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FAMILY LAW: HUSBAND AND WIFE

Joseph W. McKnight*

I. STATUS

A. NON-MARITAL RELATIONSHIPS

1. Same-Sex Unions

THE flood of literature on this subject at all levels of scholarship has become little more than a trickle. In recent years, there has been some re-definition of the institution of marriage, and the Texas literature on the subject has grown since 2000,¹ but no change in Texas law is anticipated, though the status of marriage continues to be discussed both here and elsewhere.²

B. MARRIAGE: CEREMONIAL, BIGAMOUS, INFORMAL, AND PUTATIVE

In *Cook v. Stallcup*³ a woman sought to evict a man from her home. But that action mounted to nothing more than a catalyst to the man's suit for divorce in Denton County. The court ordered the sale of the house (alleged as the couple's community property), and the proceeds were deposited in the registry of the court. The woman then filed suit in Dallas County against the man and another woman to seek a declaratory judgment that she and the man had never been married because he had been married to another woman until 1999. It was then that the parties abandoned the suit in Denton County. The funds deposited in the Denton court's registry were transferred to the registry in Dallas County. There was no assertion that the alleged marriage of 1972 had become valid with the removal of the impediment in 1999,⁴ nor was there any assertion of an informal marriage after that time. The woman was awarded a judgment

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1. The bibliography of Texas "gay and lesbian rights" has increased since 1999. Cf. 2004-2005 STATE BAR [OF TEXAS] SECTION REPORT FAMILY LAW 26-27 (2004) and 2002-2006 STATE BAR [OF TEXAS] SECTION REPORT FAMILY LAW 40-41 (2006).

2. See, e.g., HARRY D. KRAUSE, *Comparative Family Law—Past Traditions Battle Future Trends* in MATHIAS REIMANN & REINHARD ZIMMERMANN, eds., *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, 1101 (2007); Jane Mair, *Marriage: Legal Status or Personal Relationship*, 11 EDINBURGH L. REV. 117 (2007).

3. 170 S.W.3d 916 (Tex. App.—Dallas 2005, no pet.).

4. TEX. FAM. CODE ANN. § 6.202(b) (Vernon 2003) provides that when the impediment to a void marriage is removed, a subsisting marriage becomes valid if the couple lived together and held themselves out as married. The fact that the validated marriage had not remained a putative marriage may account for the court's silence concerning the alleged invalid marriage declared as void.

declaring that she and the man were never married. In a post-judgment motion the woman sought disbursement of the funds that had been transferred to the registry of Dallas County. The man in turn asked that his "spousal support" be deducted from the fund until a final trial. The court took no notice of the man's motion. On appeal the court held that the trial court had disposed of the man's claim to any of the funds in the court's registry because those funds were not traceable to a marriage between the parties.⁵

The situation in *Jumper v. Jumper*⁶ might be diagnosed as a less-acute case than *Cook*. In 1983, the wife married for the first time, and the marriage was *not* dissolved by the man's death or by judicial decree. In 1998, the wife married a second time. After discovering his wife's first marriage, the second husband petitioned in 2005 to have his marriage declared void. The wife filed a counter petition for divorce and argued that her first marriage was void because her first husband had been married to someone else. The wife also pled that a judicial decree of nullity of her first marriage had been granted on January 1, 2006. The trial court nevertheless granted summary judgment to the husband. The wife appealed. The Dallas Court of Appeals reversed the judgment of the trial court in substantial reliance on the wife's January 1 decree.⁷ The court of appeals also relied on the very strong presumption that the most recent marriage is valid against any prior marriage until validity of the prior marriage is proved by the contesting spouse.⁸

In *Cardwell v. Cardwell*⁹ the wife had married for the first time in 1984 but left her husband in 1986. The wife was told by her husband that he would take care of a divorce. The wife assumed that the divorce had been granted, but she made no inquiry. In 1988, she married a second time but divorced in 1992. In 1995 the wife married for the third time. In some manner unexplained by the court, the wife discovered in 1999 that she was not divorced from her first husband and told her present husband. The wife sued the first husband. A decree of divorce was granted in 1999. The wife separated from her third husband in 2003. Both parties brought suit for divorce. The trial court found that the parties had had an informal marriage, since the dissolution of the wife's first marriage in 1999, and granted a divorce. Each party appealed; the husband challenged the trial court's division of property, and the wife contested the trial court's refusal to find that her third marriage was at least putative in nature. The trial court had rejected the wife's assertion that her third marriage was putative until her divorce from her first husband because she had made no reasonable effort to determine the status of her first

5. *Cook*, 170 S.W.3d at 920.

6. No. 05-06-0217-CV, 2007 WL 1124946 (Tex. App.—Dallas Apr. 17, 2007, no pet. h.).

7. *Id.* at *5.

8. *Id.* at *2; TEX. FAM. CODE § 1.102 (Vernon 2003), which the court declared is "one of the strongest, if not the strongest known to law."

9. 195 S.W.3d 856 (Tex. App.—Dallas 2006, no pet.).

marriage before entering into her third marriage. The Dallas County Court of Appeals affirmed the trial court's conclusions.¹⁰ The court of appeals seemed to surmise that the trial court had doubted the wife's credibility.¹¹ The court of appeals held that "[w]hen the party arguing for a putative 'marriage is aware that there was a former marriage, the question becomes one of reasonableness of that party's belief that the former marriage has been dissolved.'"¹² In each case of this sort a defined standard of reasonable belief is hard to apply in light of the great variety of facts encountered by trial courts.

In *Cardwell*, the court of appeals also observed that the same evidence supporting the wife's lack of good faith in believing that the first marriage had been dissolved also precluded a finding of her good faith in entering into the third marriage.¹³ In such a case, rather than relying on proof of a subsequent informal marriage, one can rely on proof of a formal marriage when the impediment is removed, and the void marriage becomes valid under section 6.202(b).¹⁴ Thus it is unnecessary to prove a subsequent informal marriage or a prior void informal marriage.

The informal fiduciary relationship between a woman and her former lover had come apart before the man filed for bankruptcy in *In re Hughes*.¹⁵ The woman asserted that, without her consent, her former lover had used over \$46,000 of her funds that had been deposited in his bank account, though some of her funds had been used by her authority to buy and furnish a home which the couple occupied together. Sometime afterwards, the man had left the woman, the house, and its contents to marry someone else. The woman recovered a judgment for the amount of money she sought. In the man's bankruptcy proceeding, the woman pled to have the debt declared as one incurred by "fraud or defalcation while acting in a fiduciary capacity . . . [or] for willful and malicious injury. . . ."¹⁶ under section 523(a)(6) of the Bankruptcy Code.¹⁷ The claimant argued both that an express trust existed because of a special relationship of trust and confidence she had with the debtor¹⁸ and that Texas law recognizes that such a trust relationship may be informal.¹⁹ The bankruptcy court rejected her argument and explained that "the con-

10. *Id.* at 858 (relying on *Garduno v. Garduno*, 760 S.W.2d 735, 740 (Tex. App.—Corpus Christi 1988, no writ.)).

11. *Id.* at 859.

12. *Id.*

13. *Id.*

14. The court stated that an informal marriage existed when the impediment to the third marriage was removed by the divorce from the first marriage. That all the elements of an informal marriage then existed can scarcely be doubted, but the third (ceremonial) marriage became effective on removal of the impediment.

15. 354 B.R. 820 (Bankr. S.D. Tex. 2006).

16. *Hughes*, 354 B.R. at 823.

17. 11 U.S.C. § 523(a)(6).

18. *Hughes*, 354 B.R. at 823-24 (citing *Hubbard v. Shankle*, 138 S.W.3d 474, 483 (Tex. App.—Fort Worth 2004, pet. denied)).

19. *In re Bennett*, 989 F.2d 779, 784-85 (5th Cir. 1993) (citing *In re Angelle*, 610 F.2d 1335 (5th Cir. 1980)).

cept of fiduciary capacity . . . is narrowly defined [as] applying only to technical or express trusts, and not those which the law implies from the contract."²⁰

C. TORTIOUS INJURY: DERIVATIVE CLAIMS

In *Brocken v. Entergy Gulf States, Inc.*,²¹ a husband was injured while working for an independent contractor in the course of installing a new electricity pole for his contractor-employer. The worker, his wife, and his daughter brought suit against two defendants: the component-part manufacturer of a device which was part of the pole being installed and the owner of the electric lines who hired the contractor to install the new pole without interrupting the service of the electric lines. The worker failed to show that the manufacturer had a duty to warn the line-owner of any dangers inherent in installation of the device, that the manufacturer had actual knowledge that the crew of which the husband was a member had a false expectation that the functioning of the device would respond to any fault on the electric line, or that the maker knew of the danger to the independent contractor's crew.²² Though the line-owner was aware of some risk, the owner did not know of the false expectations of the installing workers with respect to the manufactured part, or of any actual risk involved that might occur while installing the pole. The plaintiff's action therefore failed, and the manufacturer's motion for summary judgment was properly granted.²³ Because the wife's and daughter's rights were derivative of success of the worker's case, their causes of action also failed.²⁴

D. CARE FOR THE ELDERLY

In *Heritage Housing Developments, Inc. v. Carr*²⁵ the widow of a deceased nursing-home patient brought suit against an incorporated nursing home and its corporate owner for negligent care of her late husband, who had resided at the home for fifteen months but was removed to another home where he died two years later. The patient had suffered from Alzheimer's disease for about a decade before admission to the nursing home. The jury gave a verdict for the plaintiff and found that the parent corporation was liable for forty-five percent of the award. The parent corporation appealed on the ground that there was insufficient evidence to support the verdict of vicarious liability for the direction and control of the staff of the nursing home. The Houston Court of Appeals for the First District sustained the parent corporation's appeal.²⁶

20. *Hughes*, 354 B.R. at 822-23.

21. 197 S.W.3d 429 (Tex. App.—Beaumont 2006, no pet.).

22. *Id.* at 439.

23. *Id.* at 440.

24. *Id.*

25. 190 S.W. 3d 560 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

26. *Id.* at 565, 567, 572.

The law covering the rights of the elderly and their care continues to develop, and in time there may be a sufficient body of rules for their codification in the Texas Family Code, as anticipated by its draftsmen when a title of the code was designated for that purposes. That time has not yet arrived.

II. CHARACTERIZATION OF MARITAL PROPERTY

A. COMMUNITY PRESUMPTION

*Valenzuela v. Parra*²⁷ presents an odd application of the community presumption. At issue was a divorcing couple's home. The court found that the couple had married informally in 1994.²⁸ The husband testified that his parents had bought the house on which he had made the down payment. It was first occupied by him, his wife, and his sister and her husband. Thereafter, the two couples rented the house. Both couples "paid the mortgage as rent," and when his sister and her husband moved out, the husband made all the mortgage payments as his rent. At trial the husband denied having any ownership interest in the house but acknowledged that he was the recipient of a one-half interest in the house by his parents. The grant to him, he said, was meant to function as a will. The husband's father testified that the house was owned by the father, the mother, and their son. The husband's mother testified to the same effect as her son. The parents' plan seemed to be that the son would take his mother's one-half interest as a result of the parents' joint gift and would inherit the father's share on the father's death. The idea was artful, but its execution was faulty.²⁹

The sketchy record that came from the trial court seemed to contain only these salient findings: (1) the conveyance to the husband during marriage was of a one-half share in the house, (2) the husband had made all the mortgage payments, and (3) the husband denied any ownership interest at all. Thus, in the view of the trial court, the conveyance during marriage from which the husband claimed no interest was nonetheless a community one-half interest which the court divided equally between the divorcing spouses. The El Paso Court of Appeals affirmed that conclusion, even though the only possible consideration for community ownership was the mortgage payments.³⁰ The parents' plan could have been achieved by a mutual will of the parents that the husband continue to pay the mortgage as rent during the spouses' mutual lives and then take each spouse's shares upon his or her death. In the alternative the parents could have made a conveyance to their son of an undivided one-half interest of the property to take effect on the death of the first to die and the other half on the survivor's death.

27. 225 S.W.3d 635 (Tex. App.—El Paso 2006, no pet.).

28. *Id.*

29. *Id.*

30. *Id.* at *4.

B. TRACING

Tracing separate property demands a high burden of proof. A mere testimonial assertion that property was purchased with separate funds is typically insufficient to overcome the community presumption. In *Garza v. Garza*,³¹ the husband purchased three lots during the marriage, and, after constructing a house on each lot, he sold them to buyers under the name of a company that he claimed was part of his tile company.³² At the divorce trial, the wife argued that the court erred in finding that the three lots were the husband's separate property because he had failed to overcome the community-property presumption. With regard to all three lots, the earnest money contracts, the deeds, and the settlement statements were in the husband's name alone. The financing was in his name individually. The earnest money contracts for all three lots were entered into during the marriage. Though he testified that the funds to purchase the lots came from the tile business, *i.e.*, his separate property, the husband could not produce any financial statements tracing the funds to that business. Thus the trial court's finding that the homes were the husband's separate property was not supported by factually sufficient evidence.³³ As the three lots and their improvements were a substantial portion of the community estate, the trial court's mischaracterization of the homes affected the just division of the community estate.³⁴ Division of the entire community estate was therefore remanded for a just and right division based upon the proper characterization of the property.³⁵

In *Vardilos v. Vardilos*,³⁶ the wife testified she had introduced her bank statement to confirm that the funds in question had been put in trust by the wife's father with her brother as trustee, and the account had not earned interest. On those facts, the trial court determined that the bank account was the wife's separate property after her father's death. The Dallas Court of Appeals affirmed this conclusion, as the record proved by clear and convincing evidence that the funds in the bank account were inherited by the wife and, as such, were her separate property.³⁷ But the court of appeals failed to reveal the facts in the record that proved the wife's position by clear and convincing evidence.³⁸

No Texas court of appeals has assessed the character of a tax refund of payment made with the separate property of one spouse for a tax on the income of both spouses on a joint federal tax return. It has been suggested that such a refund belongs to the spouse who furnished the separate property payment. The correct solution, though, is simply a matter

31. 217 S.W.3d 538 (Tex. App.—San Antonio 2006, no pet.).

32. *Id.* at 548.

33. *Id.*

34. *Id.*

35. *Id.* at 551.

36. 219 S.W.3d 920 (Tex. App.—Dallas 2007, no pet.).

37. *Id.* at 922-23.

38. For a failure to trace alleged separate property deposits into community savings account, see *Mock v. Mock*, 216 S.W. 3d 370, 373 (Tex. App.—Eastland 2006, pet. denied).

of tracing intangibles from one depository to another.³⁹ *In re Donnell*⁴⁰ supports this position. In *Donnell*, overpayment by each spouse resulted from excessive wage withholding of community property. The husband and the wife had filed for Chapter 7 bankruptcy in May 2005 and received a discharge in September 2006. Each had filed a separate tax return. The trustee in bankruptcy filed a turnover order for a portion of those amounts “derive[d] from a tax year including the pre-bankruptcy filing period.”⁴¹ To discharge his burden of proof, the trustee in bankruptcy argued that the portion of the refund includable in the bankruptcy estate of each spouse is controlled by the ratio of the number of pre-petition days in the tax year to the number of days in that year, specifically 145/365. He thus discharged his burden subject to certain amounts attributable to the fact that some of the wife’s refund was for an additional Child Tax Credit. Thus that part of the refund that passed to the trustee was a property interest of each debtor as of the commencement of the suit, including refunds for income-tax payments withheld from the debtor prior to filing for bankruptcy based on earnings prior to the bankruptcy filing.⁴² The bankruptcy court went on to say that the decision of the Fifth Circuit in *In re Burgess*⁴³ makes clear that the 1978 amendments to the Bankruptcy Code define the bankruptcy estate precisely. Thus the bankruptcy court’s approach to identifying the component parts of the refund suggests the same sort of tracing for identifying separate and community elements of an income-tax refund to be characterized for purposes of divorce or annulment.

C. MARITAL PROPERTY AGREEMENTS

In *Myers v. Myers*,⁴⁴ the Austin Court of Appeals considered a very unusual alleged marital property partition made by a man and woman prior to acquiring 159 acres of land. The man had procured a printed form entitled “Partition and Exchange Agreement” from a lawyer who had previously represented the woman. The couple executed the agreement with interlineations by the man that he was “single,” that the woman was his “friend,” that they were “not” married at common law, that the man had separate property that was perhaps referable to his making the down payment on the land, and that the agreement constituted their understanding concerning their “friendship.” But, elsewhere in the agreement, there were printed references to “husband” and “marriage” which had not been altered.⁴⁵ In the view of the trial court, the couple

39. See JOSEPH W. MCKNIGHT & WILLIAM A. REPPY, JR., TEXAS MATRIMONIAL PROPERTY LAW 132 note 1 (10th ed. 2006-2007); see also Joseph W. McKnight *Family Law: Husband and Wife*, 47 SMU L. REV. 1161, 1171-72 (1994).

40. 357 B.R. 386 (Bankr. W.D. Tex. 2006).

41. *Id.* at 388.

42. *Id.* at 390 (citing *Kokoszka v. Belford*, 417 U.S. 642, 647 (1974)).

43. 438 F.3d 493, 498 (5th Cir. 2006).

44. No. 03-05-00231-CV, 2006 WL 3523792, at *1 (Tex. App.—Austin Dec. 8, 2006, no. pet.) (mem. op.).

45. *Id.* at *2.

had been living together since the beginning of 1995, were holding themselves out as husband and wife, and were therefore informally married. In 2002, the woman sought and received a divorce. In his appeal, the man put heavy emphasis on the binding character of the agreement. At trial the woman had testified that when the agreement was executed the man had been, "screaming" at her for two hours to sign the agreement.⁴⁶ Though the court of appeals did not mention any respects in which she purported to alter the agreement, she was evidently forced to sign it. Even so, she seemed to cast doubt on the purported execution before a notary and suggested that the latter part of the instrument had been added later.⁴⁷

The court of appeals inferred that the trial court had found that the agreement "was involuntarily executed by the woman."⁴⁸ Because the trial court had found that there was an informal marriage, the agreement was therefore an invalid *marital* partition agreement.⁴⁹ The man insisted that this conclusion constituted an improper reliance on a common-law defense under section 4.105(c). Despite the provisions of section 4.105(c) that state common-law defenses are not allowed to rebut the validity of a marital partition, it is inevitable that some facts must be alleged and proved to show a lack of the essential elements of voluntary execution of a valid partition agreement under section 4.105(a)(1).⁵⁰

In *In re Wilson*,⁵¹ a dispute arose when the heirs and the decedent's executor misunderstood the nature of a joint-bank account. The decedent and his wife had made deposits in a bank account held in the name of both spouses jointly, with a recital of the right of survivorship. The designation of the account substantially complied with the language describing such accounts in section 439(a) of the Probate Code.⁵² The executor of the husband's estate had filed a motion with the Probate Court of Smith County to declare that the joint accounts of the decedent and his widow constituted their community property and that the husband's estate was entitled to half of it. In opposing that conclusion, the executor relied on the order of the probate court approving the inventory and appraisal of the accounts as part of the decedent's estate. The court of appeals pointed out that the lower court's order did not constitute an adjudication of property interests in the accounts.⁵³ Thus the widow was entitled to the deposits in all of the accounts in accordance with the statute.⁵⁴

46. *Id.*

47. *Id.*

48. *Id.* at *2.

49. *Id.* (citing TEX. FAM. CODE ANN. § 4.105 (2003); *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 695 (Tex. App.—Austin 2005, pet. denied); *Matelski v. Matelski*, 840 S.W. 2d 124, 128-29 (Tex. App.—Fort Worth 1992, no writ.)).

50. *Id.* at *2.

51. 213 S.W. 3d 491 (Tex. App.—Tyler 2006, no pet.).

52. TEX. PROB. CODE ANN. § 439(a) (Vernon 2003).

53. *Wilson*, 213 S.W.3d at 495.

54. TEX. PROB. CODE ANN. § 439(a) (Vernon 2003).

D. PHYSICAL IMPAIRMENT

*Sooy v. Sooy*⁵⁵ dealt with the ex-husband's post-divorce receipt of an impaired worker's compensation benefit. After the ex-husband's receipt of payment, the ex-wife moved for a new trial. The trial court denied her motion, and the ex-wife appealed. The court of appeals solution turned on the statutory definition of the benefit received. Though the Labor Code⁵⁶ defines such a benefit as based on earning capacity, the benefit is paid for the bodily impairment consequences of the injury and not for lost wages.⁵⁷ The statute seems designed to give the injured recipient tax-free compensation for injury, though the loss is measured by loss of earnings rather than pain and suffering and future impairment, which, in this instance occurred after the termination of the marriage. Thus the compensation was measured by loss of post-divorce wages achieved by a statutory fiction as a partial consequence of the timing of the divorce.⁵⁸

In *D.B. v. K.B.*,⁵⁹ the husband had discovered during the marriage that a fraud had been perpetrated against a federal agency. In his suit under the federal False Claims Act,⁶⁰ he served a copy of his complaint on the federal attorney. A relator in a qui tam proceeding may recover between fifteen and thirty percent of the damages awarded. After filing his suit under the False Claims Act, the husband filed a petition for divorce. The couple reached an agreement on division of all their property except for the possible qui tam recovery. The divorce court concluded that the husband's potential recovery would be community property. The husband appealed. The court of appeals analogized the potential qui tam fee to the fractional interest in future military retirement benefits earned during marriage but payable after divorce in *Cearley v. Cearley*.⁶¹ In response to the husband's argument that federal law preempts Texas community property law, the court of appeals observed that the argument had not been raised until the appellate stage of the proceeding, and the point was therefore waived.⁶² The court of appeals went on to say, however, that the husband's right to recover under the federal act was contingent on the federal government's prosecuting the case successfully and granting recovery to the husband. The right was therefore earned (if received) during the marriage.⁶³

55. 2007 WL 516259 (Tex. App.—San Antonio 2006, no pet.) (mem. op.).

56. TEX. LAB. CODE § 408.126 (Vernon 2006).

57. Tex. Worker's Compensation Comm. v. Garcia, 893 S.W.2d 504, 514 (Tex. 1995).

58. *Id.* at 516.

59. 176 S.W.3d 343 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

60. 31 U.S.C. § 3730(b) (1994).

61. 544 S.W.3d 661 (Tex. 1976); *see also In re Biddle*, 52 Cal. App. 4th 396, 60 Cal. Reprtr. 2d 569 (1997).

62. *D.B.*, 176 S.W.3d at 350 n.10; *see also Loria v. Loria*, 189 S.W.3d 797 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (invalid judicial effort to restrict the power of a retired military spouse to alter entitlement to federal benefits).

63. *D.B.*, 176 S.W.3d at 350 n.10.

E. CONFLICT OF LAWS

In *Cardwell v. Cardwell*,⁶⁴ the husband complained that the trial court had concluded that the husband's Kansas oil and gas property was treated as community property rather than his separate property. But the court of appeals agreed that the husband had not met his burden of proof that the property was his separate property.⁶⁵ Specifically, the husband should have offered proof of significant facts of the investment and Kansas conflict-of-laws rules. The Missouri Supreme Court has concluded that when Texas community property is invested in Missouri realty, it should be treated as Texas Community property for purposes of division on divorce.⁶⁶

F. EQUITABLE REIMBURSEMENT AND ECONOMIC CONTRIBUTION

In *Cardwell v. Cardwell*,⁶⁷ the trial court also held that the third husband owned 120 acres of land as his separate property and that the community estate was entitled to reimbursement for the economic contribution of the \$254,000 for improvements to that property. The trial court, however, pointedly treated a claim for equitable reimbursement and a statutory claim for economic contributions as two different sort of remedies.⁶⁸ The court of appeals held that there are simply two different kinds of reimbursement: the old, equitable Spanish-type and the new right to claim for economic contribution, not subject to equitable denial or reduction.⁶⁹ The court of appeals went on to discuss the calculation of awards to the wife as they may have been arrived at by the trial court and finally stated that "[w]hether the trial court adjusted the contribution award downward or upward, the judgment awarded [the] wife [was] close enough to the calculation of the economic-contribution award under the statute that we see no abuse of discretion."⁷⁰ In making this observation, the court of appeals seemed to lose sight of a frequently unmentioned distinction between ordinary reimbursement and reimbursement for economic contribution. The calculation for ordering reimbursement takes equities into account whereas economic contribution is reimbursed by a precise calculation under section 3.403(b). The case, therefore, should have been remanded for a redetermination of the division of the estate.

When carelessly used, terms of art can be misleading. For example, in *Raymond v. Raymond*⁷¹ the wife agreed that the community estate was

64. 195 S.W.3d 856, 862 (Tex. App.—Dallas 2006, no pet.).

65. *Id.* at 861-62.

66. *In re Perry*, 480 S.W.3d 983 (Mo. 1972).

67. 195 S.W.3d at 860.

68. *Id.* at 860 (In note 4 the court gave a rather limited definition of "reimbursement." As for the "equitable lien," which the furnishing estate already has on the benefited property for an economic contribution or other right of reimbursement, it becomes a legal lien when fixed on the property by the divorce decree.).

69. *Id.* at 860.

70. *Id.* at 861.

71. 190 S.W. 3d 77, 82 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

due reimbursement for funds expended on the husband's separate property. The court briefly discussed the alleged "economic contribution" made with community funds. But the court pointed out that the wife was not using the word as a term of art; rather it was just her fashionable way of referring to an ordinary right of reimbursement.

In *Rogers v. Foxworth*,⁷² the couple married in 1988. Each owned a house in neighboring towns. They kept both houses and continued to use both of them. When the husband died in 2001, he was survived by his wife and his two daughters from a previous marriage. The probate court appointed the widow as the independent administratrix of the estate.⁷³ In 2004, the daughters filed a claim for economic contribution as during the marriage their father had supplied nearly three times as much in payments of community property on the outstanding indebtedness on the widow's house as she had paid with her separate property. The daughters claimed the amount of community contributions to the widow's separate estate but failed to show the value of increase in the widow's ownership interest in the property due to the community payments. The trial court nevertheless awarded recovery to the daughters for the amount claimed. The widow appealed.⁷⁴ The trial court had apparently sought to apply the formula in section 3.402(b) to compute the economic contribution due, including the increase in net value resulting from the amount contributed by the community estate. Thus, the trial court did not comply with the formula for computation of economic contribution. On appeal, the daughters therefore argued that they could nevertheless recover their claimed expenditures by the ordinary or traditional Spanish law of reimbursement.⁷⁵ The court of appeals rejected this contention because the daughters had not demonstrated the extent of the benefit conferred.⁷⁶ In saying that "[e]quity is the first factor that must be established in a claim for economic contribution,"⁷⁷ the court of appeals was simply referring to the monetary contribution of the community estate. For purpose of granting ordinary reimbursement, fairness and the extent of the benefit conferred are always considered.⁷⁸ In a claim for economic contribution, the value of the economic benefit resulting from the expenditures also must be shown, but equities are not taken into account in fixing the amount due as computed by the statutory formula. The facts of this case suggest that a claimant in pleading for reimbursement should consider pleading both sorts of reimbursement in the alternative.

In *Rogers*, the husband's estate had also asserted its right to recover for economic contribution of the husband's share of community payments to

72. 214 S.W.3d 196 (Tex. App.—Tyler 2007, no pet. h.).

73. *Id.* at 197.

74. *Id.* at 198.

75. See *Anderson v. Gilliland*, 684 S.W.2d 673, 675 (Tex. 1985).

76. *Rogers*, 214 S.W.3d at 199 (citing *Moroch v. Collins*, 174 S.W.3d 849, 868 (Tex. App.—Dallas 2006, pet. denied)).

77. *Id.* (citing *Moroch v. Collins*, 174 S.W.3d 849, 866 (Tex. App.—Dallas 2006, pet. denied)).

78. *Anderson*, 684 S.W.2d at 675.

the widow's teacher-retirement account. The court of appeals adopted the widow's argument that the husband's estate could not benefit from the retirement account because he had predeceased his wife and he had thus lost his interest.⁷⁹ Although statutory rules concerning the retirement account provide that a predeceasing spouse of the employer loses his interest in the account, Texas does not follow this terminable interest rule as it has been declared contrary to the definition of community property in article XVI section 15 of the Texas Constitution.⁸⁰ The national Congress can, of course, impose the terminable interest rule with respect to federal benefits applicable to Texas⁸¹ under the supremacy clause of the United States Constitution, but the Texas Legislature does not in this instance have correlative power with respect to retirement interests of state employees.

The Eastland Court of Appeals in *Nelson v. Nelson*⁸² made careful distinctions in dealing with a very extensive list of marital and pre-marital calculations concerning contributions and improvements of one marital estate by another. Prior to the couple's marriage in 1995, the husband had bought five acres of land from his parents, owing \$8,000 on the purchase at the time of the marriage. Before the marriage, the wife had sold her house for a net amount of \$187,500, which she deposited in her bank. Also prior to their marriage, the couple began to build a house on the husband's five acres, doing most of the work themselves and using \$16,600 of the proceeds from the sale of the wife's house. At the time of their marriage, the new house was substantially built, and, following their marriage, the couple spent an additional \$5,600 on its completion. The couple then negotiated with the husband's parents to discharge the husband's indebtedness in full by paying \$2,000. The couple then bought an additional twelve acres from the husband's parents.⁸³

In the couple's divorce which occurred several years later the court of appeals concluded that their community estate was owed \$18,600 as an economic contribution to the husband's separate property and that the wife's separate estate was also entitled to \$16,000 as an economic contribution.⁸⁴ The court of appeals concluded that its hands were tightly tied by its inability to readjust divisions and fixing of liens on property. But the court nevertheless reached some general conclusions to guide the trial court on remand. Simply calling a claim one for economic contribution does not necessarily make it so. Economic contributions must occur during marriage and, in the calculation of economic contributions, use of the statutory formula is the exclusive means of producing the proper result.

79. *Rogers*, 214 S.W.3d at 199-200.

80. *Allard v. Frech*, 754 S.W. 2d 112 (Tex. 1988), *cert. denied*, 488 U.S. 1006 (1989); *see* TEX. CONST. Art. XVI § 15 (2003); *see also* *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925); *see also* Joseph W. McKnight, *Family Law: Husband and Wife*, 50 SMU. L. REV. 1189, 1202-06 (1997).

81. *See* *Valdez v. Ramirez*, 574 S.W.2d 748 (Tex. 1978).

82. 193 S.W.3d 624 (Tex. App.—Eastland 2006, no pet.).

83. *Id.* at 627.

84. *Id.*

The court of appeals added that ordinary reimbursement can be had for both premarital and marital benefits conferred but always limited by the extent of benefits conferred.⁸⁵ As to the lien element in the definition of an economic contribution, the court of appeals seemed to exclude common-law purchase-money liens, unless fixed by a judgment.⁸⁶

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

A. MANAGEMENT

Third persons are entitled to rely on the power of a spouse to deal with community property held in that spouse's name.⁸⁷ In *In re Wimberly*,⁸⁸ the wife had granted a home-equity lien to a lender without joining the husband, as required by the Texas Constitution⁸⁹ for the transfer of a homestead to a lender. In her divorce proceeding that was brought several months later, the mortgage company-lender intervened to assert the validity of its claim. In exchange for a monetary payment, the husband then entered into an agreement with the lender that the lien was valid, and the property was awarded to him by the divorce court subject to the creditor's lien. Several years later the ex-husband filed for bankruptcy, and, seeking to set aside the lien, he filed a bill of review in the divorce court to assert the invalidity of his agreement with the lender as entered into under duress. In granting summary judgment to the lender, the bankruptcy court held that the husband's agreement entered into with the mortgagee precluded his claim.⁹⁰ The court concluded that the ex-husband's reliance on *La Salle Bank National Association v. White*⁹¹ was misplaced.⁹² There the San Antonio Court of Appeals held that the provisions of the Texas Constitution with respect to the validity of home-equity loans must prevail over a lender's relitigation on principles of equitable subrogation.⁹³ In this instance, unlike that in *La Salle Bank*, the statutory preclusion doctrine barred relitigation.⁹⁴ The provisions of the

85. *Id.* at 636.

86. *Id.*

87. TEX. FAM. CODE ANN. § 3.104 (Vernon 2003).

88. 355 B.R. 596 (Bankr. S.D. Tex. 2006).

89. TEX. CONST. art. XVI § 50 (Vernon 2004).

90. *Wimberly*, 355 B.R. at 599.

91. In *LaSalle Bank Nat'l Ass'n v. White*, 217 S.W.3d 573 (Tex. App.—San Antonio 2006, pet. filed), the San Antonio Court of Appeals sitting, en banc, held that a borrower's interest in a homestead on land designated for agricultural purposes under article XVI, section 50(a)(6)(I) of the Texas Constitution is not subject to a valid home-equity loan. *Id.* at 575. The lender's alternative argument was no more successful. The lender was therefore not equitably subrogated to the lien held by third persons who were paid the balance of their existing purchase-money lien on the land and for the accrued ad valorem taxes, both of which arose before the 1995 constitutional amendment governing home-equity loans. *Id.* at 577-78. Two justices disagreed with their colleagues' rejection of the equitable lien under *Benchmark Bank v. Crowder*, 919 S.W. 2d 657 (Tex. 1996). *Id.* at 579-81.

92. *Wimberly*, 355 B.R. at 600.

93. *LaSalle Bank*, 217 S.W.3d at 575-77.

94. *Wimberly*, 355 B.R. at 604.

Texas Constitution on home equity loans were therefore irrelevant, not to mention those on spousal joinder, in putting an incumbrance on the family home which went unnoted. The bankruptcy court also rejected the ex-husband's assertion that the court should wait for the outcome of his bill of review in the divorce court before ruling on his claim in bankruptcy.⁹⁵ The bankruptcy court explained that the ex-husband's argument did "not present a likely meritorious claim and [did] not assert that [he] was prevented in any way from asserting his claim" in the divorce court.⁹⁶

B. LIABILITY

1. *Personal and Property Liability*

The fundamental differences between separate and community property are very familiar, but the rules of spousal liability cannot be defined in quite the same easy way. Saying that an obligation is a community debt merely means that some community property is liable for its payment as well as the separate property of the debtor, unless the obligee has agreed to look only to one of those estates. To say that an obligation is a separate debt means that there is a personal obligation to pay for both separate and community acquisitions.

In an appeal from a Dallas divorce court, the Eastland Court of Appeals considered the wife's liability for her husband's credit card debts in *Mock v. Mock*.⁹⁷ Both courts stumbled and fell. Using a credit card in his name, the husband incurred liability for which the wife had no contractual liability. In their divorce, the court ordered the wife to pay one half of the indebtedness incurred by the husband. There was no proof that the debts were incurred for necessities or that the husband was otherwise acting as the wife's agent.⁹⁸ Thus the wife was not liable as principal of her husband under section 3.201(a) or (c) of the Texas Family Code; nor was she liable under section 3.201(b) or section 3.202(a) to which section 3.201(b) refers. The wife's separate property, therefore, was not liable for the husband's obligation. Fixing the wife with general personal liability for the husband's debts on his credit card is without statutory authority. Although jointly managed community property is liable for such debts, section 3.202(c) does not allow a court to order a wife to pay her husband's debt from all funds available to her merely because her property interest in jointly managed community property may be reached by the husband's creditor under section 3.202(c). The court confused personal liability with property liability in saying that the wife is liable for all community debts. A community debt means that some community property is liable for such a debt, but not all community property or all property of any person who may own an interest in some commu-

95. *Id.* at 599-600.

96. *Id.*

97. 216 S.W.3d 370, 373-74 (Tex. App.—Eastland 2006, pet. denied).

98. *Id.*

nity property controlled by sections 3.201(a) and (c) or 3.202(a), (b), (c), or (d).

In *Montemayor v. Ortiz Celada*,⁹⁹ a creditor recovered a judgment against the husband for a large debt. The judgment debt was later assigned to the plaintiffs who sued the debtor-husband and his wife and recovered a money judgment against them as well as a declaratory judgment that the wife's business was community property subject to payment of the debt. In 1990, the husband had filed for voluntary bankruptcy under Chapter 7, but the judgment debt was not discharged because the bankruptcy court had found that the debt had been incurred by fraud to which the husband was a party. In 2002, after the wife's business interest had grown very considerably, the creditor succeeded in having a receiver appointed to assume control of the wife's business. In her motion to dissolve the receivership, the wife showed that the business was commenced with money given to her by her father and that she had remained in control of the business. The wife therefore asserted and proved that the business was her solely managed community property, not subject to her husband's debts. The receivership was dissolved, and the wife successfully sued for damages in tort for the creditor's wrongful seizure of her business to pay her husband's debt. The creditor appealed in reliance on *Cockerham v. Cockerham*,¹⁰⁰ which was discussed at great length by the Corpus Christi Court of Appeals. In *Montemayer*, the court of appeals found that the decision of the Texas Supreme Court in *Cockerham* was not dispositive of the case before the court because in the case before it, the court of appeals found that the wife had maintained entire control of the property subject to her sole management, and no other community funds, other than those derived from that business, were used in her business.¹⁰¹ As to the claim for tortious damages, however, the wife was unsuccessful except for her recovery of attorney's fees.¹⁰²

C. EXEMPT PROPERTY

1. Homestead

With a dispute of homestead exemption before it in a bankruptcy dispute, the Fifth Circuit sought the opinion of the Texas Supreme Court as to whether a yacht moored to a dock, and provided with water, electricity, and telephone service, is a Texas homestead. In *Norris v. Thomas*,¹⁰³ the majority of the Texas Supreme Court rejected an expanded interpretation of homestead protection, a decision that four dissenting justices termed a "cramped interpretation of homestead."¹⁰⁴ The supreme court's decision turned on a strict reading of Article XVI, section 51 of

99. 208 S.W.3d 627 (Tex. App.—Corpus Christi 2006, no pet.).

100. 527 S.W.2d 162 (Tex. 1975).

101. *Montemayor*, 208 S.W.3d at 644.

102. *Id.* at 667.

103. 215 S.W.3d 851 (Tex. 2007).

104. *Id.* at 862.

the Texas Constitution¹⁰⁵ that protects "improvements on the land . . . used for purposes of a home."¹⁰⁶ The yacht was certainly used as a home, but it was not on land. "[T]he homestead exemption . . . contemplates a requisite degree of physical permanency and attachment to fixed realty—'thereon' and 'on the land.'"¹⁰⁷

In *In re Wynne*,¹⁰⁸ a woman-grantor conveyed realty, which she later asserted was her homestead, and the grantee paid outstanding taxes against the land amounting to \$12,000. About four months after paying the taxes, the grantee brought suit against the grantor to foreclose a tax lien. The court entered an agreed judgment awarding the grantee \$12,000 plus interest, secured by a lien on the property. The payment of taxes on land, it should be noted, was one of the three exceptions to the rule in article XVI, section 60 of the Texas Constitution of 1876 to 2004 that a homestead could not be encumbered.

The woman failed to make payments on the lien and filed for bankruptcy under Chapter 7. In the bankruptcy proceeding she invoked section 522(f)(1)(A) of the Bankruptcy Code¹⁰⁹ to avoid the judicial lien that impaired her homestead exemption. The creditor argued that his was not a judicial lien as provided in that section but a security lien created by agreement. The bankruptcy court held that the creditor's lien had merged into the judgment and thus had become a judicial lien. The district court upheld the decision of the bankruptcy court on the ground that the creditor did not have a statutory lien (as he had asserted) because he had failed to show that he was subrogated to the taxing authority's lien by his discharge of the tax-liens. The Fifth Circuit Court of Appeals also rejected the subrogation argument because the agreed judgment said nothing about a tax lien. Though the district court had concluded that the creditor had abandoned his further argument that he had a consensual lien, the Fifth Circuit found that the argument was still viable and remanded the case for further proceedings.¹¹⁰

As in *Bounds v. Caudle*,¹¹¹ the husband in *Florey v. Estate of McConnell*¹¹² had been convicted of killing his wife. To handle his defense the husband in *Florey* had hired the plaintiff-attorney to defend him. The husband had paid part of his counsel's fee initially and gave the attorney a note for \$75,000, secured by a deed-of-trust lien on the couple's homestead where he had continued to live. The ex-wife's estate recovered a judgment for wrongful death against the husband and brought a declaratory judgment to gain a clear title to the homestead by invalidating the

105. TEX. CONST. art. XVI § 51 (Vernon 2004).

106. *Id.*

107. *Norris*, 215 S.W.3d at 858.

108. 207 F. App'x 472 (5th Cir. 2006). The court stated, however, that the case is not a precedent except under the circumstances provided in 5th Cir. R. 4.05.

109. 11 U.S.C. § 522(f)(1)(A).

110. *Wynne*, 207 F. App'x at 476.

111. 560 S.W. 2d 925 (Tex. 1977).

112. 212 S.W.3d 439 (Tex. App.—Austin 2006, no pet.).

attorney's deed of trust. The realty was sold, and the proceeds were divided equally between the wife's estate and the registry of the court. The trial court held that the property was a homestead, that the husband had not abandoned the homestead before signing the note and deed of trust, and that the deed of trust was invalid.¹¹³ The Austin Court of Appeals affirmed the judgment of the trial court.¹¹⁴ The ultimate issue was whether the attorney had a valid lien on the homestead property.¹¹⁵ There was no disclaimer of a homestead interest in the deed of trust.¹¹⁶ The lien against the homestead was denied.¹¹⁷ The homestead is protected from a lien, except for purposes expressly excepted by the Constitution,¹¹⁸ and the payment of one's attorney's fees is not one of them.

In *In re Anderson*,¹¹⁹ a Chapter 7 debtor sought to avoid a judicial lien on her home based on a judgment which vested her creditor with title to a twenty-percent interest in the debtor's homestead. The alleged lienholder asserted, inter alia, that he held a great deal more than a lien which may be defeated under section 522(f) of the Bankruptcy Code. The property interest had been awarded to the creditor in a Texas proceeding, and thus the principle of res judicata applied, as did the Rooker-Feldman doctrine that precludes an inferior federal court from modifying or nullifying a state court's judgment.¹²⁰ The Houston bankruptcy court accepted all these arguments. As to the first, the court held that the debtor did not have a mere lien interest against the property but an ownership interest,¹²¹ and thus this case was distinguished from *In re Levi*,¹²² where a judicial decree was accompanied by a judicial lien that was subject to the applicability of section 522(f). The debtor's interest in the property therefore could rise no higher than her eighty-percent right of ownership, and twenty percent belonged to the respondent and was not part of the debtor's homestead.¹²³

The bankruptcy courts were also concerned with other homestead problems not encountered in Texas courts. The matter of concern in *In re Kleibrink*¹²⁴ was the homestead of a single, bankrupt man and his ex-wife. In 1996, the husband and wife had given a note and lien on a retail installment contract to buy a home. The debtor-ex-husband, who was

113. The trial court refused to find that the husband's disposal of a one-half interest in the homestead constituted a disposition of his separate property. The appellate court did not comment on this point. But if the property had been the couple's community estate, and the effect of the wife's death was to create a tenancy in common, the husband still could not have fastened a lien on that part of the homestead property.

114. *Floreys*, 212 S.W.3d at 450.

115. *Id.* at 445.

116. *Id.*

117. *Id.* at 450.

118. *Id.* at 443 (citing TEX. CONST. art XVI § 50(a) (Vernon 2004)).

119. 357 B.R. 404 (Bankr. S.D. Tex. 2006).

120. D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

121. *Anderson*, 357 B.R. at 409-10.

122. 183 B.R. 468 (Bankr. N.D. Tex. 1996).

123. *Anderson*, 357 B.R. at 410.

124. 346 B.R. 734 (Bankr. N.D. Tex. 2006).

before a Dallas bankruptcy court in 2006, had been before the bankruptcy court twice before. The foreclosure of the lien had been stayed in the ex-husband's first bankruptcy filing in 2001 shortly after the couple's divorce and was later dismissed. Foreclosure was stayed again in a second case filed in 2003. The assignee of the original holder of the note and lien had sought pre-petition arrears, insurance expenses, late-charges, and attorneys' fees as well as dismissal of the second filing. The debtor denied the validity of the assignment to the noteholder-creditor. The creditor's motion was denied, and the debtor was granted a discharge on confirmation of his plan in 2004. With his debts mounting again, the debtor filed a third voluntary petition in late 2005, and the alleged assignee again filed his motion to lift the stay. The creditor acknowledged the discharge of personal liability of the debtor on the note but asserted continuing liability on the lien, and that liability of the ex-wife was continuing. In contesting the continued validity of the lien the debtor seems to have come close to making the argument that because his personal liability extended to the entire debt, or at least half of it, his full liability had been discharged. But he failed to make that argument clearly. Instead, the debtor focused on the fact that the couple had contracted only one lien, and he may have thought that he owed only half the debt and failed to realize that his liability covered the entire indebtedness under the provisions of the note. The bankruptcy court concluded that the creditor, with both a note and a lien, had "two distinct remedies."¹²⁵ "[T]he rule is that where the debt is *not* paid in full under the plan, the lien remains intact and passes through the bankruptcy unaffected."¹²⁶ The bankruptcy court also noted that the lien might be extinguished by section 506(d) by "providing for, and paying in full, the underlying debt under a confirmed plan."¹²⁷ But as the court remarked, this course requires "a good deal of careful exegesis on the text of that section and the Federal Rules of Bankruptcy Procedure 3012 and 7001"¹²⁸ and proceedings by contested matters or adversary proceedings by which "the differences are often blurred"¹²⁹ and may require a valuation under section 506(a).¹³⁰ The court also noted that a claim-objection under section 502 might be appropriate¹³¹ and that the Fifth Circuit Court of Appeals seems to favor that approach.¹³² The debtor had argued that a claim-objection is sufficient to extinguish a lien under section 506,¹³³ but the court pointed out that such an objection is not always sufficient to

125. *Id.* at 746, 747 c.1 (emphasis added).

126. *Id.* at 748; 11 U.S.C. § 506(d).

127. *Id.*

128. *Id.* at 748.

129. *Id.* at 749 (quoting *In re Saldana*, 294 B.R. 180 (Bankr. M.D. Fla. 2003)).

130. *Id.* at 750.

131. *Id.*

132. See *In re Howard*, 972 F.2d 639 (5th Cir. 1992).

133. *Kleibrink*, 346 B.R. at 752 (citing *In re Robinson*, 217 B.R. 527 (Bankr. E.D. Tex. 1998)).

achieve the result desired.¹³⁴

In *In re Riviera*,¹³⁵ a married couple and a corporation owned by them contracted with a builder to acquire land on which the builder agreed to construct a building for the purchaser. The building was meant to be used for both a home and for commercial purposes. The builder gave a contract for deed of the improved property to the couple in their corporation, and a bank financed the project and acted as agent for the purchasing couple. In 1999, the builder transferred the improved realty to the corporation and its owners. The corporation filed for bankruptcy and, in its schedules, claimed the realty as an asset. In 2003, the bankruptcy court granted relief from stay and allowed the bank to foreclose its lien. An adversary proceeding was then begun by the bankrupts against the bank, alleging liability under the Deceptive Trade Practices Act ("DTPA"), criminal activity with intent to commit felonies, and wrongful foreclosure. The bank sought summary judgment.

As to the alleged negligence of the bank in extending to the builder a commercial rather than a home-construction loan, the court held that the plaintiffs failed to show that the bank owed any duty of care to the purchasers.¹³⁶ As to the DTPA violation, the plaintiff failed to show the essential element of reliance on any misrepresentation of the bank.¹³⁷ As to the further allegation of the bank's negligence in administering the loan, engaging in criminal activity in doing so, and in making a wrongful foreclosure, the court held that the plaintiffs lacked any separate cause of action because the alleged breach of the Penal Code "merely supports the proposition that the evidence of the alleged Penal Code violation may be admissible at trial if there is a separate cause of action. It does not establish a separate [civil] cause of action."¹³⁸ As to the assertion of wrongful foreclosure, the trustee had not asserted a fee title to the land at the time the bank's lien was created. Finally, as to the bankrupt couple's asserted homestead use of the premises, there was no proof of the bank's knowledge of the plan on the part of the couple that might have created a fact issue at trial in the couple's favor.¹³⁹ But that a contract for deed can support a homestead claim was accepted by the court.¹⁴⁰

The bank argued that the couple's prior assertion that the corporation was owner of the land precluded their taking an inconsistent position that the property was their homestead. The court's conclusion was that the point involved a fact issue not yet resolved.¹⁴¹ As to the couple's assertion of lack of notice of the foreclosure, the bank stressed the fact that the

134. *Id.* at 752.

135. 358 B.R. 688 (S.D. Tex. 2007).

136. *Id.* at 692.

137. *Id.* at 691-92.

138. *Id.* at 692.

139. *Id.*

140. *Laubhan v. Alliance Life Ins. Co.*, 134 S.W.2d 788 (Tex. Civ. App.—Amarillo 1939, no writ).

141. *Id.* at 613.

lien had been granted to the bank by a prospective future owner, not by the couple or their corporation. Further, "[i]f the lien . . . was valid, the notice of foreclosure sale was also valid."¹⁴² The couple was not entitled to notice under section 51.002 of the Property Code.¹⁴³ The issue of the validity of the lien was reserved for trial.

As a way of meeting the complaint that some states, including Texas, have afforded excessively broad homestead exemptions that might be abused by a debtor's move to one of those states in anticipation of bankruptcy, in 2005 Congress adopted the rule that for claiming a homestead in bankruptcy of more than \$125,000, the debtor is required to show that his homestead was acquired more than 1,215 days prior to filing a petition in bankruptcy.

The requirement of the running of 1,215 days since a homestead's acquisition (calculated as forty and one-half months of thirty days each or roughly three and a third years) was considered in *In re Blair*.¹⁴⁴ There the bankruptcy court held that the merely monetary interest in their homestead, which the couple acquired by making mortgage payments during the period, was not the sort of interest to which the rule applies.¹⁴⁵ Rather, acquisition refers to title in the property and not to its increase in equity-value.¹⁴⁶ Anticipating another sort of dispute, the court also concluded that "[a] debtor is not subject to the homestead cap if he takes the proceeds of his first residence and reinvests them in a second residence even within the prescribed period of section 522(p)."¹⁴⁷

In calculating disposable income for the purpose of a Chapter 13 plan under the 2005 legislation,¹⁴⁸ the bankruptcy court in *In re Lara*¹⁴⁹ was particularly concerned with confirmation of a joint Chapter 13 plan of a husband and wife. The court held that a debtor is allowed to deduct certain standard expense allowances from current monthly income in order to calculate projected disposable income which must be dedicated to payment of claims under a reorganization plan.¹⁵⁰ Under the amended Bankruptcy Act, these standards established by the Internal Revenue Service vary from one region of the country to another. Standard expenses are also allowed for housing and utilities, and transportation costs are reflected in allowances for owners of cars. Computations include acquisition ("ownership") costs and operating costs, actual necessary

142. *Id.*

143. *Id.*

144. 334 B.R. 374 (Bankr. N.D. Tex. 2005).

145. *Id.* at 376-77.

146. *Id.*

147. *Id.* at 377. The court also referred to § 522(p) as restricting the "mansion loophole" by requiring that a debtor who moves from one state to another to take advantage of the exemption laws of the latter must be a domiciliary of the new state of residence before claiming that state's homestead exemption. *Id.* at 377-78.

148. Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. 707(b)(2)(A)(ii)(I), 1325(b)(1), (b)(2).

149. 347 B.R. 198 (Bankr. N.D. Tex. 2006).

150. *Id.* at 204.

monthly expenses for taxes, payroll deductions, life insurance, health care, health insurance, and charitable contributions.

The court also addressed the calculation of expense-allowances under the 2005 legislation in the confirmation of a Chapter 13 plan. In the *Lara* joint bankruptcy, the court concluded that *each* spouse was not allowed to claim an expense allowance for one vehicle regardless of the existence of debt or lease payments on the vehicle.¹⁵¹ The court went on to apply the act to other expenses claimed by the debtors, especially the “other necessary expenses” that may be claimed.¹⁵²

2. *Personal Property Exemptions*

In *In re M^cBride*,¹⁵³ the trustee in a Chapter 7 bankruptcy case objected to the debtor’s claim of an exemption for after-tax contributions to an ERISA-qualified savings plan. The court rejected the trustee’s contention that Texas law does not treat such contributions as exempt from creditors’ claims merely because the debtor has access to those funds.¹⁵⁴ That argument seems based either on a presumption that control causes a fraudulent transfer to be presumed or that the temptation to defraud is too dangerous to be allowed and thus constitutes a sort of presumed fraudulent transfer. Neither of these explanations, however, was actually advanced. The court nevertheless made the point that if a fund is administered so that a debtor is allowed to defraud the Internal Revenue Service, that is a very different situation.¹⁵⁵ “If the Savings Plan contains an anti-alienation clause as required by ERISA . . . [it is] therefore excluded from the bankruptcy estate. . . .”¹⁵⁶ There was no evidence in this case that the debtor had any access to the after-tax funds, but the court added that, even if such evidence were before the court, and that the plan was not “tax qualified,” the after-tax contributions would still be excluded from the bankruptcy estate.¹⁵⁷

One day before filing for bankruptcy the couple in *In re Soza*¹⁵⁸ purchased an annuity, which they later insisted would constitute exempt property under sections 1108.051 and 1108.053 of the Insurance Code, but the bankruptcy court sustained the trustee’s objection to classifying that property as exempt. The debtors sought to offer evidence that the couple had inherited the money that they used to buy the annuity, but the bankruptcy court refused to take testimony on that point because the evidence was offered for the first time at the bankruptcy hearing.¹⁵⁹ As section 1108.053 of the Insurance Code replaces old section 21.22, which included

151. *Id.* at 202-03.

152. *Id.* at 204.

153. 347 B.R. 535 (Bankr. S.D. Tex. 2006).

154. *Id.* at 591.

155. *Id.* at 593.

156. *Id.* at 594.

157. *Id.* at 594-95.

158. 358 B.R. 903 (Bankr. S.D. Tex. 2006).

159. *Id.* at 905-06.

the same "in fraud of creditors exemption" now found in 1108.053, only fraudulent acts covered by old section 21.22 now apply to the new sections.¹⁶⁰ The court cited *Leibman v. Grand*¹⁶¹ as an example. There the debtor had sold assets for amounts well below their acquisition cost and destroyed most of the evidence of those transactions. The debtor testified that he had no intention of paying the creditor's judgments. The court contrasted *Marineau v. General American Life Insurance Co.*,¹⁶² where the debtor purchased an exempt policy of life insurance with embezzled funds, to a federal Eighth Circuit case,¹⁶³ where non-exempt assets were bought on the eve of bankruptcy but not with fraudulent intent. In both instances, the courts "looked to the ownership interest in the non-exempt property used to acquire the exempt property."¹⁶⁴ The court went on to quote the Fifth Circuit in *In re Bowyer*¹⁶⁵ that "the mere conversion of non-exempt property into exempt property on the eve of bankruptcy [is] not in itself such fraud as will deprive the bankrupt of his right to exemptions."¹⁶⁶ Thus, in light of Texas's policy that exemption laws should be liberally construed in favor of a debtor, and in the absence of other indicia of fraud apart from the implication of a bankruptcy eve transfer, that fact alone does not show fraudulent intent. The court concluded that even if the trustee's contention is correct that section 1108.053 is a fraudulent-transfer statute, "his assertion that this conversion constituted a fraudulent transfer must fail."¹⁶⁷ Nor in the court's view did the debtor's mere conversion of one asset to another amount to "constructive fraud."¹⁶⁸

Over a period of three-and-a-half years a couple was before the Eastland Court of Appeals in two different but related disputes. The first case was the husband's appeal from their divorce decree,¹⁶⁹ but the adjudication of the dispute did not occur until after the facts underlying the second dispute arose, culminating in *Langston v. GMAC Mortgage Corp.*¹⁷⁰ The couple had lived in the husband's separate house, which they had subjected to a lien for a home-equity loan. In their divorce, the court awarded the house to the wife and directed her to discharge the note and hold the husband harmless on the loan. On the husband's appeal, the court reversed the award of the husband's separate property to his wife in the first appeal.¹⁷¹ The report of the second case does not indicate that

160. *Id.* at 907.

161. 981 S.W.2d 426, 430 (Tex. App.—El Paso 1998, no pet.).

162. 898 S.W.2d 397, 402 (Tex. App.—Fort Worth 1995, writ denied).

163. *Hanson v. First Nat'l Bank*, 848 F.2d 866, 869–70 (8th Cir. 1998).

164. *Soza*, 358 B.R. at 907.

165. 916 F.2d 1056 (5th Cir. 1990).

166. *Soza*, 358 B.R. at 908-09.

167. *Id.* at 910.

168. *Id.* at 910-11.

169. 82 S.W.3d 686 (Tex. App.—Eastland 2002, no pet.); see Joseph W. McKnight, *Family Law: Husband and Wife*, 56 SMU L. REV. 1659, 1671 (2003).

170. *Langston v. GMAC Mortgage Corp.*, 183 S.W.3d 479 (Tex. App.—Texarkana 2005, no pet.).

171. *Id.* at 480.

the husband had superseded the judgment during the appeal as the ex-wife was apparently able to deal with the property pending the outcome of the appeal.¹⁷² But before the appeal had been acted on, the ex-wife had procured another home-equity loan on the property to discharge the prior loan, and the second lender had thus acquired a first lien on the property. After the reversal and remand of the divorce case to the trial court, the ex-wife's new mortgagee intervened in the divorce proceeding to maintain its lien on the realty, which was clearly the separate property of the ex-husband. As a result of the more recent loan to the ex-wife, the mortgagee claimed subrogation to the husband's interest because his liability on the first note had been benefited by discharge of his liability. The only contrary argument put forward by the ex-husband was that the mortgagee had acted as a volunteer. The court of appeals held that the mortgagee did not act as a volunteer by acting at the request of a party to the loan to be discharged.¹⁷³ Short of attempting to put her in involuntary bankruptcy, the most likely recourse left to the ex-husband was a suit against his ex-wife for the debt that he had paid which she had been ordered to pay by the divorce court.

Spousal joinder for a valid homestead conveyance is vital. In *Geldard v. Watson*,¹⁷⁴ a wife and her second husband had lived in the wife's home for thirty years. Before moving to a nursing home, the wife without her husband's joinder conveyed the home to her daughter. The daughter promptly brought suit in a justice-of-the-peace court for the husband's eviction. The husband responded by a quiet-title action asserting his right to homestead occupancy in the county court. The justice court nevertheless ruled in favor of the daughter, and the county court affirmed its judgment. The Texarkana Court of Appeals found sua sponte that both lower courts lacked jurisdiction of the matter.¹⁷⁵ Further, the husband was and had been in possession of the premises since 1976 and his joinder was therefore necessary to a passing of title to his stepdaughter under section 5.001 of the Family Code.¹⁷⁶

IV. DIVISION OF MARITAL PROPERTY ON DIVORCE

A. DIVORCE PROCEEDINGS

1. *Service of Process*

Service of process by publication will not confer jurisdiction on a court to enter a personal judgment against a non resident, but substituted service by publication is proper against a Texas resident. In *In re A.B.*,¹⁷⁷

172. See TEX. R. APP. P. 24.2.

173. *Langston v. GMAC Mortgage Corp.*, 183 S.W.3d at 481 (relying on *Kone v. Harper*, 297 S.W. 294, 297 (Tex. Civ. App.—Waco 1927), *aff'd sub nom.*; *Ward-Harrison Co. v. Kone*, 1 S.W.2d 857 (Tex. Comm. App. 1928, holding approved)).

174. 214 S.W.3d 202 (Tex. App.—Texarkana 2007, no. pet.).

175. *Id.* at 209.

176. *Id.*

177. 207 S.W.3d 434 (Tex. App.—Dallas 2006, no. pet.).

the mother of minor children filed for divorce from their father, a Texas resident. The original service of process was returned unexecuted. The father was served by publication but did not appear. The trial court then ordered him to make child-support payments. The trial court later ordered the payments, including any arrears, to be made to the Attorney General. Pursuant to chapter 231, the Attorney General filed a motion stating a child support arrearage of \$67,059.12 and sought a judgment for that amount. The trial court found it had no personal jurisdiction because service of process in the underlying divorce decree was obtained through citation by publication.¹⁷⁸

The court of appeals disagreed. The father's ad litem attorney in the divorce proceeding had filed both an answer and a general denial on his behalf. No claim was raised that the trial court lacked personal jurisdiction, and there was "no evidence that [the father] was a non-resident . . . at the time of service by publication in the underlying divorce proceeding."¹⁷⁹ The divorce decree revealed no lack of jurisdiction; therefore the decree was not subject to attack in the enforcement proceeding.¹⁸⁰

2. Contempt

In Jones County, in June 2006, the wife in *In re Sloan*¹⁸¹ had filed suit against her alleged husband for divorce, though there was some question as to whether they were married. The trial court entered temporary orders in early July, but the levying officers were unable to serve the respondent who was said by his mother to be working in Iraq until January 2007. The trial court then ordered that substituted service would suffice and could be achieved by leaving a copy of the citation with anyone sixteen years of age or older at the respondent's mother's residence in New Mexico. The citation was served there on the alleged husband's stepfather in September 2006. The trial court held a temporary hearing in early August. The divorce petitioner appeared, but no testimony was taken. The trial court rendered an oral order granting the petitioner's request and a temporary injunction. The trial court awarded the petitioner interim attorneys' fees of \$7,500, court costs, temporary support of \$3,500 a month to begin the following month, \$4,000 retroactive support, and a horse. A written order was issued a little over a week later. Two days before the entry of the order, the respondent had filed a special appearance, a plea in abatement, and a motion to vacate or modify the temporary orders. At a hearing on the respondent's motion in early September, the respondent testified that he lived in Arizona, but during his absence in Iraq he had used his mother's home in New Mexico as his mailing address. His mother had contacted him in Iraq by telephone to say that some papers were there for him. In response to the opposing attorney's

178. *Id.* at 436-37.

179. *Id.* at 439.

180. *Id.*

181. 214 S.W.3d 217 (Tex. App.—Eastland 2007, no pet.).

effort to call the petitioner as a witness, the trial court ruled that whether there had been a valid marriage was not an issue at the hearing on the motion to vacate the temporary orders. The trial court found that service was proper and that the respondent was aware of the proceedings against him prior to that hearing, at which the return of service was finally filed. The judge set a compliance hearing and stated that the temporary orders were still in effect. On September 14, the order denying the respondent's motion to vacate the temporary order was entered, and at a hearing on the following day, the petitioner's attorney stated that the respondent had failed to comply with the temporary orders. The respondent's counsel stated that his client was short of funds but intended to pay the amounts ordered. The trial court then found the respondent in criminal contempt for his failure to pay the ordered amounts, particularly his failure to pay the retroactive spousal support of \$4,000. The respondent was then committed to jail.

The respondent sought a writ of habeas corpus from the Eastland Court of Appeals. The court of appeals granted the prisoner's petition. The trial court in Jones County had lacked personal jurisdiction and lacked evidence of personal service. Though the prisoner received his mail at his mother's address in New Mexico, he had returned after receiving a telephone message from his mother that papers of unexplained character had been left for him at her address. On his return from Iraq he had lived in Arizona. The court of appeals concluded that the substituted service was insufficiently evidenced,¹⁸² that the affidavit of service was markedly inadequate,¹⁸³ and that personal jurisdiction had not been achieved by appropriate service of process before the temporary orders were entered.¹⁸⁴ Though the respondent had initially vacillated somewhat in his testimony concerning his intention to obey the court's order to pay the sums ordered, the court of appeals commented "that [the respondent was] being held in direct contempt [as opposed to constructive contempt] for not [obeying] the temporary orders entered by the trial court, not for things [he] did or said during the hearing."¹⁸⁵ The court added that

we need not discuss [his] being deprived of his liberty without due process of law arising from a lack of proper notice as well as for other reasons. Nor is it necessary to consider [his] retroactive contempt claims in which he says that [the judge] held him in contempt and ordered him confined for failure to take certain actions by a date that had already passed prior to the time that the trial court ordered that he take those actions. . . .¹⁸⁶

182. *Id.* at 222.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 223-24.

The court of appeals concluded that “[t]he [prisoner] cannot be held in contempt for violating a void order.”¹⁸⁷

3. *Forum non conveniens*

Under the equitable doctrine of *forum non conveniens*, a court can decline to impose an inconvenient jurisdiction on a litigant if the court balances several private and public factors and ultimately determines that for the convenience of the parties and witnesses, and in the interest of justice, the action should be pursued in another forum. In *Lee v. Na*,¹⁸⁸ the husband and wife were Korean nationals married in Korea, and the husband was an admitted resident of the United States. The wife filed suit for divorce in Dallas County, and soon afterward the husband filed a petition in family court in Korea, requesting nullification of the marriage, or in the alternative, divorce. The husband filed a plea in abatement, requesting that the case be abated until the conclusion of the Korean suit. No evidence was admitted at the hearing on the plea in abatement, but the trial court took judicial notice of the Korean petition. The trial court dismissed the case for want of jurisdiction and stated that the case “needed to be resolved in Korea.”¹⁸⁹ At the wife’s request, the trial court entered findings of fact and conclusions of law that the court had dismissed the case on principles of *forum non conveniens*.¹⁹⁰

The court of appeals reversed and remanded the proceeding because “[t]here must be some evidence in the record that allows the trial court to balance the *forum non conveniens* factors and determine whether they weigh strongly in favor of trying the case in another forum.”¹⁹¹ Because there was no such evidence introduced at the hearing, the “[u]nsubstantiated, conclusory allegations in [the] motion”¹⁹² were insufficient, and the trial court abused its discretion in dismissing the case based on *forum non conveniens*.¹⁹³

4. *Functions of Associate Judges*

In *Chacon v. Chacon*,¹⁹⁴ the El Paso Court of Appeals addressed the relationship between associate judges and their referring courts deciding a divorce case. The associate judge had granted the divorce “on the grounds of fault, as pled in the amended petition,” and made recommendations regarding the division of the marital estate, including an award of reimbursement to the husband’s claim for his down payment on a home.¹⁹⁵ The divorce decree entered by the trial court dissolved the mar-

187. *Id.* at 224.

188. 198 S.W.3d 492 (Tex. App.—Dallas 2006, no pet.).

189. *Id.* at 494.

190. *Id.*

191. *Id.* at 495.

192. *Id.*

193. *Id.*

194. 222 S.W.3d 909 (Tex. App.—El Paso 2007, no pet.).

195. *Id.* at 911.

riage on the grounds of cruelty, but, in its division of other property and liability, the trial court did not mention the husband's reimbursement claim. The husband appealed to challenge the trial court's property division and asserted that, under section 201.015(b) of the Texas Family Code, the trial court lacked jurisdiction to consider the grounds for divorce and the character of the down payment.¹⁹⁶ Essentially the husband's argument was that section 201.015(b) is a limit on the referring court's jurisdiction in favor of that of the associate judge.

In affirming the trial court's decision the El Paso Court of Appeals concluded that the trial court had jurisdiction to consider fault in the divorce.¹⁹⁷ The court of appeals also found that section 201.015(b) is intended to limit the appealing party's ability to raise issues he has not specifically raised in a de novo hearing but not to limit the referring court's jurisdiction.¹⁹⁸ Further, in a de novo hearing on the issue of property division, the referring court would have properly begun by determining the character of each asset, including the money the husband paid as the down payment. The court of appeals also found that the division of the community estate was not manifestly unjust or unfair, and even if the trial court's division was based on the finding of cruelty, it would not constitute error because in this context the trial court could have considered fault in making the division of community property.¹⁹⁹

5. Jury Trial

A party is required to act affirmatively in order to preserve his right to appeal a denial of his right to a jury trial. In *Vardilos v. Vardilos*,²⁰⁰ the husband appealed the trial court's denial of his request for a jury trial. The Dallas Court of Appeals held that the husband had waived any right to complain on appeal and that the trial court had denied his request because the husband neither "objected to the case[s] going forward without a jury or indicated in any way to the trial judge [that] he intended to stand on his perfected right to a jury trial."²⁰¹

6. Violence

Cases involving post-divorce violence are relatively rare, but the Eastland Court of Appeals recently addressed the trial court's power to modify a protective order in *In re S.S.*²⁰² Nearly five months after the divorce, the ex-wife was granted a protective order against the ex-husband's acts of family violence. The ex-husband appealed, and the court of appeals affirmed the award of the protective order. The wife then filed a motion to modify the protective order by requesting that the husband be ordered

196. *Id.* at 912.

197. *Id.* at 913.

198. *Id.*

199. *Id.*

200. 219 S.W.3d 920 (Tex. App.—Dallas 2007, no pet.).

201. *Id.* at 923.

202. 217 S.W.3d 685 (Tex. App.—Eastland 2007, no pet.).

to pay the attorneys' fees resulting from his unsuccessful appeal. The trial court granted her request. The husband appealed this order, alleging among other things that the trial court could not modify the protective order without a showing of changed circumstances, and that res judicata prevents the trial court from modifying the protective order.

The husband lost on all points. The court of appeals held that the trial court can modify a protective order to include attorneys' fees without a showing of changed circumstances under sections 81.005(a) and 87.001: "[d]uring the effective period of a protective order, the trial court retains the power and jurisdiction to modify the order by either deleting or adding items to the order."²⁰³

7. Termination of the Court's Plenary Powers

When a final decree of divorce is signed, the trial court retains jurisdiction over the case until the thirtieth day from judgment. The parties to a divorce can extend this period for forty-five days by timely filing a motion for new trial or to correct, modify, or reform the judgment. In *Malone v. Hampton*²⁰⁴ neither party filed such a motion. The former attorney of the wife, however, filed a motion for new trial as an intervenor. But to have successfully intervened and extended the court's plenary power, the lawyer should have filed his petition in intervention prior to the entry of the divorce decree, and he had not done so. Meanwhile the husband had filed a request for sanctions against the attorney, alleging that the attorney's motion was frivolous and brought for purposes of harassment. The court agreed and ordered sanctions against the attorney, but not until weeks after its plenary jurisdiction expired. The court's sanction order was therefore void.²⁰⁵

B. DIVISION OF PROPERTY

1. Property Settlement Agreements

In *Ricks v. Ricks*,²⁰⁶ both spouses were represented by counsel in negotiating their property settlement agreement. The principal point at issue was the value of shares in a medical clinic. The ex-wife sought a new trial on the ground of misrepresentation of the value of the shares and alleged newly discovered evidence on the income of the clinic. The wife further complained that reference to mediation had not been carried out in accordance with section 6.602(a), in that the parties had not agreed to the mediation in writing and the court had taken no action in making the reference. But the wife had failed to preserve these issues for appeal by making a timely complaint to the trial court. As for the husband's alleged breach of fiduciary duty in the course of valuing the assets, the court of

203. *Id.* at 686-87.

204. 182 S.W.3d 465 (Tex. App.—Dallas 2006, no pet.).

205. *Id.* at 470.

206. 169 S.W.3d 523 (Tex. App.—Dallas 2005, no pet.).

appeals observed that “[t]he fiduciary duty arising from the marital relationship ceases in a contested divorce when the husband and wife each hire independent attorneys to represent them.”²⁰⁷ As to her new evidence complaint, the ex-wife failed to explain that the facts she referred to were indeed newly discovered. Her motion for a new trial was denied.²⁰⁸

2. *Making the Division*

If a court has sufficient information to exercise its good judgment in making a division, its second concern is to make that division just and fair, or at least not manifestly unfair. When there is no clear reason for making a significantly uneven division, it is often difficult for a court to make the division of a modest community estate. In *In re Loggins*,²⁰⁹ the marriage had lasted only two months. The community property consisted of personal effects, a computer, a bank account of \$4,700, and outdoor furniture. The wife testified that she had been made seriously ill by a drink containing cocaine and valium allegedly prepared for her by her husband, and as a result she had been hospitalized and subjected to medical expenses of over \$4,000. The husband had been indicted for aggravated assault for which he apparently had not been tried. The trial court awarded the wife the community furniture, the computer, and the \$4,700 on deposit in a bank account from which she was ordered to pay the husband \$2,000. Though the husband invoked the privilege of the fifth amendment to the United States Constitution when asked questions concerning the incident, the court of appeals observed that “the finder of fact in a civil action may draw whatever inference is reasonable.”²¹⁰ The court of appeals concluded that there was “factually sufficient evidence to prove the assault.”²¹¹

In two cases, appealing husbands complained of very substantial disparities in community divisions. In *In re Brown*,²¹² the entire community estate was awarded to the wife, and, in *Ohendalski v. Ohendalski*,²¹³ the wife received eighty-one percent of the community estate. In both cases, fault was a significant factor in the court’s division. In *Brown*, there was fault in causing the marital breakdown and use of significant community funds to pay for the husband’s criminal defense for the molestation of minors,²¹⁴ in addition to the husband’s lack of need for support (because of his confinement in prison) as compared to the wife’s needy situation, contributed to in no small measure by the husband’s prior conduct. The

207. *Id.* at 526.

208. *Id.* at 528-29.

209. No. 06-05-00130-CV, 2006 WL 2051740 (Tex. App.—Texarkana July 25, 2006, no pet.).

210. *Id.* at *2.

211. *Id.*

212. 187 S.W.3d 143 (Tex. App.—Waco 2006, no pet.).

213. 203 S.W.3d 910 (Tex. App.—Beaumont 2006, no pet.).

214. *See Brown v. Texas*, 54 S.W.3d 930 (Tex. App.—Corpus Christi 2001, pet. denied).

court of appeals concluded that the no-fault ground of insupportability on which the divorce was based was amply illustrated by the acts of the husband, but the trial court was criticized for not making itself better informed on the extent of the community assets.

In *Ohendalski*, the wife supported the trial court's division by asserting sufficiency of evidence to support allegations of fault: the husband's extra-marital sexual activity, bountiful use of alcohol, and abusive treatment of his wife, including an occasion when he kicked her. The Beaumont Court of Appeals reviewed all of these grounds. The wife's allegation of unsupportability was amply supported, and, in affirming the division of property, the court of appeals relied on its decision in *Golias v. Golias*²¹⁵ (where there was an award of seventy-nine percent of the community estate to the wife) and a long catalog of other instances of disproportionate division.²¹⁶ In making the unequal division, the court of appeals also mentioned "the benefits that [the wife] would have derived from the continuation of the marriage" and "enhancement of the community estate because of the expenditure of [her] separate assets,"²¹⁷ not to mention the husband's waste of community funds on his extra-marital affair.²¹⁸

In *Barry v. Barry*,²¹⁹ the husband failed to file a timely response to the wife's petition for divorce, and a default judgment was entered, granting the wife an interest in a limited partnership in which the husband held a community interest. The husband filed a notice of restricted appeal. The Houston Court of Appeals for the First District noted that the husband's late filing of his answer did not amount to a post-judgment motion and that the husband had therefore satisfied the requirements of a restricted appeal which he filed within the six month rule of procedure.²²⁰ The wife asserted the opposite contention. The husband responded that his post-judgment answer was the equivalent of a post-judgment motion. Looking to the "substance" of the matter and not on "the form of its title or caption," the court of appeals concluded that the post-judgment filing of an answer does not change its nature into a post-judgment motion.²²¹ The court of appeals reversed the judgment of the trial court and remanded the case for a redivision of property.²²²

The husband's complaints about the disproportionate division of the community property in *M^cSweeney v. M^cSweeney*²²³ included an assertion

215. 861 S.W.2d 401 (Tex. App.—Beaumont 1993, no writ).

216. *Okendalksi*, 203 S.W.3d at 914-15. In all but one of the cases cited, the court approved a division of at least eighty percent of the community estate to one spouse. *Id.* at 915.

217. *Id.* at 915.

218. *Id.*

219. 193 S.W.3d 72 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

220. TEX. R. APP. P. 30.

221. *Barry*, 193 S.W.3d at 74.

222. *Id.* at 75.

223. No. 04-06-00461-CV, 2007 WL 247677 (Tex. App.—San Antonio Jan. 31, 2007, no pet.). For other instances of disproportionate division of community property, see *Hailey v. Hailey*, 176 S.W.3d 374 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Combe-Ovadia v. Combe-Ovadia*, No. 14-04-01025-CV, 2006 WL 2164726 (Tex. App.—Houston [14th

that the wife had kept or sold his personal effects, which he was generally unable to identify, and that his disability-retirement pay from the United States Postal Service was his separate property. As to the first, he was unable to establish separate ownership as to amount, and, as to the second, his characterization was simply mistaken²²⁴ as a matter of law. The husband's principal ground for appeal pertained to division of the community estate. He argued that the award was disproportionate because his wife was awarded fifty percent of the entire community interest in his retirement benefits rather than half that amount. The San Antonio Court of Appeals presumed that the trial court had made a proper division and went on to justify the unequal division of the community estate by pointing out the significant disparity in wage-earning ability of the spouses and the fact that the divorce would cause the wife to lose a share of the federal benefits the husband was receiving.²²⁵

As for the tortious damages for assault, the court in *In re Loggins*,²²⁶ cited *Twyman v. Twyman*²²⁷ as authority for the proposition that a tort claim may be joined in a divorce proceeding without noting that such an approach was only supported by a plurality, and not a majority, of the Texas Supreme Court as carefully pointed out in *Schlueter v. Schlueter*.²²⁸ Though the court in *Twyman* held that an interspousal action for intentional infliction of emotional distress may be maintained,²²⁹ the court in *Loggins* found that the evidence of pain and mental anguish while the wife was conscious was "extremely meager."²³⁰ The court nonetheless inferred that the wife had "endured some pain as a consequence" of the husband's acts.²³¹ The court then went on to suggest a prompt remittitur of \$10,000 from the \$25,000 judgment subject to the \$2,000 offset already directed. Otherwise, the case would be reversed and remanded.²³²

It is striking how many marital disputes involving lottery winnings have been encountered in recent years.²³³ The most recent of these is *In re Joyner*.²³⁴ In this instance it seems that the dispute may have been a product, rather than a cause, of marital breakdown—the consequence of a lottery ticket bought in a spirit of celebration of the divorce. The par-

Dist.] Aug. 3, 2006, no pet.) (the husband was ordered to pay debts in excess of the community property).

224. *McSweeney*, 2007 WL 247677, at *1.

225. *Id.* at *2-3.

226. No. 06-05-00130-CV, 2006 WL 2051740, at *3 (Tex. App.—Texarkana July 25, 2006, no pet.).

227. 855 S.W.2d 619, 624-26 (Tex. 1993).

228. 975 S.W.2d 584, 587 (Tex. 1998).

229. *Id.* at 625-26.

230. 2006 WL 2051740, at *3.

231. *Id.*

232. *Id.*

233. The earliest Texas reported case dealing with lottery winnings is *Dixon v. Sander-son*, 72 Tex. 359, 10 S.W. 535 (1888). For a discussion of other recent appellate disputes prompted by lottery winnings, see *Stanley v. Riney*, 970 S.W.2d 636 (Tex. App.—Tyler 1999, no pet.), and *Mayes v. Stewart*, 11 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). But all such cases have not been appealed.

234. 196 S.W.3d 883 (Tex. App.—Texarkana 2006, pet. denied).

ties had mediated and signed a settlement of issues in dispute, and the court orally rendered a divorce. At the hearing, both parties had asked the court to accept the settlement agreement. The following day the ex-husband bought his winning lottery ticket. The question before the Texarkana Court of Appeals was whether the divorce was granted before the purchase of the lottery ticket on July 2, 2003, or on June 24, 2004, when the divorce decree was finally signed. The answer is simple: on July 2, 2003. Therefore the lottery winnings could not have been community property. Because the property division had to occur along with the severance of the bonds of marriage, the appealing wife argued that the later date of rendition of the divorce was controlling and that the court was required to indicate a division of each item of property in dispute rather than merely relying on the settlement in general terms. Although the wife put great weight on the implication of a future act in the divorce judge's comment "I am going to grant the divorce," the judge had also made reference to "your former wife" in speaking to the husband. The court of appeals interpreted the court's language as amounting to a rendition of divorce: "[t]he disputed property was undeniably settled in this hearing and therefore [consideration of it was] not severed from the divorce."²³⁵

In a suit for divorce, when values of property are in disagreement as a result of contradicting and competing testimony, a trial court does not abuse its discretion in dividing the marital estate by basing its decision on that conflicting evidence. In *Trial v. Trial*²³⁶ the parties disputed the value of a house that the trial court had awarded to the wife. The husband testified that the house was undervalued, but he did not present any evidence to support that assertion. The court of appeals found no abuse of the trial court's discretion under section 7.001 of the Texas Family Code.²³⁷

The San Antonio Court of Appeals also found no merit in the husband's claim, that in making its division of property, the trial court should have taken into consideration legal expenses that he incurred in defense of a criminal matter.²³⁸ Generally the trial court may consider legal expenses in ordering the division of the community estate. Although the husband claimed that the wife maliciously contacted police about explosives that he had stored in the house, the wife testified that she merely sought help from the authorities in disposing of the explosives. The court of appeals concluded that the husband did not establish any malicious intent on the wife's part.²³⁹ Moreover, the trial court gave the husband an opportunity to put on proof that he had incurred legal fees with regard

235. *Id.* at 887-88. For a discussion of similar disputes, see Joseph W. McKnight, *Family Law: Husband and Wife*, 43 S.W. L.J. 3-4 (1989).

236. No. 04-05-00418-CV, 2006 WL 1993772 (Tex. App.—San Antonio July 19, 2006, no pet.).

237. *Id.* at *1.

238. *Id.* at *2.

239. *Id.*

to the criminal investigation, but the husband failed to present evidence of the amount of his legal expenses.²⁴⁰

The San Antonio Court of Appeals held in *Lifshutz v. Lifshutz*²⁴¹ that the husband had usurped corporate and partnership opportunities and thereby breached his fiduciary duty toward them. Those business entities were therefore awarded damages against the husband. In this instance the court of appeals held that an alter-ego finding on remand was precluded by the law of the case and the scope of the remand.²⁴²

For making investments, the husband and his son in *Gibson v. Gibson*²⁴³ had formed a limited partnership to which the husband-father had contributed one-half of the capital from his community estate, and the son had supplied the other half. The assets of this limited partnership consisted mainly of real property along with a much smaller amount of cash and securities. On divorce, the court awarded the wife some specific partnership property from the husband's interest in the partnership. The husband's appeal addressed the disposition of the items of partnership property.²⁴⁴ Because a partner does not have an interest in specific partnership property, that award was reversed, and the case was remanded for a new division.²⁴⁵ Such property is not a community asset, but property of the limited partnership entity.

C. EX-SPOUSAL MAINTENANCE

In *Hipolito v. Hipolito*,²⁴⁶ the divorce court had awarded ex-spousal maintenance to the wife.²⁴⁷ For a spouse to be eligible for ex-spousal maintenance, the marriage must have lasted for at least ten years. The couple in *Hipolito* had been married for the requisite ten years by the date of the trial, but not when the petition was filed. The principal point was determining how to measure the statutory requirement that the marriage had extended for ten years or more, since the statute does not provide how that period is measured. The court laid out several of the rules of statutory construction to determine "legislative intent," including the plain-meaning rule, which the court seems to have regarded as applicable. The court specifically mentioned the practice of looking at the statute as a whole rather than in its constituent parts.

The court of appeals presumed that "every word in a statute is used for a purpose and must be given effect if reasonable and possible. Likewise, every word excluded from a statute must be presumed to have been ex-

240. *Id.* at *3.

241. 199 S.W. 3d 9 (Tex. App.—San Antonio 2006, pet. denied).

242. *Id.* at 21.

243. 190 S.W.3d 821 (Tex. App.—Fort Worth 2006, no pet.). For another assertion of alter ego of a spouse in relation to a propertied entity, see *Boyo v. Boyo*, 196 S.W.3d 409 (Tex. App.—Beaumont 2006, no pet.).

244. TEX. REV. LIMITED PARTNERSHIP ACT, TEX. REV. CIV. STAT. art. 6132 a-1 § 7.01 (Vernon Supp. 2007).

245. *Gibson*, 190 S.W.3d at 822-23.

246. 200 S.W.3d 805 (Tex. App.—Dallas 2006, pet. denied).

247. TEX. FAM. CODE ANN. 8.051(2) (Vernon 2007).

cluded for a purpose.”²⁴⁸ The maxim is *includio unio est exclusio*.²⁴⁹ In the court’s review, the statute means that “the marriage [must] be in existence for ten years or longer before a spouse can be eligible for maintenance.”²⁵⁰

The court of appeals pointed out that the legislature specifically provides in section 8.051(1)(A) that the significance of putting the burden on a spouse in a particular instance is called for if that spouse has a criminal record involving violence “within two years before the date of filing [the petition for] the divorce.”²⁵¹ The court of appeals concluded that the legislature could have included such a provision in section 8.051(2) “if it had chosen to do so,” as a justification for including the provision for purposes of interpretation. But if the legislature did not do so; the ordinary rule of construction is that the legislature did not do so intentionally. The court of appeals then seemingly concluded that a court may measure the ten years by any method.²⁵² It is up to the legislature to define the time.²⁵³ If the couple is married for eight years and then divorces and later marries for three years prior to filing for divorce a second time, would the total meet the requirement of the statute? What is said in section 8.051(1)(A) about an instance of violence does not help in solving the question. The Code Construction Act went unmentioned.

Misunderstandings among most of the participants in the trial of a 2005 Bexar County divorce case were before the Supreme Court of Texas in late 2006. In *Chisolm v. Chisolm*,²⁵⁴ the husband’s counsel read into the trial record, without objection, what was understood as the parties’ agreement as to matters in dispute between them. Assisted by an interpreter, the wife, whose command of English was apparently very halting, indicated that there was an agreement as to custody of their children but that she did not understand the handling of the division of property, with the implication that she had inadvertently consented to the division as provided. The trial court rendered a judgment containing most, but not all, of the terms of the asserted agreement, including some additional, but undiscussed, terms as to tax liability. The wife appealed.

The San Antonio Court of Appeals affirmed the judgment of the trial court: “[D]espite Ms. Chisholm’s statement indicating a lack of understanding during the proceedings, she participated with her attorney in reaching the agreement and understood it sufficiently for the court to enter a judgment.”²⁵⁵

248. *Hipolito*, 200 S.W.3d at 806.

249. *Id.*

250. *Id.* at 801.

251. *Id.* at 807.

252. *Id.*

253. *Id.* at 806-07.

254. 209 S.W.3d 96 (Tex. 2006).

255. *Id.* at 98 (quoting *Chisholm v. Chisholm*, 214 S.W.3d 463, 465 (Tex. App.—San Antonio 2005), *rev’d*, 209 S.W.3d 96 (Tex. 2006)).

In a per curiam opinion, the Texas Supreme Court reversed the holding of the court below: “[w]hen [what purports to be] a consent judgment is rendered without consent or is not in strict compliance with the terms of the agreement, the judgment must be set aside.”²⁵⁶ The supreme court then quoted a portion of the husband’s brief in defense of the agreement: “While certainly not a work of art, the court’s proceedings were very typical of the family law cases in Bexar County, Texas where there is a hodgepodge of agreements recited into the record and various orders entered by the court to resolve disputes between the parties.”²⁵⁷

In granting the wife’s “petition for review” without hearing oral argument, the Texas Supreme Court observed that, “[w]hether the characterization of practice is accurate, there was no basis in this case for the trial court to make the findings necessary to divide the marital estate and render final judgment.”²⁵⁸

In *M^cCollough v. M^cCollough*,²⁵⁹ a couple entered into an agreement incident to divorce committing the husband to pay his wife \$5,000 a month “as alimony.” The agreement was incorporated by reference in the divorce decree. The ex-husband sought to modify the agreement. In affirming the trial court’s judgment denying his petition, the Austin Court of Appeals held that the husband’s reliance on the ex-spousal maintenance provisions of the Family Code²⁶⁰ was misplaced: “[S]uch alimony agreements . . . even when incorporated into divorce decrees, are enforceable as contracts.”²⁶¹ The agreement specifically provided that “this agreement is enforceable as a contract,”²⁶² and no reference was made to “maintenance” or to Chapter 8 of the Family Code.²⁶³ Nor did the parties indicate any contemplation of modification under Chapter 8;²⁶⁴ they had entered into an agreement under section 7.006.²⁶⁵ “The fact that a court expressly approves such an agreement and incorporates it into the final decree does not transform contractual alimony into court ordered maintenance payments subject to the termination and modifications provisions of Chapter 8 of the Family Code.”²⁶⁶

D. POST-DIVORCE CONCERNS

1. *Voluntary Acceptance of Benefits*

A party’s voluntary acceptance of benefits of a judgment precludes that

256. *Id.* (citing *Burnaman v. Heaton*, 240 S.W.2d 288, 291-92 (1951)).

257. *Id.*

258. *Id.* at 98.

259. 212 S.W.3d 638 (Tex. App.—Austin 2006, no pet.).

260. *Id.* at 641 (citing TEX. FAM. CODE ANN. §§ 8.056, 8.057, 8.059).

261. *Id.* at 642.

262. *Id.*

263. *Id.* at 646.

264. *Id.* at 647.

265. *Id.* at 648.

266. *Id.* (citing *M^cGoodwin v. M^cGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984)); *Woolam v. Tussing*, 54 S.W.3d 442, 449 (Tex. App.—Corpus Christi 2001, no pet.); *Cardwell v. Sicola-Cardwell*, 978 S.W.2d 722, 724 (Tex. App.—Austin 1998, pet. denied).

party's appeal. In *Raymond v. Raymond*,²⁶⁷ prior to the trial of the wife's petition for divorce, she had filed a motion to compel safe-keeping of her financial interests after her husband had taken out a loan against his retirement fund in order to invest in securities. The husband then sold the stocks but suffered a loss of \$6,500. The divorce court awarded the wife \$6,500 which the husband then paid.²⁶⁸ This was the receipt of benefits to which the husband referred when he asserted that acceptance of a benefit precluded the wife's appeal under the acceptance-of-benefits doctrine. But prior to her appeal the ex-wife had posted a supersedeas bond. The Houston Court of Appeals for the First District concluded that no benefit of the divorce judgment had been received by the wife because the judgment had been suspended.²⁶⁹

2. *Qualified Domestic Relations Order*

A qualified domestics relations order ("QDRO") may be a species of a post-divorce enforcement or a clarification order, and under section 9.007(a) a QDRO cannot amend, modify, or otherwise alter the division of property made or approved in the divorce decree. In *Gainous v. Gainous*,²⁷⁰ the divorce court awarded the wife one half of the Houston Firemen's Relief and Retirement Benefits standing in the husband's name. To carry out the decree, the QDRO stated that the wife was awarded half of the payments based on accrued benefits as of the date of divorce and specifically excluded any interest credited to a Deferred Retirement Option Plan ("DROP"). When the husband became eligible to retire, he instead elected to participate in the DROP rather than retiring. Five years later, when he did finally retire, the wife filed a motion seeking a clarifying order and to receive, not only her portion of the service-pension benefits that the husband would receive, but also a portion of four additional benefits, including a portion of the DROP funds. The trial court denied the wife's motion.

In reversing and remanding, the Houston Court of Appeals for the First District found that "[n]othing in the plain language of the divorce decree" excluded the wife's participation in benefits such as DROP funds.²⁷¹ Further, the court of appeals found that the language in the decree was broad enough to award the wife half of all of the husband's benefits in the funds.²⁷² Because the QDRO precluded the wife from receiving any portion of the husband's DROP funds at any time, the QDRO impermissibly altered the decree's property division and was void to the extent that it did so. The wife could, therefore, challenge the QDRO by a collateral attack.²⁷³

267. 190 S.W.3d 77 (Tex. App.—Houston [1st Dist.] 2005, no. pet.).

268. *Id.* at 79-80.

269. *Id.* at 80.

270. 219 S.W.3d 97 (Tex. App.—Houston [1st Dist.] 2006, pet. filed).

271. *Id.* at 108.

272. *Id.* at 109.

273. *Id.* at 111.

3. Collateral Attack for Fraud

*Henderson v. Chambers*²⁷⁴ was a post-divorce dispute concerning characterization of marital property. The couple married in 1987. In 1993, the husband and his father formed a partnership to develop certain realty. In 1995, the father and son, with the advice of their lawyers, amended their partnership agreement, back-dating it to 1993 when the partnership was created. The amended agreement recited that the husband's partnership interest was the husband's separate property, and the husband's parents made a gift in writing of \$13,000 to the husband that was presumably meant to support the husband's asserted separate interest. When the husband and wife were divorced in 1998, the character of the husband's interest in the partnership was contested along with the wife's allegations that the husband's lawyers had assisted him in perpetrating a fraud. Prior to the trial for divorce, the couple's disputes were settled by a written agreement between the husband and wife providing that whatever interest both had in the partnership belonged solely to the husband. The agreement was incorporated in the divorce decree.

Alleging that they had defrauded her of her community interest in the partnership, the ex-wife brought suit in 2001 against the ex-husband, his father, and their attorneys. The defendants responded with a motion for summary judgment, which was granted by the trial court and approved on appeal.²⁷⁵ The court of appeals also concluded that the ex-wife had made an impermissible collateral attack on the judgment of divorce.²⁷⁶ Though the husband and his parents did not have the power to affect the husband's initial community partnership interest (if it was a community interest), that issue was before the divorce court, and the wife had there acceded to the husband's separate interest.²⁷⁷ In response to the ex-wife's argument that the parties to the later case were different from those in the suit for divorce to which the attorneys were not parties, the court of appeals held that the question of whether allegations are intrinsic or extrinsic is a question of whether the attorneys' conduct was thus known or could have been known, or was at issue in the prior lawsuit.²⁷⁸ The court of appeals merely stated that in her petition for divorce the wife had "specifically asserted in writing that the fraud was accomplished with the assistance of the ex-husband's lawyers,"²⁷⁹ and the dispute as to the lawyers' acts were therefore intrinsic to the divorce case and a bar to her collateral attack.²⁸⁰

274. 208 S.W.3d 546 (Tex. App.—Austin 2006, no pet.).

275. *Id.* at 554.

276. *Id.* at 548.

277. *Id.* at 550-54 (in reliance on *Browning v. Prostok*, 165 S.W.3d 336 (Tex. 2005); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993); *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627 (Tex. 1992); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984)).

278. *Id.* at 553.

279. *Id.*

280. For a bill of review that also lacked grounds, see *Boaz v. Boaz*, 221 S.W.3d 126 (Tex. App.—Houston [1st Dist.] 2006, no pet.)

4. *Undivided Property*

In *In re Malacara*,²⁸¹ almost ninety percent of the value of the husband's retirement benefits were community property that were left unprovided for in the couple's property settlement agreement and thus their divorce decree as well. But the ex-wife was unaware of the oversight until seventeen years after their divorce. In the ex-wife's post-divorce suit for her share of the benefits, the trial court made an equal division and awarded the ex-wife a monetary judgment for her share of those retirement benefits already disbursed.²⁸² The husband appealed, and the Amarillo Court of Appeals affirmed the holding of the trial court.²⁸³

The settlement agreement and the divorce decree had awarded the husband "all personal property in [his] possession" but had further provided that "all community property not listed . . . shall be owned by [both spouses] as equal co-tenants."²⁸⁴ In his appeal, the ex-husband argued unconvincingly that the accumulated retirement benefits were a part of the "personal property in possession" awarded to him in the property-settlement agreement. In rejecting that argument, the court pointed out that the reference did not include intangible personal property, which was not subject to immediate possession or disposition.²⁸⁵

5. *Sanctions*

In *Broesche v. Jacobson*,²⁸⁶ in response to the ex-husband's motion for sanctions, the trial court found that the ex-wife had abused the discovery process in relation to scheduling and rescheduling her deposition, in filing frivolous motions and pleadings, and otherwise causing delay and disruption of the proceedings.²⁸⁷ The court of appeals particularly noted the fact that the ex-wife had refiled the same claims that had been disposed of in prior litigation and thus affirmed the trial court's conclusion.²⁸⁸ The court of appeals also affirmed the trial court's award of attorneys' fees to the employer, not limiting them to the time spent for preparing and filing the interpleader and covering time in dealing with matters inextricably intertwined with the interpleader.²⁸⁹ The court of appeals stressed the trial court's "great latitude in dealing with . . . properly interpleaded

281. 223 S.W.3d 600 (Tex. App.—Amarillo 2007, no pet.).

282. As co-tenants of the fund that disposition seems consistent with section 9.009 and 9.010(b) of the Family Code.

283. 223 S.W.3d at 604.

284. *Id.* at 602-03.

285. *Id.* at 602.

286. 218 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). The ex-wife brought suit three years after a divorce of the parties for interpretation of the terms of the decree concerning the division of mineral interests, and the geologist ex-husband's employer filed an interpleader in the suit. The court of appeals held that the terms of the divorce were ambiguous and remanded that part of the case for further consideration. *Id.* at 279.

287. *See id.* at 275.

288. *Id.*

289. *Id.* at 277-78.

funds to enforce a judgment within its jurisdiction.”²⁹⁰

6. Contempt

The complex interplay between private spousal contracts, alimony obligations, and enforcement debts by contempt was before the Texas Supreme Court in *In re Green*.²⁹¹ The former husband filed a writ of habeas corpus, alleging that he could not be imprisoned for nonpayment of a contractual alimony obligation that was incorporated in the divorce decree.

Speaking per curiam, the supreme court granted the writ, finding that this situation fell under the Texas constitutional provision prohibiting imprisonment for debt.²⁹² Non-compliance with a private debt obligation, such as one for alimony, arising from a contract between the parties cannot be enforced by imprisonment even if payment of the debt is specified in a court order.²⁹³ A support order is enforceable by contempt only if it was entered on the authority of the Family Code. The supreme court in effect reaffirmed its holding in *Ex parte Hall* that one spouse’s voluntary agreement to support the other beyond requirements of law is a contractual debt and cannot be enforced by contempt.²⁹⁴

The supreme court went on to hold that a contempt order stating that an ex-husband has to remain in jail until he provides proof of current health-insurance coverage for his children was an insufficient basis for criminal contempt.²⁹⁵ In this instance, the contempt order omitted two crucial elements necessary under due process of law to imprison a person for civil constructive contempt: (1) a written judgment of contempt for neglecting to maintain his children’s health insurance as ordered, and (2) a written order of commitment for that failure.²⁹⁶ “It is well established that both a written judgment of contempt and a written order of commitment are required by due process to imprison a person for civil constructive contempt.”²⁹⁷ Finally, the supreme court noted that “[a] contempt order cannot contain uncertainty or susceptibility of more than one construction or meaning.”²⁹⁸ It is difficult, however, to discern whether the supreme court in the per curiam opinion was speaking of civil or of criminal contempt, or perhaps both. At one point the supreme court says that “a private alimony debt . . . is not contempt *punishable* by imprisonment.”²⁹⁹ At another point the supreme court says that “[a] failure to

290. *Id.* at 278 (citing *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372, 383 (Tex. App.—San Antonio 1992, writ denied), *Kenseth v. Dallas County*, 126 S.W.3d 584, 598 (Tex. App.—Dallas 2004, pet. denied)).

291. 221 S.W.3d 645 (Tex. 2007).

292. *Id.* at 647-49.

293. *Id.* at 646.

294. *Id.* at 647 (citing *Ex parte Hall*, 854 S.W.2d 656, 659 (Tex. 1993)).

295. *Id.* at 649.

296. *Id.*

297. *Id.* (quoting *Ex parte Hernandez*, 827 S.W.2d 858 (Tex. 1992) (per curiam)).

298. *Id.*

299. *Id.* at 647 (emphasis added).

provide child support, including a failure to provide health insurance under a voluntary agreement, is *punishable* by contempt” under section 154.124(c) of the Texas Family Code but for the lack of a proper order of commitment.³⁰⁰ Elsewhere the supreme court seems to be referring to civil contempt or “civil constructive contempt.”³⁰¹ The apparent failure of the supreme court to draw a clear distinction between civil and criminal contempt is also apparent in the court’s remark toward the end of its opinion that “the commitment order purports to make such insurance coverage a condition of [the ex-husband’s] release, if not a basis for confinement (a fine distinction) to be sure. . . .”³⁰² A contempt order “cannot contain uncertainty or susceptibility of more than one construction or meaning.”³⁰³ The supreme court therefore granted writ of habeas corpus.³⁰⁴

300. *Id.* at 649 (emphasis added).

301. *Id.*

302. *Id.*

303. *Id.* (citing *Ex parte Glover*, 701 S.W.2d 639, 640 (Tex. 1985)). For another grant of a writ of habeas corpus see *In re Henry*, 154 S.W.3d 594, 595 (Tex. 2005) (ex-husband’s seizure for failure to pay property taxes as ordered by the trial court is within the constitution prohibition of imprisonment for debt.). TEX. CONST. art. 1, § 18.

304. *Id.*