DIVORCE

## A. DIVISION PROCEEDINGS

In its *Opinion No. 584*,<sup>269</sup> the Professional Ethics Committee for the State Bar of Texas was asked whether it is permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to continue to represent a client in a proceeding after the lawyer has learned that the conduct of the lawyer's former client may be material to the proceeding. In *Opinion No. 584*, a client hired a lawyer to represent the client in a child-custody modification proceeding against the client's former spouse.<sup>270</sup> After being hired, the lawyer learned from another source that his former client in a divorce proceeding had a relationship with his present client. When contacted by his present client, the lawyer had no continuing obligations or responsibilities to his former client other than those arising from his former client's status as such.<sup>271</sup>

The Ethics Committee classified this problem as one falling within the ambit of Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct, under which a lawyer who has previously represented a particular client may not thereafter represent another person in a matter adverse to the former client:

if (a) the new matter questions the validity of the lawyer's services or work product for the former client, (b) the representation of the subsequent client will in reasonable probability involve a violation of Rule 1.05, or (c) the matter in which the lawyer represent the subsequent client is the same or a substantially related matter.<sup>272</sup>

The Committee noted that whether a matter falls under the prohibitions of Rule 1.09 depends on "the likelihood and degree to which the current representation may result in legal, financial, or other identifiable harm" to the former client.<sup>273</sup>

In this instance, the Committee concluded that the custody proceeding between the present client and the client's former spouse did not involve the validity of the lawyer's work for his prior client and that it was not the same or substantially similar to the matter for which the previous client had sought the lawyer's services.<sup>274</sup> The Committee also pointed out that the lawyer's obligation under Rule 1.09(a)(2) (pertaining to potential

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269. 71 Tex. B.J. 840 (Nov. 2008).

270. *Id.*

271. *Id.*

272. *Id.* (citing Texas Disciplinary Rule of Professional Conduct 1.09(a). The Committee also cited *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 51 (Tex. 1998) for the proposition that matters are "substantially related" under Rule 1.09 "when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar." The Committee also noted that in instances when a substantial relationship exists, Texas courts apply a "conclusive presumption" that confidential information was actually transmitted from client to lawyer. See *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834 (Tex. 1994)).

273. *Opinion No. 584*, 71 Tex. B.J. at 840.

274. *Id.*

Rule 1.05 violations) was discharged if it was not *reasonably probable* that the lawyer, in representing his client, would reveal confidential information of the former client or use such information to the client's disadvantage, unless the former client consented after consultation or the information had become generally known.<sup>275</sup> Thus, a lawyer is free under Rule 1.09 to represent his client in a proceeding after learning that the conduct of his former client might be material if the matter is not adverse to the former client, the matter is adverse to the former client but the lawyer's work for the former client is not questioned, the present representation does not involve the same or substantially related matter to a former clients' matter and "the representation will not in reasonable probability involve a violation of Rule 1.05 with respect to confidential information of the former client."<sup>276</sup>

Compliance with the provisions of Rule 1.05 was, in the Committee's estimation, of paramount importance, and the lawyer's representation of his present client would be improper, notwithstanding Rule 1.09, if by proceeding, the lawyer failed to abide by the confidentiality requirements of Rule 1.05.<sup>277</sup>

In *In re Ashton*, in the course of a trial for divorce, the husband filed a writ of mandamus requesting relief of his duties of trusteeship and appointment of a new trustee.<sup>278</sup> The trial court had already appointed a third party to serve as fee master and successor trustee to the trust which was created and managed by the husband, and had ordered the trust, through the new trustee, to pay part of the wife's expenses of the trial and her attorney's fees.<sup>279</sup> The Dallas Court of Appeals held that the trial court lacked jurisdiction over the trust. In the divorce proceeding the husband had been amended as a party in his individual capacity only and not in his capacity as trustee; therefore, the trust had not otherwise been named as a party.<sup>280</sup> The trial court's order, with respect to the husband's trusteeship, was therefore void. The court noted that jurisdiction over a party to a suit is contingent on the proper service of process on that party and that suits against a trust must be brought against its legal representative who is named and acting as such.<sup>281</sup> The court of appeals conditionally granted the husband's petition for a writ of mandamus and directed

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275. *Id.* at 841. The Committee cited Comment 4 of Rule 1.09 for this proposition, which declares that "if there were a reasonable probability that the subsequent representation would involve either an unauthorized disclosure of confidential information under Rule 1.05(b)(1) or an improper use of such information to the disadvantage of the former client under Rule 1.05(b)(3), that representation would be improper under paragraph (a)." TEX. GOV'T CODE ANN. T.2, Subt. G App. A, Art. 10, § 9, Rule 1.09 (Vernon 2009).

276. *Opinion No. 584*, 71 Tex. B.J. at 841.

277. *Id.*

278. 266 S.W.3d 602, 603 (Tex. App.—Dallas 2008, no pet.).

279. *Id.* The wife had asserted that she would be unable to compensate her attorneys and experts because her husband had siphoned community funds into the trust and thereby limited her access to them. She asked the trial court to equalize the parties' fees, to appoint a fee master, and to appoint a successor trustee to manage the trust. *Id.*

280. *Id.* at 604.

281. *Id.*

the trial court to vacate the order concerning the trust. The wife's request to dismiss the writ of mandamus for mootness and her alternative request to abate the proceeding were denied.<sup>282</sup>

In *Boufaissal v. Boufaissal*,<sup>283</sup> the parties tendered an agreed decree of divorce to the trial judge for signature after a simple prove-up hearing. The decree recited the terms of their divorce and property division. In response to the wife's appeal from the judgment to which she had agreed, the court held that she was barred from taking an appeal in the absence of any allegation and proof of fraud, collusion, or misinterpretation.<sup>284</sup> She did not assert any of those grounds. A party's consent to the trial judge's entry of judgment waives any error except for those pertaining to jurisdiction. The wife had already signified her approval and consent to the terms of the decree as to both form and substance and, therefore, waived her complaint.<sup>285</sup>

## B. MAKING THE DIVISION

In *Witte v. Witte*,<sup>286</sup> the ex-husband challenged the trial court's division of property. The Houston Fourteenth District Court of Appeals, with some misgiving by Justice Thompson Frost as to the appellant's waiver of certain issues by a briefing error,<sup>287</sup> affirmed the lower court's division citing the insufficient evidence presented by the husband in support of his assertion. In his appeal, the husband argued that the trial court erred by mischaracterizing community property as the wife's separate property and by awarding the wife reimbursement from the community estate.<sup>288</sup> The ex-husband also asserted that the award of certain property to the ex-wife had a material ill effect on the property division. The court rejected the ex-husband's apparently imprecise argument on the grounds that there was no demonstrated support.<sup>289</sup>

The ex-husband also challenged the factual sufficiency of the evidence offered to rebut the community presumption that led to the trial court's awarding shares of stock in three closely-held family corporations to his ex-wife. As to the shares from two of the corporations, the ex-husband presented no evidence to support his challenge.<sup>290</sup> As to the shares from the third corporation, the ex-wife had executed a loan of \$700,000 to purchase the shares, and as of the date of the appeal she had repaid only

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282. *Id.* at 605.

283. 251 S.W.3d 160 (Tex. App.—Dallas 2008, no pet.).

284. *Id.* at 161.

285. *Id.*

286. No. 14-05-00768-CV, 2008 WL 451717 at \*1 n.1 (Tex. App.—Houston [14th Dist.] 2008, pet. designated) (not designated for publication) (“Because the issues in this case are not settled, Senior Justice Edelman opposes designation of this opinion as memorandum; but because he has not written a concurrence or dissent, the decision to designate it as [a] memorandum is determined by a majority of the panel.”).

287. *Id.* at \*3.

288. *Id.* at \*1.

289. *Id.* at \*2.

290. *Id.*

\$10,000. The divorce decree made no mention of this debt nor assigned it to either party,<sup>291</sup> but the ex-husband failed to provide sufficient evidence that would establish the value of the stock had, at any time since its purchase, appreciated to an amount exceeding the outstanding debt. The court concluded that even if the stock had been characterized as community property and the debt as a community liability, there was no evidence that the debt and the stock combined would have resulted in any positive value and, therefore, could not have had a material effect on the division.<sup>292</sup> Thus, the court rejected the ex-husband's argument with respect to the shares from all three corporations.<sup>293</sup>

The ex-husband also contended that the trial court erred in considering his fault as a factor in making an unequal division of the marital estate, despite the fact that the divorce was granted on no-fault grounds. The appellate court rejected his argument and noted that while the Texas Supreme Court has not decided this point, the Houston Court of Appeals held that it is appropriate to grant the divorce in such circumstances.<sup>294</sup> As to issues raised by the ex-husband for the first time on appeal, the court rejected considerations of those issues, noting that issues not raised in an appellant's original brief are waived.<sup>295</sup> The court concluded by affirming the judgment of the trial court.

In *Brooks v. Brooks*,<sup>296</sup> the husband appealed from the trial court's failure to render judgment in a divorce proceeding in accordance with a mediated settlement agreement and the trial court's award of ex-spousal maintenance to the wife. The couple had entered into a mediated settlement agreement dividing their property in accordance with section 6.602<sup>297</sup> after the wife had filed for divorce. Over a year later, counsel for the parties agreed to void the settlement agreement and remediate the dispute. Before new mediation could occur, however, the parties retried the case. Each spouse had new plans for property division. Despite the husband's motion for substitution of counsel, which was granted, and his new counsel's subsequently filed motion for a new trial, the court denied the motion and signed the final decree which was more generous to the wife than the proposed mediated agreement based on the contention that the mediated settlement agreement should have been the basis of the trial court's division. On appeal, the court held that the husband was barred

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291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at \*2 (citing *Mohindra v. Mohindra*, No. 14-06-00056-CV, 2007 WL 3072057, at \*2 (Tex. App.—Houston [14th Dist.] Oct. 23, 2007, no pet.) (mem. op., not designated for publication); *Bishop v. Bishop*, No. 14-02-00132-CV, 2003 WL 21229476, at \*3 (Tex. App.—Houston [14th Dist.] May 29, 2003, no pet.) (mem. op., not designated for publication)).

295. *Witte*, 2008 WL 451717, at \*3 (citing TEX. R. APP. P. 38.3; *Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 (Tex. App.—Houston [1st Dist.] 2005, pet. denied), *cert denied*, 549 U.S. 895 (2006); *Zamarron v. Shinko Wire Co.*, 125 S.W.3d 132, 139 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

296. 257 S.W.3d 418 (Tex. App.—Fort Worth 2008, pet. denied).

297. TEX. FAM. CODE ANN. § 6.602.

from enforcing the prior agreement under the doctrine of quasi-estoppel because it would have been unconscionable to allow enforcement after he had taken the inconsistent position that it was unenforceable, as demonstrated by his unwillingness to participate in a subsequent mediation.<sup>298</sup> As to the enforceability of mediated settlement agreements generally, the court pointed out that while such agreements that meet the requirements of section 6.602(b) are binding despite a unilateral withdrawal of consent, a trial court is nevertheless free to disregard such an agreement in certain circumstances, which in this case included the presence of a colorable quasi-estoppel claim.<sup>299</sup>

In *Chafino v. Chafino*,<sup>300</sup> the wife appealed a divorce decree contending that the trial court abused its discretion in its division of community property. The wife's petition had alleged insupportability, adultery, and cruel treatment. Her husband denied and counterclaimed alleging insupportability and cruelty.<sup>301</sup> The El Paso appellate court observed that the husband's "apparent adulterous behavior and his consistent denials thereof provided the trial court with a reasonable basis for making an unequal property division."<sup>302</sup> The wife had been awarded over seventy percent of the marital assets in that disproportionate division.<sup>303</sup> On appeal she asserted that she was entitled to an even greater percentage of the marital estate because of her husband's alleged infidelity.<sup>304</sup> The court of appeals rejected that argument and noted that disproportionate divisions on divorce are reviewed under an abuse of discretion standard and that the trial court had had a reasonable basis to support the particular percentages of property granted to each party.<sup>305</sup> Therefore, the wife failed to discharge her burden to show that the division was clearly an abuse of discretion. An unequal property division, the court said, may not be used merely to punish the party at fault in a divorce, and, in the absence of evidence that the award in place was clearly an abuse of the trial court's discretion, the award would be upheld without enhancement regardless of whether the reviewing court's might have reached a contrary conclusion.<sup>306</sup>

In the wife's suit for divorce in *Burney v. Burney*,<sup>307</sup> the ex-husband challenged the division of property. He raised two issues: (1) the trial court's handling of debts and (2) its failure to deal with two checks and a washer and dryer, which he claimed as his separate property.<sup>308</sup> The trial court determined that the debt would be the responsibility of the spouse

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298. *Brooks*, 257 S.W.3d at 423–24.

299. *Id.* at 421–22.

300. 228 S.W.3d 467 (Tex. App.—El Paso 2007, no pet.).

301. *Id.* at 469.

302. *Id.* at 473.

303. *Id.* at 473–74.

304. *Id.* at 474.

305. *Id.*

306. *Id.*

307. 225 S.W.3d 208 (Tex. App.—El Paso 2006, no pet.).

308. *Id.* at 217–18.



in whose name the debt was incurred<sup>309</sup>—a decision based in part on the fact that the evidence concerning debts was insufficient. The husband had alleged that the total amount of debt accumulated during the marriage was over \$73,000, of which over \$48,000 was incurred by his ex-wife.<sup>310</sup> Thus, he argued that the trial court erred by not ordering the ex-wife to pay that amount. The El Paso Court of Appeals found the husband's accounting of the debt was inaccurate. The court also considered the wife's allegations that some portions of the debt resulted from the ex-husband's deliberate attempt to block her payments.<sup>311</sup> The appellate court also noted that the wife's employment was sporadic and that the husband, as a member of an accounting firm, had "more ability to retire debts." As a result, the appellate court found that evidence supported the trial court's exercise of discretion regarding the debts.<sup>312</sup>

On his second issue, the ex-husband argued that the trial court failed to account for an insurance check, a travel expense check, and a kitchen appliance, all of which he claimed as his separate property. The wife testified that the check was issued by the insurance company to cover stolen lawn furniture, some of which was the separate property of each spouse, and she further admitted forging her husband's endorsement of the check and depositing the proceeds into their joint account to pay for living expenses after they were separated. She asserted that the travel-expense check was used to pay for groceries and day care. The court of appeals found that the trial court had a reasonable basis for believing the testimony of the ex-wife regarding her use of the funds to discharge the husband's duty of support with no right of reimbursement.<sup>313</sup> As to the husband's separate appliance, which the trial court concluded should remain in the house for the benefit of the couple's only child, the court of appeals concluded that the husband had been improperly divested of his separate property.<sup>314</sup> The case was remanded to the trial court to redivide the property in accordance with the opinion, but if the ex-wife filed a remittitur of the washing machine, the judgment was affirmed.<sup>315</sup>

With respect to characterization of some of the property at issue, the wife offered the oral testimony from her mother to establish that her father had given particular property to the wife. The husband responded by asserting that this evidence was insufficient to rebut the community presumption because no effort to trace the property had been made.<sup>316</sup> The court nevertheless found that tracing was inapplicable to this case in the absence of any suggestion of a mutation of the property. The oral testimony offered by the wife's mother as to the acquisition had estab-

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309. *Id.* at 217.

310. *Id.*

311. *Id.* at 218.

312. *Id.*

313. *Id.* at 219.

314. *Id.*

315. *Id.*

316. *Id.* at 219-21.

lished its separate character.<sup>317</sup>

In a motion following the trial in the wife's suit for divorce in *Love v. Bailey Love*,<sup>318</sup> the wife sought an order requiring the husband to pay \$5,000 that the trial court had awarded to her as attorney's fees pending appeal. The husband<sup>319</sup> asserted that he could not be ordered to pay because the trial court had considered attorney's fees in making a division of the community property and the matter was thus *res judicata* to a subsequent order to pay attorney's fees pending appeal. The husband relied on the authority of *John M. Gillis, P.C. v. Wilbur*,<sup>320</sup> in which an attorney representing a wife was unsuccessful in his post-divorce efforts to secure his attorney's fees from his client. In that instance, the court had concluded that the wife's attorney's fees (as an integral part of the property division) should have been sought in "the divorce action," and if the grant of fees is not so ordered by the divorce court as part of the division, the granting of attorney's fees becomes *res judicata*.<sup>321</sup> In *Love*, the appellate court regarded the authority of *Gillis* as inapplicable because section 6.709(a)(2), under which the wife had been awarded the fees by the trial court, supplies an independent authority for granting such a post-divorce temporary order.<sup>322</sup> The court might have noted that section 6.709 was not enacted until 1997, twelve years after *Gillis* was decided.

### C. EX-SPOUSAL MAINTENANCE

In *Chafino v. Chafino*,<sup>323</sup> the El Paso Court of Appeals concluded that: (1) a trial court's decision to award ex-spousal maintenance is governed by an abuse of discretion standard; (2) section 8.051 of the Texas Family Code places affirmative requirements on a party seeking such maintenance; and (3) because the wife had failed to meet the statutory requirements, the trial court did not abuse its decision.<sup>324</sup> The court stressed that the Family Code presumes that ex-spousal maintenance is not warranted unless the movant-spouse has attempted to seek post-divorce employment or to develop such practical skills to make self-sufficiency possible. The wife in this case had not taken such steps.<sup>325</sup> The court of appeals, therefore, held that the trial court did not abuse its discretion in refusing

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317. *Id.*

318. 217 S.W.3d 33 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

319. The terms wife and husband are used by the court rather than ex-wife and ex-husband though nothing is said about the supercession of the trial court's order.

320. 700 S.W.2d 734 (Tex. App.—Dallas 1985, no writ).

321. *Id.* at 736–37; *Love*, 217 S.W.3d at 36.

322. *Love*, 217 S.W.3d at 36 n.2; see also TEX. FAM. CODE ANN. § 6.709(a)(2) (Vernon 2006).

323. 228 S.W.3d 467, 474–75 (Tex. App.—El Paso 2007, no pet.).

324. TEX. FAM. CODE ANN. § 8.051(2)(C) (Vernon 2006) (requiring that the marriage lasted ten years or longer and that "the spouse seeking maintenance lacks sufficient property, including property distributed to the spouse under this code, to provide for the spouse's minimum reasonable needs; and that the spouse "clearly lacks earning ability in the labor market adequate to provide support for the spouse's minimum reasonable needs.").

325. *Id.*

to award ex-spousal maintenance.<sup>326</sup>

*In re Green*, on the other hand, dealt with enforcement of an ex-spousal support based on an agreement between the divorcing spouses.<sup>327</sup> The former wife asserted that her former husband had failed to make the agreed ex-spousal support payments and to maintain health insurance for their children as required by the agreed divorce decree. The district court granted her motion for contempt and ordered the former husband held until he purged his contempt. The former husband filed a petition for a writ of habeas corpus, arguing that he could not be imprisoned for non-payment of a contractual support obligation incorporated in his divorce decree.<sup>328</sup> The Texas Supreme Court held that a court's order to pay ex-spousal support is unenforceable by contempt if the order merely restates a private debt rather than a legal duty imposed by Texas law.<sup>329</sup> The Supreme Court relied on Texas's constitutional provision against imprisonment for debt.<sup>330</sup> The former husband had voluntarily agreed to make contractual payments and was not ordered to do so under the Family Code's provision for ex-spousal maintenance. The voluntary support payments in this case clearly fell outside Chapter 8 of the Family Code.<sup>331</sup> The payment ordered exceeded the three-year extent of court-ordered ex-spousal maintenance and there was no finding that the former wife was disabled, caring for a disabled child, or lacked sufficient earning ability. Further, the decree did not state that the payments would terminate upon the former wife's remarriage.<sup>332</sup> Citing its previous decision in *Ex parte Hall*, the court stated that because the support order was not entered "on the authority of the Family Code," it could not be enforced by contempt.<sup>333</sup>

Acknowledging that a failure to provide health insurance under a voluntary agreement *can* be punished by contempt, the court determined that the former husband could not be confined in *this* case due to absence of a proper commitment order.<sup>334</sup> Whether the court meant that a failure to provide health insurance, standing alone, will serve as a sufficient basis for a judgment of contempt and resulting commitment is not clear. The Texas Supreme Court emphasized, however, that a contempt order cannot contain uncertainty or ambiguity of meaning.<sup>335</sup>

On appeal from a clarification and enforcement order of his divorce decree in *Parrish v. Parrish*, the former husband challenged the trial

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326. *Id.*

327. *In re Green*, 221 S.W.3d 645, 646 (Tex. 2007).

328. *Id.* at 646-47.

329. *Id.* at 647.

330. *Id.* See TEX. CONST. art. I, § 18 (stating that "[n]o person shall ever be imprisoned for debt").

331. *In re Green*, 221 S.W.3d at 647-48.

332. *Id.*; see TEX. FAM. CODE ANN. §§ 8.051(2), 8.054, 8.056(a).

333. *In re Green*, 221 S.W.3d at 648 (quoting *ex parte Hall*, 854 S.W.2d 656, 658 (Tex. 1993)).

334. *Id.* at 649.

335. *Id.*

court's division of stock options as unsupported by sufficient evidence and asserted that the trial court had erred by not preparing findings of fact and conclusions of law.<sup>336</sup> In 2003 the parties entered into a mediated agreement prior to their final divorce-hearing for division of most of their assets. They agreed to make an equal division of stock-options granted by any employer of the husband, and the final divorce decree reflected their agreement as to any options existing on December 16, 2003.<sup>337</sup> In 2006, the former wife filed a motion for clarification because she regarded the decree's general reference to stock-options as not sufficiently specific to be enforceable by contempt.<sup>338</sup> Her ex-husband responded with a petition for enforcement asserting that his former wife had failed to comply with provisions of the decree. The ex-wife then filed her petition for enforcement, contending that her former husband had disposed of stock-options without turning over any after-tax proceeds to her.<sup>339</sup>

Although the trial court conducted an evidentiary hearing and received testimony concerning other types of property, no testimony was offered about the stock-options.<sup>340</sup> Four months later a new order was prepared and the ex-husband's counsel advised the court that the net proceeds from the stock options were then \$123,000, but he failed to offer proof of this assertion because his client was out of the country. The trial court nevertheless signed a clarification and enforcement order awarding the ex-wife one-half of two grants of stock options from 2001 and 2003 without hearing any other evidence.<sup>341</sup>

The Eastland Court of Appeals held that the trial court did not have sufficient evidence to support an enforcement and clarification order addressing specific grants of stock options for which it had heard no evidence but disagreed with the former husband's assertion that the decree affected only vested stock-options.<sup>342</sup> The court noted that Texas courts have a "mandatory duty to order a division of the [marital] estate" on divorce and that "this duty extends to unvested stock-options because they constitute a contingent interest in property and are thus a community asset."<sup>343</sup> Specifically the court noted that the term "in existence" is neither synonymous with vested nor inconsistent with contingent and that "a construction [of the divorce decree] that favors the division of a community asset is generally preferable."<sup>344</sup> The court of appeals concluded by reversing the trial court's clarification and enforcement order in part and remanding the case for further proceedings.<sup>345</sup>

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336. 254 S.W.3d 572, 574 (Tex. App.—Eastland 2008, no pet.).

337. *Id.* at 573.

338. *Id.* at 574.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 575.

343. *Id.*

344. *Id.*

345. *Id.* at 576.

## D. ENFORCEMENT

After rendition of a divorce in *Sheikh v. Sheikh*, the trial court awarded the wife an owelty judgment of \$632,000 to equalize the property division and \$330,000 in actual damages against her husband for assault and fraud.<sup>346</sup> During the pendency of the husband's appeal, the wife filed her application for a post-judgment turnover order and appointment of a receiver, including a request that the receiver serve as a master in chancery.<sup>347</sup> The husband filed an opposition to the turnover application, alleging that section 9.007(c) of the Texas Family Code prohibited the requested relief because he did not hold any non-exempt property except for that awarded to the wife in the decree and that the order exceeded the terms of the wife's application by authorizing the receiver to take action that superseded the authority of the turnover order.<sup>348</sup> The trial court nevertheless granted a turnover order and a receivership order.<sup>349</sup> On appeal from this order, the appellate court held that the trial court did not have subject-matter jurisdiction to enforce this order because section 9.007(c) explicitly prohibits enforcement of orders designed to assist in implementing a property division while a valid appeal from such a division is pending.<sup>350</sup> The court stated that section 9.007(c) is aimed at orders that go beyond a "ministerial act of execution" to implement a decree's property division.<sup>351</sup> The court noted, however, that the trial court would have jurisdiction to enforce the turnover order to the extent that it merely enforced the monetary award of the divorce decree.<sup>352</sup> In this instance the order was written so broadly that whatever its permissible application, it nevertheless had the erroneous effect of authorizing the receiver to take possession and dispose of assets that necessarily included some of the property that was the subject of the contested division.<sup>353</sup> The appellate court concluded that because the trial court had jurisdiction to enforce the unsuperseded monetary judgment against the hus-

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346. 248 S.W.3d 381, 384-85 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

347. *Id.* at 385.

348. *Id.* Section 9.007(c) of the Family Code provides that "[t]he power of the court to render further orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending." TEX. FAM. CODE ANN. § 9.007(c) (Vernon 2006) (emphasis added). In *English v. English*, this process was interpreted as meaning that "the trial court is prohibited from implementing and clarifying the property division by way of further order" while an appeal is pending. 44 S.W.3d 102, 106 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

349. *Sheikh*, 248 S.W.3d at 385. The order granted the receiver authority to take possession of and to sell "all non-exempt property of [husband] that [was] in [his] actual or constructive possession or control." The order seemed to reach only the monetary award incidental to the divorce decree but alluded to division of property contained in the divorce decree. *Id.* at 388-89.

350. *Id.* at 391-92.

351. *Id.* at 388 (citing *In re Fischer-Stoker*, 174 S.W.3d 268, 272 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

352. *Id.* at 389-90.

353. *Id.* at 390. "It is clear from [the wife's] pleadings and the parties' discussions at the turnover-and-receivership hearings, and from evidence adduced at that hearing, that at least part of what [the wife] sought by her application was the turnover of property that had been awarded to her in the divorce decree." *Id.* at 391.

band, the trial court had general subject-matter jurisdiction to enter the turnover order and the receivership order except to the extent that the later order allowed the receiver to take property still in the husband's possession as a matter of dispute in the pending appeal.<sup>354</sup> The court further held that it was an abuse of discretion not to limit the receiver's authority to prevent his implementation of the decree's property division pending the appeal.<sup>355</sup> The court also held that Texas law dictated that the appointment of a master in chancery, whenever entered, was unappealable whether or not the appointment was imbedded in an invalid order, and the proper vehicle to challenge the appointment of a master in chancery is a writ of mandamus.<sup>356</sup> The appellate court reversed all portions of the trial court's order except that part appointing a master in chancery, a matter the appellate court regarded as beyond its jurisdiction to consider, and remanded the cause.<sup>357</sup>

Mediated divorce settlement agreements are immediately binding, may survive the death of a party even if the court has not issued a divorce decree, and may affect beneficiary designations in wills. In *Spiegel v. KLRU Endowment Fund*, a husband and wife had signed a mediated settlement agreement, but the wife died before the court could issue a final divorce decree.<sup>358</sup> Her will, executed before the settlement agreement, devised "our homestead" to her husband. Her executor filed a declaratory action in the county court to enforce the settlement agreement and to prevent the husband from receiving assets allocated to the wife in the settlement agreement but left to him in the will. The county court agreed with the executor.<sup>359</sup> The appellate court affirmed that decision.<sup>360</sup> In deciding the issue of first impression, the court held that the mediated settlement agreement was immediately binding and did not need to be incorporated in a final divorce decree before a spouse's death to be enforceable.<sup>361</sup> The court noted that section 6.602 "allows spouses to enter into settlement agreements that are immediately binding and do not require the approval of the court," that public policy supports the immediate effectiveness of mediated settlement agreements and their

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354. *Id.* at 391–92. See TEX. FAM. CODE ANN. § 9.007(c) (Vernon 2006).

355. *Id.* at 392.

356. *Id.* at 393–94. See *In re Holt*, 01-06-00290-CV, 2006 WL 1549968, at \*1–3 (Tex. App.—Houston [1st Dist.] June 8, 2006, no pet.) (memo op., not designated for publication) (amending mandamus relief from a post-judgment order appointing a master in chancery when a separate, previously entered, post-judgment turnover and receivership order has been suspended before appointment of the chancery master); *Simpson v. Canales*, 806 S.W.2d 802, 812 (Tex. 1991) (noting that an order of a pre-trial master in chancery is reviewable by mandamus because "[t]o require the parties to reserve their complaint for appeal would be to deny them any effective relief from the trial court's order."); see also *In re Moyer*, 183 S.W.3d 48, 58–59 (Tex. App.—Austin 2005, no pet.) (holding that appellate jurisdiction does not extend to a post-judgment order appointing a master in chancery even when that order was embedded a turnover and receivership order).

357. *Sheikh*, 248 S.W.3d at 395.

358. 228 S.W.3d 237, 239–40 (Tex. App.—Austin 2007, pet. denied).

359. *Id.* at 240.

360. *Id.* at 239.

361. *Id.* at 241–43.

enforcement to reduce litigation, and that sale is an incentive to mediate in order to take advantage of a prompt final resolution, which promotes good faith mediation.<sup>362</sup> The court also stressed that the settlement agreement contained plain language showing the parties' intention that the agreement be immediately effective.<sup>363</sup> The court further held that the homestead referred to in the deceased wife's will became part of her residuary estate because the settlement agreement designated the homestead as the wife's separate property and the husband had established a new residence.<sup>364</sup> The court went on to hold that the husband had no interest in any assets that were bequeathed to him but were subsequently allotted to the wife in the settlement agreement.<sup>365</sup> The court noted a split among appellate courts regarding the need for specific language revoking beneficiary designations in a settlement agreement or divorce decree.<sup>366</sup> The court concluded that the settlement agreement, in lieu of specific language, contained releases against future claims and achieved the complete severance of the parties' financial relationship.<sup>367</sup>

*Dempsey v. Dempsey* was before the El Paso Court of Appeals on a motion for rehearing of the former wife's petition for a protective order in response to the ex-husband's acts of family violence.<sup>368</sup> The former husband appealed the protective order that had been given in 2004 in favor of his former wife. After the associate judge had found that family violence had occurred and was likely to occur again, the district judge approved the associate judge's recommendation that a protective order be granted. The former husband contended that the trial court, in denying his motion for a continuance, had erred in accepting the ex-wife's version of the facts.

The court noted that when a respondent to an application for a protective order is served with notice of an application within forty-eight hours before the time set for a scheduled hearing requested by the petitioner, the trial court must, upon request, reschedule the hearing for a date not later than fourteen days after the date set for the hearing.<sup>369</sup> The appellant admitted that he was served with notice on June 11, for a hearing scheduled on June 17, more than forty-eight hours before the hearing was set.<sup>370</sup> The court concluded that, under the circumstances and because of the expedited nature of the proceedings, it could not conclude that the trial court abused its discretion.<sup>371</sup> Nor did the court find that the trial court had acted arbitrarily and unreasonably in denying the former hus-

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362. *Id.* at 241; see TEX. FAM. CODE ANN. § 6.602 (Vernon 2006).

363. *Spiegel*, 228 S.W.3d at 242.

364. *Id.*

365. *Id.* at 245.

366. *Id.* at 244-45.

367. *Id.* at 245.

368. 227 S.W.3d 771, 773 (Tex. App.—El Paso 2005, no pet.).

369. *Id.* at 776.

370. *Id.*

371. *Id.*

band's motion for a continuance.<sup>372</sup>

The former husband also complained that the trial court abused its discretion in its finding that family violence had occurred and was likely to occur again based solely on the former wife's testimony. In conducting its abuse of discretion review of the trial court's finding and the trial court's order, the appellate court raised two questions: (1) did the trial court have sufficient information upon which to exercise its discretion and (2) did the trial court err in its application of good judgment?<sup>373</sup> In considering the legal sufficiency point, the appellate court explained that it considers the evidence that tends to support the findings of fact and disregards contradictory evidence and inferences. Viewing the evidence in favor of the trial court's findings, the appellate court concluded that the former wife's testimony provided more than a scintilla of evidence to support the finding of family violence and that the finding was not so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust.<sup>374</sup> The former husband had argued that the trial court should have discredited all of the former wife's testimony, but the appellate court noted that the trial court was the sole judge of a witness's credibility and was "free to reject or accept *all or part* of a witness's testimony."<sup>375</sup> The trial court did not abuse its discretion because it was entitled to believe the former wife's version of events as to some of her allegations but not all of them.<sup>376</sup> The former husband further argued that one of his former wife's allegations was a "global allegation of an act of violence," and that such a global allegation presents "a guessing game for a respondent."<sup>377</sup> The El Paso court's response was that the Family Code does not require an applicant for a protective order to provide specific facts of alleged violence.<sup>378</sup> As to the alleged acts of family violence toward his wife, the husband argued that she had voluntarily placed herself in a dangerous situation and that the perceived threat was not directed against her.<sup>379</sup> The court found, however, that the former husband's act of pushing his former wife constituted an act of family violence in accordance with the definition found in the Family Code, regardless of the surrounding circumstances.<sup>380</sup> The court found no exception in the statute based upon a victim's being at fault for having placed herself in danger.<sup>381</sup>

In affirming the trial court's order, the El Paso court concluded that the trial court had, as a matter of law and fact, sufficient information upon which to exercise its discretion and that the trial court's decision to grant the protective order against the former husband was reasonable and not

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372. *Id.*

373. *Id.* at 777.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.* at 778 (citing TEX. FAM. CODE ANN. § 82.004 (Vernon 2006)).

379. *Id.*

380. *Id.* (citing TEX. FAM. CODE ANN. § 71.004 (Vernon 2006)).

381. *Id.*



arbitrary.<sup>382</sup>

In *Chek Investments, L.L.C. v. L.R.*,<sup>383</sup> the wife sued her husband for divorce and amended her pleadings to join the appealing business entities of her husband as defendants. Those three appellants were operated primarily outside Texas, as alleged agents of her husband acting as repositories for misappropriated community funds and debts.<sup>384</sup> The appellants joined in a single special appearance challenging the court's exercise of personal jurisdiction over them, and the trial court denied the special appearance in its entirety.<sup>385</sup> In this interlocutory appeal, the wife moved for dismissal for want of jurisdiction. The Dallas Court of Appeals held that it could only exercise jurisdiction over an interlocutory appeal from an order denying a special appearance if the underlying suit did not arise from a cause of action brought under the Family Code.<sup>386</sup> In interpreting Section 51.014, the Dallas Court of Appeals recognized that the text of the statute indicated two competing legislative purposes—to encourage prompt appellate review of special-appearance rulings and to recognize that “the burdens of expense and delay caused by interlocutory appeals are less tolerable in family-law disputes, and [therefore] the need for prompt resolution in such cases outweighs the benefits to be had from allowing interlocutory appellate review.”<sup>387</sup> The court continued by noting that the word “suit” is defined as “any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him,” and that the word “under” in this context generally means “by authority of.”<sup>388</sup> Thus, the court held that the wife's underlying divorce proceeding in which the appellants had been joined clearly constituted a “suit” arising “under” the Family Code, and, therefore, the appellants were attempting to bring an interlocutory appeal in a context that was specifically forbidden by statute.<sup>389</sup> The court concluded by noting that this section does not limit itself to defendants who are “sued under” the Family Code but rather applies if the defendants “specially appear[ ] ‘in a suit brought under the Family Code.’”<sup>390</sup> The court, therefore, lacked jurisdiction over the appellant's interlocutory appeal.<sup>391</sup>

In *Tracy v. Tracy*, the former wife appealed the trial court's order finding her in contempt for violating the divorce decree.<sup>392</sup> Because it did not have jurisdiction over a judgment for contempt by direct appeal, the Dal-

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382. *Id.* at 778–79.

383. 260 S.W.3d 704 (Tex. App.—Dallas 2008, no pet.).

384. *Id.* at 705.

385. *Id.*

386. *Id.* at 706; see TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon 2008).

387. *Chek Invs.*, 260 S.W.3d at 706.

388. *Id.* The definition of “suit” was extracted from *Nat'l Life Co. v. Rice*, 140 Tex. 315, 167 S.W.2d 1021, 1023 (1943), and that of “under” from *Powell v. City of Baird*, 133 Tex. 489, 128 S.W.2d 786, 790 (1939).

389. *Id.* at 707.

390. *Id.*

391. *Id.*

392. 219 S.W.3d 527, 528 (Tex. App.—Dallas 2007, no pet.).

las Court of Appeals dismissed the appeal for want of jurisdiction.<sup>393</sup> Due to the unusual facts presented in this proceeding, however, the court nevertheless provided guidance to the trial judge on the validity of the contempt order under which the former wife risked confinement.

As part of the divorce decree, the former husband had been ordered to apply for refinancing of the marital residence and to pay the former wife \$50,000 upon closing of the refinancing.<sup>394</sup> The former wife was, in turn, ordered to tender a special warranty deed to the closing agent for the refinancing. The former husband brought a petition to enforce the decree, complaining that his former wife had refused to deliver the deed after he had paid her \$50,000 and that she had demanded that he pay her an additional \$10,000 before she would tender the deed. The former husband argued that his ex-wife be held in contempt, jailed, and fined for her violations of the court's order and sought reasonable attorney's fees.<sup>395</sup> Two days after the petition was filed, the former wife executed and delivered the deed to the former husband. At the enforcement hearing, the ex-husband's counsel acknowledged receipt of the deed, but the ex-husband argued that he was entitled to attorney's fees that could have been avoided had his former wife complied promptly with the terms and conditions of the decree. The trial court found the former wife in contempt of court for having violated the divorce decree and awarded the former husband attorney's fees and costs.<sup>396</sup> But the former wife did not pay the attorney's fees and instead filed a motion to vacate or amend the order. She contended that the award of attorney's fees could not be enforced by contempt. She also asserted that there was newly discovered evidence that she may have executed a special warranty deed and returned it to the lender in a timely manner.<sup>397</sup> The former wife's counsel explained that his client had actually executed the deed before the petition for enforcement was filed but that, as counsel, he had not been aware of the document at the previous hearing because he did not prepare the document and did not he have a copy of it in his file. He also explained that the former wife did not realize she had signed the deed and only found a copy of the last page after the last hearing.<sup>398</sup> The trial judge ultimately denied the motion to vacate the order but agreed to suspend the imposition of his subsequent order until the appeal was completed.<sup>399</sup>

On appeal, the former wife first argued that the trial judge abused his discretion in holding her in contempt because the decree was not specific enough to be enforced by contempt and that she had fully complied with the portion of the decree in question by the time the petition was presented to the court. She also argued that the portion of the order by

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393. *Id.*

394. *Id.* at 528–29.

395. *Id.* at 529.

396. *Id.*

397. *Id.* at 529–30.

398. *Id.* at 530.

399. *Id.*

which she was confined for nonpayment of attorney's fees constituted a prohibited imprisonment for debt and was, therefore, void as a matter of law. The Dallas Court of Appeals concluded that the record made it clear that under the order of contempt, the former wife could only avoid confinement by paying the attorney's fees of opposing counsel.<sup>400</sup> The court noted, however, that a trial court shall not imprison a person for debt, and that our law does not allow collection of attorney's fees by contempt proceedings.<sup>401</sup> Because the order in this case purported to do what the law does not allow, it was void. In offering its guidance with respect to the order, the court noted its assumption that the trial judge would not attempt to enforce the void order or direct confinement for its breach. In dismissing the appeal, the Dallas appellate court held that it had no jurisdiction over the direct appeal from the contempt order but held that the contempt order was void because it improperly threatened to confine the former wife for failing to pay attorney's fees.<sup>402</sup>

In *DeGroot v. DeGroot*, the wife's petition for divorce was granted in July, 2006 and incorporated a prior mediation agreement.<sup>403</sup> At the request of the parties, the court appointed an arbitrator and subsequently issued a new divorce decree. The wife appealed from the new decree.<sup>404</sup> The court of appeals held that the later divorce decree was invalid because the trial court's plenary power had expired when it sought to do more than clarify the original divorce decree. The ex-husband asserted that he had mailed the trial court his motion to clarify the decree on August 18, 2006, although it was not filed until August 23. In October, 2006 the parties filed a joint motion for appointment of an arbitrator with the hope of resolving several post-divorce disputes. An arbitrator was appointed in mid-October for the purpose of resolving any unsettled issues regarding the July decree. The order noted that the result of the arbitration was to be binding, but on appeal the parties asserted that it was never intended to be so. The trial court administratively closed the case pending arbitration but retained jurisdiction if causes were shown that further litigation would be necessary. On November 1, 2006 the ex-wife filed a petition for enforcement of the original decree. When the arbitration concluded on December 18, 2006, the arbitrator signed an arbitration order that changed both the property division and the terms of the original divorce decree and stated that the parties had "arbitrated the remaining issues for the preparation of the *Final Decree of Divorce*."<sup>405</sup> In January, 2007 the ex-husband filed motions to set aside the original decree, to confirm the arbitration order, and to issue a new decree incorporating its results.<sup>406</sup> The ex-wife subsequently filed *pro se* motions for a

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400. *Id.* at 531.

401. *Id.*

402. *Id.*

403. 260 S.W.3d 658, 660 (Tex. App.—Dallas 2008, no pet.).

404. *Id.*

405. *Id.* at 661 (emphasis added).

406. *Id.*

QDRO and for review of the arbitrator's order. The trial court then orally denied those motions and a petition for enforcement without vacating its order administratively closing the case. A new divorce decree was entered on January 24, 2007. The ex-wife filed a motion for a new trial, which was denied without a hearing on February 21, 2007, and she filed her notice of appeal on March 9, 2007. On the same day, the court signed written orders denying the ex-wife's motion for review of the arbitration order, her motion for a QDRO, and her petition for enforcement.<sup>407</sup> On appeal, the ex-wife first argued that the trial court erred when it signed the January divorce decree to replace the July decree because the trial court's plenary jurisdiction had expired.<sup>408</sup> She also asserted that the January decree substantially revised the property division, thus exceeding the trial court's power to clarify its original decree.<sup>409</sup> The ex-husband argued that his motion for clarification, which was file-stamped on August 23, 2006, was actually mailed on August 18, the last day to file a motion to modify and that the "mailbox rule" made the filing timely.<sup>410</sup> He also argued that his motion for clarification included a substantial change to the original divorce decree and should therefore be interpreted as a motion to modify, thus extending the trial court's plenary power under Rule 329b(a), (g).<sup>411</sup> He further argued that the trial court's order appointing an arbitrator not only vacated the original divorce decree, but also may have granted a new trial because it was based on his "motion for clarification."<sup>412</sup> He relied on the trial court's "administrative close order" in which it purported to retain "complete jurisdiction" to support this conclusion.<sup>413</sup>

The court of appeals disagreed. The "substantive" changes to which the ex-husband alluded in his "motion for clarification" were not substantive enough to qualify as a motion for modification, and, thus, in the court's view, the trial court's plenary jurisdiction to modify or set aside the first divorce decree expired on August 18, 2006—thirty days after that decree was entered.<sup>414</sup> The court went on to hold that because the first decree had been entered in July, 2006 the subsequent decree modified the terms of the property division and, therefore, exceeded the trial court's post-judgment jurisdiction under Family Code section 9.007.<sup>415</sup> The court used this same reasoning to invalidate the arbitration agreement, which the parties had agreed would not be binding, but had been incorporated

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407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. TEX. R. CIV. P. 329b.

412. *DeGroot*, 260 S.W.3d at 661.

413. *Id.*

414. *Id.* at 663-64. See TEX. R. CIV. P. 306a, 329b(a), (g); TEX. FAM. CODE ANN. § 9.007 (Vernon 2006) ("[a] court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce," and "[a]n order under this section that amends, modifies, alters, or changes 'the divorce decree's property division' is beyond the power of the [divorce] court.").

415. *DeGroot*, 260 S.W.3d at 664; see TEX. FAM. CODE ANN. § 9.007 (Vernon 2006).

into the January divorce decree and held that the court had erred when it denied the ex-wife's petition to enforce and her motion to enter a QDRO because these orders were premised on the void January divorce decree.<sup>416</sup> Based on the conclusion that the January divorce decree was void, the July decree was reinstated and the orders denying the wife's petition to enforce and her motion to enter a QDRO were reversed and remanded to the trial court.<sup>417</sup>

After trial on remand, as well as several mandamus proceedings, the former husband in *Bufkin v. Bufkin*<sup>418</sup> appealed for a second time arguing that the second trial erred in: (1) finding that a loan obligation was a community debt; (2) excluding expert testimony and rebuttal evidence pertaining to the value of the husband's ranch; (3) awarding dividend income to his wife; and (4) excluding evidence of fault. The former wife appealed on unrelated grounds. The Dallas Court of Appeals overruled all points and affirmed the second divorce decree.<sup>419</sup> In the judgment in the second trial, the wife was awarded community property in stock dividends, valuation increases in real property, a residence, and a ranch. The focus of the case was the parties premarital agreement stipulating that all property owned before marriage or acquired in the first five years of marriage would be the separate property of the acquiring spouse.<sup>420</sup> The agreement also provided that a community property estate would not arise until after their fifth wedding anniversary. The agreement stated that "income from all sources, from personal services, [and] separate property . . . all property increases in kind or in value of property that is the product of either party shall become the community property of the parties provided that it is acquired or produced from and after such date. . . ." <sup>421</sup>

The first trial court declared the residence, ranch, and stock at issue was the separate property of the husband, and the judge's pre-trial order was incorporated into the first decree—that any increase in the husband's separate property was not community property as provided in the marriage contract. The wife appealed to the El Paso Court of Appeals, which held that their contractual language stating that all increases in value of property acquired or produced after the fifth year of marriage would be community property was sufficient to embrace increases in the value of stock.<sup>422</sup> The court also concluded that there was sufficient evidence to rebut a *de minimis* argument.<sup>423</sup> While on appeal, it was agreed that the wife would narrow her appeal to "(1) whether the trial court erred in granting summary judgment, and (2) whether [the trial court] erred in

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416. *DeGroot*, 260 S.W.3d at 664-65.

417. *Id.* at 666.

418. 259 S.W.3d 343 (Tex. App.—Dallas 2008, pet. denied).

419. *Id.* at 348.

420. *Id.*

421. *Id.*

422. *Id.* at 349.

423. *Id.*

dividing the community estate by not including the increase in value of [certain stock].”<sup>424</sup> The Dallas Court of Appeals agreed with the El Paso Court’s interpretation of the agreement.<sup>425</sup>

On remand, both parties argued breach of the antenuptial agreement and asserted claims for reimbursement and injunctive relief.<sup>426</sup> The jury made findings that (1) the value of the particular stock of the husband had decreased substantially from the fifth anniversary to the divorce; (2) the value of the husband’s other stock was zero and had been since the fifth anniversary; and (3) the value of the residence and the ranch had increased between the fifth anniversary and the date of the divorce.<sup>427</sup> The jury also found a bank debt of \$835,983 to be assumed in half by each party.<sup>428</sup> The husband disputed the amount of the debt, while the wife disputed the jury’s findings of the husband’s stock valuation as well as the jury’s finding on the assumption of debt by each party. The trial court disregarded the fact-finding pertaining to the assumption of debt by each party but adopted all others.<sup>429</sup>

The second divorce decree awarded the wife \$302,010, representing one-half of the increase in value of the residence and ranch and \$124,659 in prejudgment interest.<sup>430</sup> The second decree also went on to state that no prior attorneys’ fees would be reimbursed. The decree also incorporated the findings that the husband’s stocks had not appreciated in value and eliminated any award of stock dividends to the wife. Finally, the decree ignored the jury findings on the assumption of debt and charged the entire debt to the husband.<sup>431</sup>

In his appeal the husband argued that the agreement made during the first appeal limited the issues to the divisions of increase in his particular stock. The El Paso Court of Appeals determined that once evidence of an increase in the value of the stock was found, it had to remand for division of the entire community estate.<sup>432</sup> The Dallas Court of Appeals agreed, observing that appellate courts cannot reverse single items of property division and must remand the entire community estate for redivision.<sup>433</sup> The husband’s argument was thus overruled.<sup>434</sup>

The husband also argued that the trial court erred in excluding the testimony of his real estate appraiser pertaining to the value of the ranch and residence. The Dallas Court of Appeals concluded that the trial court’s ruling would be upheld if there was any legitimate basis for the

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424. *Id.*

425. *Id.* at 350.

426. *Id.* at 349.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.* at 350.

431. *Id.*

432. *Id.*

433. *Id.* (citing *Jacobs v. Jacobs*, 687 S.W.2d 731, 732 (Tex. 1985); *Schlafy v. Schlafy*, 33 S.W.3d 863 872 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)).

434. *Id.*

ruling.<sup>435</sup> The court went on to observe that if the foundation-data underlying an expert's testimony was unreliable, the expert would not be permitted to express any opinion on that data because such an opinion would be similarly unreliable.<sup>436</sup> In this case the husband had asked his expert to value the land without the value of the timber. Instead, the expert was asked to incorporate the value of a timber appraiser in that regard. The expert, however, admitted that such a valuation failed to conform to the mandatory provisions of the Uniform Standards of Professional Appraisal Practice.<sup>437</sup> The husband failed to present any subsequent evidence supporting the reliability of a third party timber appraisal, and the court therefore concluded that the trial court did not abuse its discretion.<sup>438</sup>

The court also dismissed the husband's argument that he had been precluded from presenting "rebuttal testimony" considering the value of the ranch. The court found that the evidence did not support the husband's argument and that he, in fact, had ample opportunity to rebut the wife's valuations upon cross-examination but declined to do so.<sup>439</sup>

The court put aside the husband's argument that the trial court erred in excluding evidence of fault.<sup>440</sup> The El Paso Court of Appeals held, and the Dallas Court of Appeals agreed, that the language of the antenuptial contract expressly provided for the division of property in the event of a divorce.<sup>441</sup> Having so contracted, the parties were said to have precluded consideration of fault, and fault was therefore irrelevant.<sup>442</sup>

The court dismissed the husband's argument that the trial court erred in granting the wife's request to disregard the jury finding pertaining to the assumption of debt. The jury found that \$835,983 of debt was to be assumed by both parties.<sup>443</sup> The court noted that the debt was incurred through the use of the husband's separate property as collateral. Further, the antenuptial contract declared that "all liabilities benefiting separate property *shall be assumed* by the owner of the separate property."<sup>444</sup> The court found no evidence that the debt was used to benefit the community or pay for living expenses and concluded that the contract dictated that the debt be assumed by the husband as owner of the separate property.<sup>445</sup>

The court overruled the wife's argument that the second trial court erred in refusing to disregard jury findings as to the value of the hus-

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435. *Id.* at 351 (citing *Interstate Northborough P'ship v. Texas*, 66 S.W.3d 213, 220 (Tex. 2001); *Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995) (for the first proposition); *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998) (for the second proposition)).

436. *Id.* (citing *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997)).

437. *Id.* at 351-52.

438. *Id.* at 352.

439. *Id.*

440. *Id.* at 353.

441. *Id.*

442. *Id.*

443. *Id.* at 349.

444. *Id.* at 353.

445. *Id.*

band's stock as well as the value of the ranch.<sup>446</sup> The court observed that the standard for such a review is whether or not the record contains more than a scintilla of evidence supporting the jury's findings.<sup>447</sup> The wife had attempted to introduce a stipulation in the form of a post-verdict motion made by the husband in which he estimated the value of the ranch as lower than the jury's assessment, which would have assured the wife a larger community interest. The court rejected this argument and noted that to be enforceable, a stipulation must be in writing, signed, and filed as part of the record, or made in open court and entered of record.<sup>448</sup> The court noted further that a stipulation must be an express agreement that could not arise by implication from a post-verdict statement and that even if there were such an agreement, that agreement would not be construed as an admission of a controverted fact at trial.<sup>449</sup> The court also dismissed the wife's argument that the trial court erred by not disregarding the jury's findings on the value of particular stock. This argument was apparently based in part upon the fact that the husband, as owner of the stock, was able to offer his opinion as to its value and the jury had found the husband's testimony more persuasive than that of the wife's expert. The court also pointed out that a jury is not required to adopt an expert's value and may sift the evidence as it sees fit.<sup>450</sup>

Finally, the court considered the prejudgment interest awarded to the wife in the second decree. The husband argued that the award was erroneous because there was no identifiable amount due and that the wife's claim was one arising in equity requiring a specific pleading.<sup>451</sup> The wife responded that the prejudgment interest resulted from the antenuptial contract, though it was undisputed that the contract did not provide for such a recovery.<sup>452</sup> The court determined that there were only two grounds for obtaining such an award—an enabling statute or general principles of equity. As on the first, the court noted that the statute governing prejudgment interest in the Texas Finance Code specifically provides prejudgment interest in specific situations that do not include cases not involving credit.<sup>453</sup> Thus, no prejudgment interest was appropriate in this case. Further, to prevail under general principles of equity, it is necessary to plead the desired relief with particularity, and the wife had

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446. *Id.* at 355-56.

447. *Id.* at 354.

448. *Id.* at 355 (citing TEX. R. CIV. P. 11).

449. *Id.*

450. *Id.* (citing *Gulf States Util. Co. v. Low*, 779 S.W.3d 561, 566 (Tex. 2002) (for the proposition that an owner may express an opinion about his property's value); *State Farm, Fire & Cas. Co.*, 88 S.W.3d 313, 321 (Tex. App.—San Antonio, 2002, pet. denied) (for the proposition that the jury may sift the evidence)).

451. *Id.* at 356. The husband's claim of reimbursement in this instance was, of course, inaccurate.

452. *Id.*

453. *Id.* at 357 (citing *de la Garza v. de la Garza*, 185 S.W.3d 924, 927-29 (Tex. App.—Dallas 2006, no pet.) (for both the proposition that the Texas Finance Code now governs, and the further proposition that the Code is silent on non-credit contract cases)).



failed to do so.<sup>454</sup> The court of appeals, thus, reversed the judgment pertaining to the award of prejudgment interests and affirmed the remainder of the trial court's judgment.<sup>455</sup>

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454. *Id.* at 358.

455. *Id.*