



January 1997

Family Law: Husband and Wife

Joseph W. McKnight

Recommended Citation

Joseph W. McKnight, *Family Law: Husband and Wife*, 50 SMU L. REV. 1189 (1997)
<https://scholar.smu.edu/smulr/vol50/iss4/12>

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FAMILY LAW: HUSBAND AND WIFE

Joseph W. McKnight*

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* B.A., University of Texas; M.A., B.C.L., Oxford University; LL.M., Columbia University. Professor of Law and Larry and Jane Harlan Faculty Fellow, Southern Methodist University.

The author particularly thanks Ann E. Lane, Brenda Barton, and Daniel Deaton for their assistance in preparing this essay for publication.

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I. STATUS

A. CEREMONIAL MARRIAGE

IN 1995 the Legislature enacted Family Code section 1.045 to require an applicant for a marriage license to submit a sworn statement witnessed by two persons that the applicant does not owe delinquent court-ordered child-support.¹ The section goes on to make an intentionally false statement in that regard a jail-felony.² The Legislature also amended section 1.07(a)(1)³ to provide that a county clerk shall not issue a marriage license if either applicant fails to comply with section 1.045. Thus, the failure of either applicant to file such a statement would cause the denial of the license. The District Attorneys of Dallas and Howard Counties asked the Texas Attorney General whether these provisions are constitutional.

Relying on the decision of the United States Supreme Court in *Zablocki v. Redhail*,⁴ dealing with a somewhat similar Wisconsin statute and decisions of courts in Utah⁵ and Indiana⁶ following that decision, the

1. TEX. FAM. CODE ANN. §1.045 (Vernon Supp. 1997).

2. *Id.*

3. *Id.* § 1.07(a)(1).

4. 434 U.S. 374 (1978).

5. *Cooper v. Utah*, 684 F. Supp. 1060, 1069-70 (C.D. Utah 1987).

6. *Miller v. Morris*, 386 N.E.2d 1203, 1204-05 (Ind. 1979).

Texas Attorney General expressed the opinion⁷ that the 1995 amendments violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as infringing the right to marry. The 1995 act should, therefore, be repealed.

The Texas Attorney General also expressed the opinion that a Texas judge may perform a marriage ceremony under Family Code section 1.83(a)(4)(j) during regular office hours and use public resources, including public property and public employees in doing so. The Attorney General also reiterated that the judge may keep a fee charged for performing a marriage ceremony.⁸

B. INFORMAL MARRIAGE

In response to a woman's contention that she is the common-law wife of a decedent, evidence is sometimes offered that the man had asserted, during the alleged marriage, that he was single. Such evidence may be the man's federal income tax return filed as a single person, but that sort of evidence may not be decisive of the issue before the court.⁹ In *Dalworth Trucking Co. v. Bulen*¹⁰ the negative evidence of the decedent's marital status was his insurance benefits card which indicated, presumably in reflection of his application for insurance from his employer, that he was "divorced" and that he designated his mother and son as his insurance beneficiaries.¹¹ In this instance, however, the appellate court made no mention of the date of the insurance application or indeed whether it was put into evidence.¹² There was copious direct evidence that the man had told witnesses that he and his ex-wife had agreed to be married and were again married, after they had been divorced.¹³ The sufficiency of the evidence to support the jury's verdict of an informal marriage was thereby sustained in a contest focused both on the agreement of marriage and the couple's representation to the public that they were married.¹⁴

Asserting an informal marriage, the alleged widow in *Shepherd v. Ledford*¹⁵ brought a wrongful death action against her alleged husband's physicians for medical malpractice. The parties stipulated that the plaintiff was the informal wife of the decedent. The defendants, nevertheless,

7. Op. Tex. Att'y Gen. No. DM-384 (1996). In the course of his opinion the Attorney General noted that there are more effective means of enforcing court-ordered child support: "See e.g., Fam. Code chs. 157 (enforcement of child support orders), 158 (withholding from earnings for child support), 231 (Title IV-D program), 232 (suspension of license for failure to pay child support)."

8. *Id.* (citing *Moore v. Sheppard*, 144 Tex. 537, 192 S.W.2d 559 (1946); Op. Tex. Att'y Gen. No. JM-22 (1983); TEX. LOCAL GOV'T CODE § 154.005 (1988)).

9. See *In re Estate of Giessel*, 734 S.W.2d 27 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Winfield v. Renfro*, 821 S.W.2d 640 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

10. 924 S.W.2d 728 (Tex. App.—Texarkana 1996, no writ).

11. *Id.* at 736.

12. *Id.* at 737.

13. *Id.*

14. *Id.*

15. 926 S.W.2d 405 (Tex. App.—Fort Worth 1996, writ granted).

contested the plaintiff's standing to sue in light of the then-controlling provisions of section 1.91 of the Family Code.¹⁶ The defendants asserted that, under those provisions, by waiting more than one year after the alleged marriage to assert it, the plaintiff was precluded from asserting the marriage. The court rejected this argument on the ground that the two years statute of limitation for bringing an action for wrongful death¹⁷ made any other statutes irrelevant by its own terms. The court also held that the parties' stipulation had precluded any attack on the validity of the marriage.

*Jordan v. Jordan*¹⁸ is a case of only minor significance but with enormously complicated facts. The husband, whose estate was claimed by two women as his widow, was first married in 1957. In 1960 he abandoned his first wife in favor of another woman. The second woman was then married to a man in prison. As far as the findings of fact revealed, she remained married to him until he died in 1995, though the court noted that the prisoner might have divorced her at some time in the interval. The man whose estate was in issue nevertheless apparently thought that he was married to the second woman at some time because he successfully sued her for divorce in July, 1985, though she was evidently incapable of marrying him in the '60s and he could not have married her until his first wife divorced him in June, 1965. At that point an invalid informal marriage might have ripened into a valid marriage under Family Code section 2.22¹⁹ if the man and the second woman were then living together as husband and wife and if the second woman's prior marriage to the prisoner had been terminated. The man whose estate was in issue nevertheless entered into a ceremonial marriage with a third woman in July, 1965. The man ceased living with the third woman in 1970 and began an apparent informal union with a fourth woman in 1979. He was still living with the fourth woman when he died in 1993. The fourth woman claimed the decedent's estate as his widow and the third woman sought to refute that claim. The contest was tried to a jury. Evidently on the basis of his own partial fact-finding, the trial judge directed a verdict for the third woman and the fourth woman appealed.

The appellate court held²⁰ that because of the facts in dispute, the directed verdict was improper. The resolution of the dispute between the third and fourth women as the decedent's widow turned on whether the man had ever been married to the second woman.²¹ If he had been mar-

16. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1985), repealed and replaced in 1995 with TEX. FAM. CODE ANN. § 1.91(b) (Vernon Supp. 1997).

17. TEX. REV. CIV. STAT. ANN. art. 4590(1), § 10.01 (Vernon Supp. 1997). The court also sustained the widow's right to sue on behalf of the decedent's estate under the survival statute, TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (b) (Vernon 1986), in the absence of any descendant or the commencement of any proceeding in the probate court. *Shepherd*, 926 S.W.2d at 414.

18. 938 S.W.2d 177 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).

19. TEX. FAM. CODE ANN. § 2.22 (Vernon 1993).

20. *Jordan*, 938 S.W.2d at 180.

21. *Id.* at 179.

ried to her after he was divorced by his first wife but before his ceremonial marriage to the third woman, the marriage to the third woman could not have been valid because the man had ceased living with her prior to his divorce from his second wife in 1985. Fact issues clearly remained to be determined on remand to the trial court.

One judge concurred in the court's order to remand to the trial court rather than to render judgment in favor of the fourth woman, because the fourth woman's pleadings did not warrant her reliance on the doctrine of *res judicata* and invalidity of the marriage to the second woman.²² The concurring judge concluded that if the third woman had pled *res judicata* and voidness of the second marriage (because the man's 1985 divorce decree stated that he had been married to the second woman and had lived with her until August, 1965), the third woman (as a claimant from the decedent) would have been barred from asserting her claim²³ in that she was claiming from the man who was a party to that proceeding.

C. STATE EMPLOYMENT

In expressing an opinion concerning the law against nepotism in state employment the Texas Attorney General restated²⁴ the general rules that "statutory nepotism prohibitions apply only to officers who have actual statutory authority to hire personnel"²⁵ and that "statutory nepotism prohibitions do not apply if [a] relative of [a] member of [a] governing board is hired for [a] position authorized by that body when [the] governing body does not exercise control over [the] person to be selected."²⁶ Put affirmatively, the nepotism prohibition²⁷ was considered applicable when a school-board considered rehiring a former school-district employee who was related to a school-board member within a prohibited degree and prior to resignation had been continuously employed by the school-district at the time of the school-board member's election.²⁸

In 1995 the Legislature made an addition to the Government Code²⁹ providing that a person is not eligible to serve on the board of trustees of the state's Teacher Retirement System if that person or that person's spouse "receives a substantial amount of . . . funds from the retirement system . . ."³⁰ The Texas Attorney General expressed the opinion that a board member's service since appointment in 1991 is covered by that provision when his wife had since retired and was receiving an annuity from the system.³¹ If such a board member does not resign, he is subject to

22. *See id.* at 180 (Cohen, J., concurring).

23. *Id.* at 180.

24. Tex. Att'y Gen. LO-052 (1996).

25. Citing Op. Tex. Att'y Gen. No. DM-208 (1993).

26. Citing Op. Tex. Att'y Gen. No. H-697 (1975).

27. TEX. GOV'T CODE ANN. § 573.062 (Vernon 1994).

28. Tex. Att'y Gen. LO-015 (1996).

29. TEX. GOV'T CODE ANN. § 825.0032(a)(3) (Vernon Supp. 1997).

30. *Id.*

31. Tex. Att'y Gen. LO-142 (1996).

removal by action of the attorney general or the governor.³²

D. LOSS OF CONSORTIUM

In *Motor Express, Inc. v. Rodriguez*³³ the Supreme Court of Texas noted that although "there may be certain relationships that give rise to a duty which, if breached, would support an emotional distress award even absent proof of physical injury . . . the landowner-invitee relationship is not one."³⁴ Because the claimant husband could not recover mental-anguish damages as a matter of law, his wife's derivative claim for loss of consortium was also barred.³⁵

II. CHARACTERIZATION OF MARITAL PROPERTY

A. PERSONAL QUALITIES

Although most of the very recent decision on the characterization of marital property dealt with definitional matters reflecting the literal language of article XVI, section 15 of the Texas Constitution,³⁶ the Texarkana Court of Appeals relied on decisional law to reiterate the proposition that the financial worth of personal characteristics as exemplified by the goodwill of professional practice constitutes separate property.³⁷ Since the Texas Supreme Court confirmed the holding of the court of appeals in Amarillo in that regard in *Nail v. Nail*³⁸ in 1972, the principle has been generally followed in that context³⁹ and by analogy in relation to the acquisition of professional skills during marriage.⁴⁰ In other instances,⁴¹ however, the holding in *Nail* has been distinguished when the value of professional goodwill of a closely held corporation or large corporate entity was not directly attributable to the spouse-shareholder, who was one of many employees of the business. The acid test for the rule will be the instance when it is asserted that a portion of the sales price of a professional practice or wholly owned professional corporation,

32. *Id.* See generally TEX. GOV'T CODE ANN. ch. 665 (Vernon 1994) (procedures for removal from office).

33. 925 S.W.2d 638 (Tex. 1996) (per curiam).

34. *Id.* at 639 (citing *Boyles v. Kerr*, 855 S.W.2d 593, 600 (Tex. 1993)).

35. *Id.* at 640. In *Uniroyal Goodrich Tire Co. v. Martinez*, 928 S.W.2d 64 (Tex. App.—San Antonio 1995, writ granted), the court rejected a challenge of a \$500,000 award for a wife's loss of consortium for a husband's serious head injury that produced radical emotional changes in the husband.

36. TEX. CONST. art. XVI, § 15.

37. *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 851 (Tex. App.—Texarkana 1996, writ requested).

38. 486 S.W.2d 761 (Tex. 1972).

39. *Guzman v. Guzman*, 827 S.W.2d 445 (Tex. App.—Corpus Christi 1992, writ denied); *Finn v. Finn*, 658 S.W.2d 735, 742 (Tex. App.—Dallas 1983, writ ref'd n.r.e.). See also Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 46 SMU L. REV. 1475, 1484-86 (1993).

40. *Frausto v. Frausto*, 611 S.W.2d 656 (Tex. Civ. App.—San Antonio 1980, writ dismissed).

41. *Geesbreght v. Geesbreght*, 570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, writ dismissed).

developed and sold during marriage, is for professional goodwill and is therefore separate property.⁴²

B. INCEPTION OF TITLE

By constitutional definition,⁴³ reflecting the rule of Spanish law⁴⁴ applicable to the province of Texas and the Mexican state of Coahuila y Texas prior to the American migration and since expounded by Texas courts, property acquired prior to marriage is a spouse's separate property, even if the property is intended to be the family home, little or none of the purchase price is paid prior to marriage, and a part of the purchase price is discharged during marriage.⁴⁵

In *Leighton v. Leighton*⁴⁶ the husband had acquired a ranch prior to marriage; therefore, it was his separate property. During marriage the realty was substantially improved by expenditure of funds borrowed by both spouses who put a lien on the ranch by deed of trust as security for the loan. The divorce court concluded that the execution of the deed of trust had somehow achieved a resulting trust in favor of the community estate so that the ranch might be divided between the spouses. The court of appeals reversed this curious conclusion.⁴⁷ The husband's separate property maintained its separate character through the life of the transaction.

A lump sum award for a workers' compensation settlement for premarital injury was similarly analyzed by the Texas Supreme Court in *Lewis v. Lewis*,⁴⁸ though the entire payment of the settlement occurred during marriage. Without hearing oral argument, the court reversed and remanded the case to the court of appeals. A portion of the workers' compensation benefits had been used to buy a tract of land. Relying on the decision of the Dallas Court of Civil Appeals in *Hicks v. Hicks*,⁴⁹ the Eastland court had affirmed a divorce decree,⁵⁰ treating the compensa-

42. In such cases, of course, the sale is usually accompanied by a covenant not to compete, which will ordinarily entail a significant reduction in immediate earning power that after divorce would be treated as separate property. See also Crystal L. Landes, Comment, *The Story of Covenants Not to Compete in Texas Continues . . .*, 33 HOUS. L. REV. 913 (1996).

43. TEX. CONST. of 1845, art. VII, § 18; TEX. CONST. art. XVI, § 15.

44. FUERO REAL III.3.3 (1255); RECOP. V.9.4 (1567); NOV. REC. X.4.3 (1805).

45. See *Dawson v. Dawson*, 767 S.W.2d 949 (Tex. App.—Beaumont 1989, no writ); *Carter v. Carter*, 736 S.W.2d 775 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Roach v. Roach*, 672 S.W.2d 524 (Tex. App.—Amarillo 1984, no writ); *Wierzchula v. Wierzchula*, 623 S.W.2d 730 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

46. 921 S.W.2d 365 (Tex. App.—Houston [1st Dist.] 1996, no writ).

47. *Id.* at 367-68 (citing *Bybee v. Bybee*, 644 S.W.2d 218, 221 (Tex. App.—Fort Worth 1982, no writ)).

48. 40 Tex. Sup. Ct. J. 359 (Feb. 21, 1997) (per curiam), *rev'g* *Lewis v. Lewis*, 923 S.W.2d 837 (Tex. App.—Eastland 1996).

49. 546 S.W.2d 71 (Tex. Civ. App.—Dallas 1976, no writ), discussed along with *Andrie v. Andrie*, 751 S.W.2d 955 (Tex. App.—Eastland 1988, writ denied), in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 Sw. L.J. 1, 8-9 (1989).

50. *Lewis*, 923 S.W.2d at 839.

tion award and thus the land as community property under Family Code section 5.01(a)(3).⁵¹ Although the decision of the Eastland court was clearly wrong, the Texas Supreme Court's brief per curiam reversal may be misconstrued.

In 1961 the Supreme Court of Texas held that the sole purpose of the Texas workers' compensation scheme is to compensate for loss of earning capacity.⁵² If it can be assumed that legislative purpose had not been changed in that regard through subsequent amendments of the system,⁵³ that policy still controls the interpretation of the Texas statute.⁵⁴ Thus any recovery for pain and suffering is excluded from an award under the workers' compensation acts. Hence, if a worker is temporarily injured when married, receives a workers' compensation award for his lost earning power, is thereafter divorced, and continues to receive payments while single following his divorce, those later payments as substitutes for lost compensation after divorce are his separate property.⁵⁵ In this respect the characterization of workers' compensation benefits is similar to that of retirement benefits, which are classified as deferred earnings. The principal difference is that retirement benefits are ordinarily paid from funds that are put aside during a period while the employee was married part of the time and single part of the time. In the case of workers' compensation benefits, however, the payments can be characterized by the marital status of the employee when he is paid because the payments represent current lost earnings.⁵⁶ In this respect the workers' compensation insurance scheme operates at the public level in a manner similar to a private insurance contract providing for loss of property. The recovery takes the same character as the property destroyed.⁵⁷ At this point in its analysis of the dispute in *Lewis v. Lewis*⁵⁸ the Eastland court had gone astray in explaining its own decision in *Andrle v. Andrle*.⁵⁹

Reversing the Eastland court's conclusion in *Lewis*, the Texas Supreme Court held that a workers' compensation settlement paid in a lump sum during marriage for a permanent disability suffered while the injured worker was single was separate property because the loss of earning capacity occurred before the disabled worker married.⁶⁰ This terse analysis

51. TEX. FAM. CODE ANN. § 5.01(a)(3) (Vernon 1993).

52. *Employers' Reinsurance Corp. v. Holland*, 162 Tex. 394, 395, 347 S.W.2d 605, 606 (1961).

53. See TEX. REV. CIV. STAT. ANN. arts. 8306 to 8309-1 (Vernon 1967 & Supp. 1997).

54. The same purpose is said to motivate other American workers' compensation acts. See 2 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 57.10 (1981).

55. *Hicks v. Hicks*, 546 S.W.2d 71 (Tex. Civ. App.—Dallas 1976, no writ).

56. *Id.* at 73-74.

57. *Rolater v. Rolater*, 198 S.W. 391, 392-93 (Tex. Civ. App.—Dallas 1917, no writ).

58. 923 S.W.2d 837, 839 (Tex. App.—Eastland 1996), *rev'd per curiam*, 40 Tex. Sup. Ct. J. 359 (Feb. 21, 1997).

59. 751 S.W.2d 955 (Tex. App.—Eastland 1988, writ denied). An earlier effort was made to explain the decision in *Andrle* differently and thus to conform it to other precedents. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 SMU L. REV. 1, 9 (1989). But in *Lewis*, the Eastland Court persisted in making its error more explicit.

60. *Lewis*, 40 Tex. Sup. Ct. J. at 360.

is apt to be misunderstood. Further amplification would explain that when a worker receives a lump-sum settlement award for permanent injury while single (although the award is actually paid when the worker is married), as a matter of law the burden of proof is on the spouse who would show that part of the award is community property, because the award was for a loss which occurred while the worker was single. The wife in *Lewis* could not discharge that burden of proof. A very different burden of proof could be discharged by a wife who claimed a share of benefits for a temporary injury received while single but paid during marriage for present loss of earning power.⁶¹ Regrettably the court supported its argument in *Lewis* with two decisions which have been long since discountenanced: one by the Texas Supreme Court itself⁶² and the other⁶³ by the Legislature by enactment of section 4.03 of the Family Code.⁶⁴ More fully explained, however, the court's decision is easy to apply. The premarital lump-sum recovery for physical loss in *Lewis* had no provable nexus to loss of earning power during the marriage and was therefore the recipient's separate property.⁶⁵

With regard to characterization of benefits under an insurance agent's contract of employment, the Texarkana court's decision in *In re Wade*⁶⁶ is not unlike that in numerous unmaturing retirement benefit cases in departing from the inception of title rule in favor of an analysis recognizing such payments as deferred wages.⁶⁷ For a short time prior to marriage and during his marriage the husband was employed as an insurance agent. During marriage, he entered into a contract with his employer by which on termination of employment the husband would be paid an annual amount for five years based on his total commissions for the year preceding termination. The agent's commissions were largely attributable to the renewal of policies previously sold by the agent and were thus

61. *Hicks*, 546 S.W.2d at 73-74.

62. *Charter Oak Fire Ins. Co. v. Few*, 456 S.W.2d 156, 160 (Tex. Civ. App.—Tyler 1970), *rev'd on other grounds*, 463 S.W.2d 424 (Tex. 1971). See Joseph W. McKnight, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 45 (1971).

63. *General Ins. Co. v. Casper*, 426 S.W.2d 606, 608 (Tex. Civ. App.—Tyler 1968 writ *ref'd n.r.e.*). See Joseph W. McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 55 (1969).

64. TEX. FAM. CODE ANN. § 4.03 (Vernon 1993), initially enacted as TEX. REV. CIV. STAT. art. 4621 (effective Jan. 1, 1968).

65. In *Newsom v. Petrilli*, 919 S.W.2d 481, 484 (Tex. App.—Austin 1996, no writ), a suit for reformation of a divorce decree, the ex-husband attempted to liken what were termed "disability benefits" under his retirement plan to workers' compensation payments identifiable as payments for premarital loss of wages, citing *Bonar v. Bonar*, 614 S.W.2d 472, 473 (Tex. Civ. App.—El Paso 1981, writ *ref'd n.r.e.*). Although some of the husband's physical disability could be traced to a premarital head injury, his generally disabled condition was attributable to a "deterioration occurring through the years" of marriage and the postmarital period before the suit was brought. *Id.* The term "disability" as used in the state firemen's pension scheme is apparently a synonym for any identifiable physical malady that allows increased pension benefits to the pensioner. *Id.* at 485.

66. 923 S.W.2d 735 (Tex. App.—Texarkana 1996, writ denied).

67. There was inconclusive but strong dicta on the character of insurance agents' renewal commissions in *Vibroch v. Vibrock*, 549 S.W.2d 775, 778 (Tex. Civ. App.—Fort Worth), writ *ref'd n.r.e.*, *reserving judgment on the point*, 561 S.W.2d 776 (Tex. 1977).

clearly a form of deferred compensation. The court rejected the husband's argument that his contract related to his premarital employment contract, the terms of which were not in evidence. The appellate court remanded the case for a determination of a possible premarital separate interest in the deferred compensation as well as an evaluation of the wife's interest in all the contractual benefits at the time of divorce: "the amount of benefits the earning spouse would receive on the date of divorce if he . . . were eligible for the benefits on that date"⁶⁸ under *Berry v. Berry*.⁶⁹ The court observed that once findings are made regarding the total number of years of benefits accrued, their proportional character as separate and community property, and their value, there would be no further conditions unsatisfied under the *Berry* formula and no need to make an order for division of the benefits if and when received by the husband.⁷⁰

C. TRUST INCOME

Because income from separate property is community property of the spouses under Texas law, cash dividends on stock and the revenues from annual crops, as well as longer term crops such as timber,⁷¹ are community property. Income from a trust created for the benefit of a spouse has presented an especially difficult problem of characterization. In the initial encounter with this problem in *Hutchison v. Mitchell*⁷² the Supreme Court of Texas found an implication of periodic gift of the income from the trust as well as the eventual right to the corpus of a trust created by a husband for the benefit of his wife.⁷³ In a later nineteenth century trust case⁷⁴ and in one instance in which the grantor of a legal life estate expressed a clear intention that subsequent income should be the grantee's separate property,⁷⁵ courts of appeal followed a gift-analysis in characterizing the income. Somewhat later the subject became involved in the

68. *Wade*, 923 S.W.2d at 739.

69. 647 S.W.2d 945, 946-47 (Tex. 1983).

70. *Wade*, 923 S.W.2d at 740.

71. See *M'Elwee v. M'Elwee*, 911 S.W.2d 182, 188-89 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

72. 39 Tex. 488 (1873). The inclination of unreconstructed Texas judges, both state and federal, to question the soundness of decisions of the Texas Supreme Court during the last phrase of reconstruction has been motivated by an almost total lack of reason and an embarrassing abundance of bombast that for the reputation of all those judges should be henceforth forgotten. See James W. Paulsen & James Hambleton, *Confederates and Carpetbaggers: The Precedential Value of Decision from the Civil War and Reconstruction Eras*, 51 TEX. BAR J. 916 (1988). However one may feel about the highly political circumstances and conclusion of the decision of the Texas Supreme Court in *Ex parte Rodriguez*, 39 Tex. 706 (1873), concerning which the evidence is exceptionally murky, no question has ever been raised or any evidence adduced to impugn the motives of the court in deciding *Hutchison v. Mitchell*.

73. *Hutchison*, 39 Tex. at 493-94.

74. *McClelland v. McClelland*, 37 S.W. 350 (Tex. Civ. App.—Austin 1896, writ ref'd).

75. *Sullivan v. Skinner*, 66 S.W. 680 (Tex. Civ. App.—San Antonio 1902, writ ref'd).

highly political issue of taxation of trust income⁷⁶ which was ultimately resolved by the Revenue Act of 1948,⁷⁷ allowing the spousal joint income-tax return and the consequential splitting of trust-income between spouses. Prior to that enactment, however, Texas federal judges and the Fifth Circuit Court of Appeals in the 1930s and '40s had characterized trust income as community property to achieve that result. To reach that conclusion those courts dismissed the authority of *Hutchison v. Mitchell*, ignored later Texas appellate cases, and analyzed trust doctrine in a way that may be most politely termed excessively steeped in terminology: The beneficiary of a trust is the owner of an equitable interest in the trust that is called an equitable estate. That equitable interest, because it is called an estate, is separate property. Hence, the income from that equitable estate is community property. This argument may sound convincing enough until one examines the meaning of the terms used. Saying that the beneficiary of a trust owns an equitable estate in the trust corpus means nothing more nor less than that the beneficiary has a right (long ago recognized in English courts of equity) to enforce the trust. That is all that the term means. In its function, however, the Anglo-American trust is a device which the law allows for making an effective continuing gift of income from property held in trust. Frequently, but not always, the settlor of a trust may make an eventual gift of the corpus of the trust to the beneficiary, though the settlor may choose to make someone else the donee of the corpus or even have it return to himself. Although Texas courts have not put their analysis in these precise terms, this result is nonetheless embodied in their conclusions.⁷⁸ After reviewing the Texas and federal cases in 1982 in *Wilmington Trust Co. v. United States*⁷⁹ the federal Claims Court concluded that the weight of Texas authority supports the characterization of trust income as separate property and that the Fifth Circuit's tax-motivated analysis was fundamentally unsound, though followed by some intermediate Texas appellate courts. The result reached by the Claims Court has also been reached by the Tyler Court of Appeals in *Cleaver v. George Stanton Co.*⁸⁰ and its companion case *Cleaver v. Cleaver*.⁸¹

Two Courts of Appeals (in 1893⁸² and again in 1895⁸³) reached the conclusion that income from a self-settled trust is separate property, though

76. See *Commissioner v. Estate of Hinds*, 180 F.2d 930 (5th Cir. 1950); *McFaddin v. Commissioner*, 148 F.2d 570 (5th Cir. 1945); *Commissioner v. Sims*, 148 F.2d 574 (5th Cir. 1945); *Commissioner v. Porter*, 148 F.2d 566 (5th Cir. 1945); *Commissioner v. Wilson*, 76 F.2d 766 (5th Cir. 1935).

77. Act of April 2, 1948, ch. 168, 62 Stat. 110.

78. See Regis W. Campfield, *Interspousal Transfers*, 32 Sw. L.J. 1091, 1134-62 (1979); Joseph W. McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 47 (1969).

79. 4 Cl. Ct. 6 (1982), *aff'd*, 753 F.2d 1055 (Fed. Cir. 1983).

80. 908 S.W.2d 468 (Tex. App.—Tyler 1996, writ denied).

81. 935 S.W.2d 491 (Tex. App.—Tyler 1996, n.w.h.)

82. *Shepfin v. Small*, 23 S.W. 432 (Tex. Civ. App.—San Antonio 1893, no writ).

83. *Monday v. Vance*, 32 S.W.559 (Tex. Civ. App.—San Antonio 1895, no writ.)

it was concluded in 1955 that such income is community property.⁸⁴ Income from a self-settled trust, however, cannot rest on a gift analysis because a person cannot make a gift to himself. If the conclusion in favor of separate property is to be reached, it may depend on the time when the trust was created (that is, when the settlor was single) or the fact that the separate corpus is transformed into a retained income interest.⁸⁵ In relying on such an analysis one would feel a great deal more comfortable if the trust were also made irrevocable at its creation. Then, it may be said that the nature of the interest held in trust was permanently fixed prior to marriage. Thus, prior to marriage the settlor might limit his interest in property (then separate) to a lesser, or different, separate interest.

Characterization of the income from a self-settled trust was before the Fort Worth Court of Appeals in *Lemke v. Lemke*.⁸⁶ While single, the future husband had created a spendthrift trust for his own benefit. The initial corpus of the trust was the proceeds of a judgment for medical malpractice for brain damage suffered by the settlor. It is not stated whether the trust was irrevocable, but the trust may have been irrevocable or the court may have inferred irrevocability from the terms of its spendthrift provisions of the trust. In her absolute discretion the trustee was to pay to the beneficiary-settlor the income of the trust and as much of corpus of the trust as his needs demanded. The beneficiary subsequently married. Upon the beneficiary's divorce, questions were raised as to characterization of trust income that might have been retained during marriage and added to the trust corpus.⁸⁷ The court put the burden of proving any community property in the corpus of the trust on the wife. As to the original corpus of the trust the burden seems properly put on the wife because the premarital injury-recovery, which was placed in trust, was not acquired during marriage, even if made in part for loss of future earning capacity. There was no evidence of specific sources of distributions from the trust, but *during the marriage* the trust had distributed more than the total *value* of its earnings of all kinds during that period. The Fort Worth Court of Appeals therefore concluded that the wife had failed to show that there was any community property retained by the trustee. The wife's burden in this regard, nevertheless, seems misplaced. As the party who asserted that the property held by the trustee during marriage was not community property, the husband surely had the burden to demonstrate that point despite the net deficit in the receipt of income during the marriage. The court's further observation that under the Property Code⁸⁸ the wife lacked standing to question the validity of

84. *Merchantile National Bank v. Wilson*, 279 S.W.2d 650 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

85. As in *Shipfin* and *Munday*. In both of those instances the trust was created with the wife's separate property *during marriage*.

86. 929 S.W.2d 662 (Tex. App.—Fort Worth 1996, writ denied).

87. As against the creditors of a settlor of a trust for the settlor's benefit, a spendthrift provision as to trust income is ordinarily ineffective, but that issue was not before the court.

88. TEX. PROP. CODE ANN. § 115.011 (a) (Vernon 1995).

that trust or to join it in this suit⁸⁹ scarcely constitutes a sufficient response to her reliance on the constitutional definition of community property. The court's conclusion in this regard, therefore, seems erroneous.

D. RETIREMENT BENEFITS

Retirement and pension benefits are regarded as a form of deferred compensation by definition and, hence, if earned during marriage, are characterized as community property.⁹⁰ The courts calculate the proportional amounts of pension trust holdings constituting separate and community property using a formula of prorata allocation of income and its appreciation in value in the corpus of a pension trust. The courts allocate the income and appreciation based on the time during which income has been accumulated over the life of the trust, that is, prior to marriage, during marriage, and following the divorce of the pensioner.⁹¹ In *Bloomer v. Bloomer*,⁹² however, the court concluded that although the separate and community property elements of military pensions are ordinarily calculated on a time-basis for active-duty military personnel, it is appropriate, in the case of reserve personnel, to use the point-system employed by the military service itself in computing separate and community interests.⁹³ In either case, however, the value of the community interest is limited by its amount at the date of divorce.⁹⁴

In a post-divorce case⁹⁵ in which the wife of an active-duty soldier had been awarded one-half of the community portion of her husband's military retirement pay when and if received, the ex-husband later chose to withdraw from military service and to receive a special separation-benefit as provided by Congressional entitlement. The court held that the ex-wife was entitled to a portion of that payment which the ex-husband had received as a substitute for his unmatured retirement benefits.⁹⁶

In *Jones v. Jones*⁹⁷ the Corpus Christi court dealt with a somewhat analogous situation. On divorce an agreed judgment provided that when the soldier-husband retired the wife would receive from him each month an amount equal to 25 percent of what someone of his rank would receive at that time. On retirement the ex-husband was rated as 40 percent disabled and his retirement pay was therefore reduced. The ex-wife brought suit to enforce the judgment, and her ex-husband asserted that his full

89. *Lemke*, 929 S.W.2d at 664-65.

90. *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970).

91. *Taggart v. Taggart*, 552 S.W.2d 422, 424 (Tex. 1977).

92. 927 S.W.2d 118 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

93. *Id.* at 120-121.

94. *Berry*, 647 S.W.2d at 947.

95. *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. App.—Austin 1996, no writ).

96. *Id.* at 426-27. Under a private pension plan, however, a disability payment may be nothing more than deferred earnings and will be characterized as community property if the interest under the plan accrued during marriage. See *McElwee*, 911 S.W.2d at 188.

97. 900 S.W.2d 786 (Tex. App.—San Antonio 1995, writ denied).

pay was not subject to division under federal law,⁹⁸ because disability benefits accepted in lieu of retirement benefits are not subject to division on divorce. The court held that the ex-husband's defense constituted a collateral attack on the unappealed judgment and was barred by the doctrine of *res judicata*.⁹⁹

In *Pelzig v. Berkebile*¹⁰⁰ the court commented on the different modes of characterization of funds in defined-benefit plans¹⁰¹ and the particular defined-contribution plan before the court in that case. In the former, a very common type of plan to which the employee does not contribute, the benefit is based on the length of time the employee has been a member of the plan at the time of retirement. For computing the community share in a defined-benefit plan, the ratio of the number of months during marriage to the total number of months within the plan provides the community fractional share to be applied to the value of the interest at divorce.¹⁰² For evaluating the community share in a defined-contribution plan the amount of money contributed by the employee rather than length of the employee's membership during marriage is controlling. Computation and classification are made easier by the fact that all contributions are by the employee, simply as deferred wages. To compute the community share in that case, the amount of contributions prior to marriage are subtracted from the amount contributed during marriage.¹⁰³

E. TERMINABLE INTEREST RULE FOR STATE EMPLOYEES' PENSION PLANS

Among those nearest the crown, the Castilian monarchy fostered a self-serving disregard for the rules of marital sharing. To induce and reward special loyalty, the king had secured a rule, agreed to by those most likely to enjoy its benefits, that takers from the crown enjoyed their acquisitions as separate property rather than sharing it with their spouses.¹⁰⁴ Although the Spanish commentators on the rule sought to confine its application to true *gifts* and thus to bring such acquisitions by a spouse within the ordinary rules of separate and community property law,¹⁰⁵ the king's highest judges nevertheless tended to construe any

98. 10 U.S.C. § 1408 (1986 & Supp. 1989).

99. *Jones*, 900 S.W.2d at 787-88.

100. 931 S.W.2d 398, 403 (Tex. App.—Corpus Christi 1996, no writ).

101. *See, e.g., Berry*, 647 S.W.2d at 945.

102. *See Hatterberg v. Hatterberg*, 933 S.W.2d 522, 530 (Tex. App.—Houston [1st Dist.] 1994, no writ); Steven R. Brown, Comment, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post Judgment Partition Actions: Cures for the Inequities in Berry v. Berry*, 37 BAYLOR L. REV. 107, 115 (1985).

103. *See Inglinisky v. Inglinisky*, 735 S.W.2d 536, 538 [Tex. App.—Tyler 1987, no writ]; *see also Hatterberg*, 933 S.W.2d at 531; Brown, *supra* note 102, at 112-13.

104. FUERO REAL III.3.1-2 (1255); RECOP. V.9.2-3 (1567) Nov. REC. X.4.1-2 (1805).

105. *See* JUAN LÓPEZ DE PALACIOS RUBIOS, IN LIBRUM QUARTUM DECRETALIU GREGORII 20.65 (1573); JUAN DE MATIENÇO, COMMENTARIA IN LIBRUM QUINTUM RECOLLECTIONES LEGUM HISPANIAE (1580); *contrast* comments on RECOP. V.9.3, gl. 6, no. 2 with comments on RECOP. V.9.2, gl. 6, no. 4. *See also id.* on RECOP. V. 9.3., gl. 6, no. 5 (compensation for services).

royal grant made to a courtier or other employee of the crown as a gift, and thus, to disregard the principle that a spouse's acquisition for the performance of services were community property.¹⁰⁶ Despite the democratic spirit that prevailed on the American frontier during the nineteenth century and most of the twentieth century, the impact of the Spanish rule was nonetheless considerable in relation to acquisitions of land from the sovereign,¹⁰⁷ though as a result of blind adherence to doctrine without any effort on the part of the courts to examine the principle's monarchical underpinning. In recent decades, as republican ideology in American government has declined, the self-serving interest of lawmakers on behalf of governmental employees has tended to be condoned by the imperial judiciary that may equate its own interests with those of other members of the governmental hierarchy.

In 1925 the Supreme Court of Texas made it plain in *Arnold v. Leonard*¹⁰⁸ that the Texas Constitution¹⁰⁹ does not allow the legislature to expand the constitutional definition of separate property, there confined to gifts, inheritances, and that which spouses bring into a marriage. By a broad reading of the concept of premarital holdings in 1972¹¹⁰ the court, nevertheless, defined compensation for bodily loss as separate property but made it clear that compensation for loss of a spouse's earning power is shared by both spouses. In two subsequent instances, however, a divided Dallas Court of Civil Appeals¹¹¹ followed by a panel of the First District Court of Appeals¹¹² approved Texas's legislative provisions that terminated the community property rights of the spouse of a state employee in the employee's state pension when the spouse predeceases the state employee. The Texas legislature, however, has not so far departed from constitutional principles to attempt to deprive a divorcing spouse of a state employee of such rights.

In 1994 the Texas legislature consolidated the rule for the various state pension plans into a general rule for the pension plans of all state employees whereby the predeceasing spouse loses all rights in the community estate.¹¹³ The constitutionality of this rule came before a federal court in Houston in 1995 in *Kunin v. Feofanov*.¹¹⁴ The claimant to an interest in

106. See MATIENÇO, *op. cit.* on RECOPI. V.9.3, gl 6, no. 8 concerning the dispute between Dr. António Diaz Montalvo, the draftsman of the ORDINANCES OF CASTILE, and his wife's heirs.

107. See, e.g., *Gayoso de Lemos v. Garcia*, 1 Mart. N.S. 324 (La. 1823); *Noë v. Card*, 14 Calif. 576 (1860); *Fisk v. Flores*, 43 Tex. 340 (1875).

108. 114 Tex. 535, 273 S.W. 799 (1925).

109. TEX. CONST. art. XVI, §15.

110. *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972).

111. *Lack v. Lack*, 584 S.W.2d 896 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). The strong dissent of Robertson, J. at 900-02 has nevertheless, received support from commentators. See JOSEPH W. MCKNIGHT & WILLIAM A. REPPY, JR., TEXAS MATRIMONIAL PROPERTY LAW 119 (1983).

112. *Duckett v. Board of Trustees*, 832 S.W.2d 438, 441-42 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

113. TEX. GOV'T CODE ANN. § 804.101 (Vernon 1994).

114. No. H-93-3824 (S.D. Tex. Mar. 16, 1995) reported as an appendix to *Kunin v. Feofanov*, 69 F.3d 59, 60 (5th Cir. 1995).

the state employee's pension plan was the son of the prospective pensioner's wife who had died intestate as to that interest in June, 1993. Her son was therefore the intestate taker of any community interest his mother had in the plan.¹¹⁵ The Supreme Court of Texas in *Allard v. Frech*¹¹⁶ had held as recently as 1989 that a terminable interest provision, that is, one that cuts off the community interest of a predeceasing spouse of an employee, in a private pension plan was unconstitutional under Texas law. The federal court, however, took a different view of state law for public pensioners. Relying on the statutory terminable interest rule governing state-employees' pension plans, the holdings of the intermediate appellate courts applying that rule, and the fact that *Allard* dealt only with a private pension plan rather than a public one, the federal district court sustained the validity of the legislative terminal interest rule applying to state employees, and that conclusion was affirmed in a *per curiam* opinion of the Fifth Circuit Court of Appeals.¹¹⁷ The court particularly relied on the argument that the Texas statute does not alter the constitutional definition of separate and community property but merely "defines the non-member spouse's statutory property interest itself as one that terminates upon the death of such non-member spouse."¹¹⁸ The answer to such sophistry is that in so doing the legislature thereby deprives the spouse of a state employee of a community property interest in which all other Texas spouses are constitutionally protected under *Allard*. In a further effort to distinguish *Allard*, the court also pointed out that the Texas Supreme Court had there said that "such matter is better left to the legislature."¹¹⁹ But a concurring judge in *Allard* had also suggested that such a legislative act might be unconstitutional.¹²⁰

F. FEDERAL PREEMPTION OF STATE LAW RELATING TO PENSION PLANS

Although the provisions of the federal Employee Retirement Income Security Act of 1974 (ERISA)¹²¹ were inapplicable to the dispute in *Kunin*, because ERISA by its terms is inapplicable to any pension plan maintained by a state government or the federal government, as well as by charitable organizations,¹²² the applicability of ERISA to other pension plans was at issue in *Boggs v. Boggs*, a decision of a Louisiana federal district court¹²³ that was affirmed by the Fifth Circuit Court of

115. Ironically, if she had lived until September 1, 1993 and had made no testamentary disposition of her interest, it would have passed to her husband. TEX. PROB. CODE ANN. § 45 (Vernon Supp. 1997) (effective September 1, 1993).

116. 754 S.W.2d 111 (Tex. 1988), *cert. denied*, 488 U.S. 1006 (1989).

117. *Kunin*, 69 F.3d at 60.

118. *Id.* at 64 (citing TEX. GOV'T CODE ANN. § 804.101 (Vernon 1994)).

119. *Allard*, 754 S.W.2d at 115.

120. *Id.* at 115-16 (Ray, J., concurring).

121. 29 U.S.C. §§ 1001-1461 (1995).

122. *Id.* § 1003(b).

123. 849 F. Supp. 462 (E.D. La. 1994).

Appeals.¹²⁴ In *Boggs*, a husband-pensioner of a private pension plan had been predeceased in 1979 by his first wife. She had provided in her will that her husband should receive a usufruct in two-thirds of her estate, which included a one-half interest in the husband's pension plan acquired during their marriage with the other one-third passing to their children. After her death the husband-pensioner remarried in 1980 and was survived by his second wife when he died in 1994. Against the children of the first wife, the widow sought a declaratory judgment that the provisions of ERISA¹²⁵ have the effect of preempting state community property law, and the widow is therefore the sole beneficiary of her husband's pension plan under ERISA, which gives a *surviving spouse* the pensioner's rights under the plan.¹²⁶ To preclude federal preemption in *Boggs*, the majority of a Fifth Circuit panel relied in large measure on the holding of the United States Supreme Court that ERISA had not preempted the operation of a Georgia law precluding garnishment of funds exempt under ERISA.¹²⁷ The court argued that Louisiana's community property system [merely] affects

what a plan participant does with his benefits after they are received¹²⁸. . . . [T]he Louisiana community property law is not sufficiently 'related to' an employee benefit plan to necessitate ERISA preemption. Nothing is sought from the plan or its fiduciary. No duty will be imposed on the plan or the administrator. Benefits will continue to be paid to the beneficiary in the manner provided in the plan. A spouse's accounting obligation under community property law affects employee benefits plans "in too tenuous, remote or peripheral a manner to warrant a finding that the law 'related to' the plan."¹²⁹

ERISA was presumably "not meant to consume everything in its path," as the Fifth Circuit Court had said on an earlier occasion,¹³⁰ and the majority of the Fifth Circuit panel might have further supported its argument by stressing that a non-pensioner-spouse's right in community property arises on acquisition not by assignment of the pensioner.¹³¹ Circuit Judge King, who also participated in the *Kunin* decision, dissented. She relied

124. 82 F.3d 90 (5th Cir. 1996), *cert. granted*, 117 S.Ct. 379, (U.S. Nov. 1, 1996) (No. 96-79).

125. 29 U.S.C. § 1144(a) (1995) (the provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) and not exempt under section 1003(b).").

126. 29 U.S.C. § 1055 (1995).

127. *Mackey v. Lanier Collection Agency*, 486 U.S. 825 (1988). That case was also relied on by the unanimous Supreme Court in rejecting another, but somewhat different, agreement in form of ERISA preemption in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1680 (1995).

128. *Boggs*, 82 F.3d at 96.

129. *Id.* at 96-97 (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).

130. *Hook v. Morrison Milling Co.*, 38 F.3d 776, 786 (5th Cir. 1994).

131. The Fifth Circuit court voted against an en banc reconsideration of the case with six judges dissenting. *Boggs v. Boggs*, 89 F.3d 1169 (5th Cir. 1996). The dissenting opinion with respect to refusal to grant the en banc reconsideration nicely responded to that point. 89 F.3d at 1180-83.

heavily on the view expressed by the Ninth Circuit Court of Appeals in *Ablamis v. Roper*¹³² and on an Advisory Opinion of the Department of Labor¹³³ that ERISA is meant to favor the plan participant and no other.¹³⁴

III. CONTROL AND LIABILITY OF MARITAL PROPERTY

A. SPOUSAL AGREEMENT FOR THE SURVIVOR'S RIGHT TO COMMUNITY PROPERTY

After article XVI, section 15 of the Texas Constitution¹³⁵ was amended in 1987 to allow spouses to provide reciprocal rights of survivorship to community property, the Legislature enacted statutes in 1989 to govern that process. Section 455 of the Probate Code¹³⁶ provides four means for revoking such agreements: (1) in a manner provided in the agreement, (2) in the absence of such a term in the agreement by a written agreement made between the spouses (3) by one spouse's written notice to the other, or (4) by disposition of the property by one or both spouses in accordance with applicable law and not inconsistent with the terms of the agreement. In *Haas v. Voigt*¹³⁷ the husband and wife had entered into agreements for survivorship of their community property deposited in four bank accounts. After the wife became incompetent, the husband and one of his sons purported to create joint tenancies with a right of survivorship between them with respect to the funds in all the accounts. The husband died soon afterward. The San Antonio Court of Appeals held that the acts of the husband and son were ineffective to change the spouses' survivorship agreements. Though they were left in the accounts where they were originally deposited, it was presumably argued that changing the ultimate disposition of the funds constituted a "disposition," but the later change was certainly contrary to the spousal agreement. Further, whatever rules of law may have controlled the management of the funds prior to the spousal survivorship agreements, the spousal agreement itself indicated that the funds on deposit were subject to joint management of the spouses until they otherwise agreed. If the spouses had had an agreement with the depository allowing either spouse to withdraw funds, it might have been successfully argued that the husband's unilateral acts in company with his son to redesignate the status of the accounts would have constituted a mutually anticipated disposition of them. If there had been such an agreement with the depository, the husband's actual withdrawal of the funds and redeposit of them elsewhere would have constituted a clearer case of authorized unilateral disposition.

132. 937 F.2d 1450 (9th Cir. 1991).

133. DOL Advisory Opinion No. 90-46A (Dec. 4, 1990).

134. *Boggs*, 82 F.3d at 98 (King, C.J., dissenting).

135. TEX. CONST. art. XVI, §15.

136. TEX. PROB. CODE ANN. § 455 (Vernon Supp. 1997).

137. 940 S.W.2d 198 (Tex. App.—San Antonio 1996, writ requested).

B. DRAWING THE LINE BETWEEN A RIGHT OF REIMBURSEMENT AND RECOVERY FOR TORTIOUS INJURY

Disputes concerning control of marital property usually arise *inter se*, whereas disputes concerning liability are usually *inter alia*, that is, between a spouse, or both spouses collectively, against an outsider. In *Schlueter v. Schlueter*¹³⁸ the Austin Court of Appeals explored some of the difficulties inherent in joining an interspousal action concerning control of property involving a third person with a suit for divorce. In this instance the cause of action was for actual fraud, which although rarely pursued, could have been brought prior to removal of the bar of spousal immunity, although the extent of the remedies then available was uncertain.¹³⁹ Committing a constructive fraud on the community estate does not constitute a tortious wrong against the other spouse but rather gives rise to a right of reimbursement.¹⁴⁰ It has been sometimes said, however, that a spousal disposition of property with intent to deprive the other spouse of a community interest will support an independent cause of action for fraud.¹⁴¹ In *Schlueter* the husband delivered a check for the husband's earnings to his father, who deposited it to his own account. The father later withdrew over \$12,500 from the bank account shortly before the husband filed suit for divorce against his wife. The father presumably secreted the money elsewhere. In her countersuit for divorce, the wife joined an independent action against her husband and his father for fraud and conspiracy. At the trial, the husband at first explained that the amount transferred to his father represented money borrowed by the husband over the past thirty years, hence a mere constructive fraud,¹⁴² but he later changed his testimony and the jury found both defendants liable for fraud. The jury awarded compensatory damages against the husband and his father jointly and severally and punitive damages against the husband for \$30,000 and against his father for \$15,000.¹⁴³ Compensatory damages were awarded for depletion of the community estate which would then be divided between the spouses. The consequential damages incurred by the wife in retrieving community assets should also have been awarded to the community estate for the community expense incurred in

138. 929 S.W.2d 94 (Tex. App.—Austin 1996, writ granted).

139. See *Stramler v. Coe*, 15 Tex. 211, 215 (1855); *Mahoney v. Snyder*, 93 S.W.2d 1219 (Tex. Civ. App.—Amarillo 1936, no writ); *Bettis v. Bettis*, 83 S.W.2d 1076 (Tex. Civ. App.—El Paso 1935, no writ).

140. See *In re Moore*, 890 S.W.2d 821 (Tex. App.—Amarillo 1994, no writ), commented on in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 49 SMU L. REV. 1015, 1028-29 (1996). It is unclear whether *Mazique v. Mazique*, 742 S.W.2d 805, 808 (Tex. App.—Houston [1st Dist.] 1987, no writ), was a case of constructive or actual fraud. In her pleading the wife evidently sought reimbursement on behalf of her husband's expenditure of community funds for the benefit of his separate estate but the nature of that claim was not explained in the opinion. *Id.* at 806.

141. See *Bridges v. Bridges*, 404 S.W.2d 48 (Tex. Civ. App.—Beaumont 1966, no writ) (fraudulent use of community funds subsequent to divorce).

142. *Schlueter*, 929 S.W.2d at 96.

143. *Id.* at 95-96. The father's appeal was limited to an evidentiary point, which the appellate court decided against him, and there was no further discussion of his liability.

their recovery. The Austin court apparently reached the conclusion that a spouse's recovery of exemplary damages is the separate property of the spouse-recipient as a reward for personal persistence,¹⁴⁴ but in reaching that conclusion the value of community time expended for that purpose should be excluded for community reimbursement.

An award of damages in favor of the community against a spouse and a third party for *actual* fraud in an action joined with a suit for a divorce presents a problem in performing a prompt division of the community estate. An easy means of achieving timely division is to treat the guilty spouse's obligation to the community as discharged by including his debt to the community as part of his community share in its division. In the case of a fully depleted community estate, however, the innocent spouse will be left to choose the order of enforcing her money judgments against the joint-tortfeasors.

A fact pattern that lends itself more readily to classification as actual fraud prompted the dispute in *Vickery and Richard v. Vickery*.¹⁴⁵ The fraud practiced by the husband was more elaborate than that which had provoked the litigation in *Oliver v. Oliver*,¹⁴⁶ as might be expected when a husband-lawyer employs his wits to defraud. Apparently anxious to be divorced in order to remarry, the husband used a former client's malpractice action for an amount far beyond his insurance limits to convince his wife that she should sue him for divorce in order to provide a means of removing assets from the risk of seizure.¹⁴⁷ As he seemingly related the scheme to his wife, she would be awarded assets more than sufficient for her needs until the threat of the lawsuit had passed and they then would be reunited. The wife resisted the scheme for some time but finally succumbed. The husband hired another lawyer to bring a suit on behalf of his wife, but the attorney did not consult with the wife and without the wife's knowledge also prepared a counter claim for the husband. Also without the wife's knowledge the husband's ex-client agreed to settle her claim within the coverage of the husband's malpractice insurance policy. But the wife was induced to sign the proposed divorce decree dividing some but not all of the marital property and after a hearing, at which only the husband and the wife's lawyers were present, the judge signed the decree.

The ex-husband remarried soon after the divorce. About six months later the ex-husband hired an attorney to achieve the ex-wife's move from separate property awarded to the ex-husband, and the ex-wife also hired counsel. After not very long, the ex-wife brought a bill of review to set aside the property division made by the decree and sought a redivi-

144. *Id.*

145. No. 01-94-01004-CV, 1996 WL 745881 (Tex. App.—Houston [1st Dist.], Dec. 30, 1996, n.w.h.) (not designated for publication).

146. 889 S.W.2d 271 (Tex. 1994), commented on in Joseph W. McKnight, *Family Law & Husband and Wife*, *Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1230-31 (1995).

147. The scheme is thus reminiscent of that which was unsuccessfully pursued in *Steed v. Bost*, 602 S.W.2d 385 (Tex. Civ. App.—Austin 1980, no writ).

sion of the property already divided and an action against her ex-husband for fraud, breach of fiduciary duty, and intentional infliction of emotional distress, and an action for a division of secreted community assets. The ex-wife also joined an action against her divorce-lawyer for breach of fiduciary duty with respect to the undivided property. The court found that without negligence on the wife's part extrinsic fraud had been committed with respect to the community property so that the bill of review should be granted. The court also awarded the ex-wife damages against her attorney for mental anguish and against her ex-husband for more substantial damages for property loss and mental anguish and for exemplary damages of \$1,000,000. The court also made a division of the undivided property and a redivision of property, which included a mischaracterization of the ex-husband's separate property and its division in his favor as part of the community estate. A unanimous panel of the First District Court of Appeals sustained all the conclusions except as to the characterization of property, and, thus, a remand was required for a further redivision. An attempt to achieve an *en banc* hearing failed and two judges dissented from that conclusion. The dissenters asserted that the only issue of fraud submitted to the jury was for what they termed "constructive fraud" in hiding assets and not the issue of actual fraud of inducing the wife to consent to a sham divorce and an agreed division of property. The dissenters were equally critical of the decision in *Schlueter*, which they saw as a case involving no more than constructive fraud in hiding assets. Because of a lack of actual fraud as they construed the findings in *Vickery*, the dissenters further concluded that there could be no award of damages for mental anguish against either defendant and no award against the ex-husband for punitive damages.¹⁴⁸

Even though one spouse (behaving as the husband did in *Schlueter*) may be motivated to harm the other with respect to a community property interest in connection with a pending divorce, the dissenting judges in *Vickery* did not characterize such conduct as *actual fraud* in the sense of grounding an independent cause of action between spouses. Rather, such behavior would be said to constitute constructive fraud.

It used to be said that the test of actionability of fraud of one spouse against another in the gratuitous disposition of community property was whether the act was committed with *an actual intent* to harm.¹⁴⁹ As sug-

148. The information contained in the opinion of the Court of Appeals and the dissent from the refusal for an *en banc* hearing is insufficient to serve as a basis for comment on the pleadings and the jury submissions. It appears, however, that there were sufficient grounds for relief by bill of review and for damages based on the independent cause of action for fraudulently inducing a divorce and an agreed settlement. But if the dissenters were correct in their premises, it is difficult to understand how damages for constructive fraud and breach of fiduciary duty not shown to be motivated by malice could support an award mental anguish and how such a recovery, standing alone, could support an award for exemplary damages.

149. See *Dunn v. Vinyard*, 234 S.W. 99, 103 (Tex. Civ. App.—Texarkana 1921, no writ related to this part of the case). The flagrancy of the spouse's fraudulent conduct in secret-ing assets might also be a test of actionability but the application of such a standard would almost invariably produce uneven results.

gested by the dissenting judges in *Vickery*, the actionability of a spouse's fraudulent or other tort-like act complained of at divorce must turn on whether the improper act of the other spouse constituted an independent or extrinsic wrong (as the fraudulently secreted divorce in *Oliver*¹⁵⁰ or the fraudulent induced divorce in *Vickery*¹⁵¹) rather than the mere hiding of assets. It might be added that the Legislature has already given divorce courts an adequate but different sort of power to deal with the problem of secreted assets in Family Code section 3.58¹⁵² without the need for any additional cause of action.¹⁵³

Even when the issue of the extent of permitted interspousal actions is resolved, there is the further problem of dealing with the actionability of collusive acts of third persons. In recent years there has been an inclination on the part of some courts to make third persons liable merely because of involvement with a spouse in an effort to secrete assets, as in *Schlueter and Edgington v. Maddison*.¹⁵⁴ A test of actionability against third persons (consistent with that concerning actionability of acts of a spouse) would be to limit liability of the third person to those instances in which a spouse would also be subject to an independent action. In *Edgington* it was also suggested that if the spouse's act was contemptible, the deliberate act of the third person in assisting that act should be actionable. It would be better to say that the third party's act is merely contemptible in that case. It has also been said that a spouse's depletion of community assets through a *constructive fraud* merely provides a right of reimbursement¹⁵⁵ against the other spouse only and thus no recourse against the third person except when restitution from the spouse is of no avail.¹⁵⁶

In relation to a claim for constructive fraud the Fourteenth District appellate court in *Zieba v. Martin*¹⁵⁷ discussed a number of points on standards of proof, presumptions, and burdens to establish a claim for reimbursement, though because the court was dealing with a divorce situ-

150. *Oliver v. Oliver*, 889 S.W.2d 271, 272, 274 (Tex. 1994).

151. *Vickery*, 1996 WL 745881.

152. *E.g.*, TEX. FAM. CODE ANN. § 3.58(a)(6), (a)(10), (c)(1) (Vernon 1993).

153. For a generally negative assessment of the need to recognize intentional spousal emotional distress as a cause of action, see Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268 (1996).

154. 870 S.W.2d 187 (Tex. App.—Houston [14th Dist.] 1994, no writ).

155. *See Putnam, M.D.P.A. Money Purchase Pension Plan v. Stephenson*, 805 S.W.2d 16 (Tex. App.—Dallas 1991, no writ); *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed w.o.j.); *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

156. *See Carnes*, 533 S.W.2d at 371-72. As recently as 1970 the Dallas Court of Civil Appeals absolved a third party of liability for fraudulent connivance in such a context despite a jury's finding of virtual participation of the third party in the fraudulent scheme. *Teas v. Republic Nat'l Bank*, 460 S.W.2d 233 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.). But in light of subsequent development, such a conclusion must be termed outmoded. *See Edgington v. Maddison*, 870 S.W.2d 187 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Jones v. Jones*, 804 S.W.2d 623 (Tex. App.—Texarkana 1991, no writ); *Spruill v. Spruill*, 624 S.W.2d 694 (Tex. App.—El Paso 1981, writ dismissed).

157. 928 S.W.2d 782, 787-790 (Tex. App.—Houston [14th Dist.] 1996, no writ).

ation, the court blurred the lines between a finding of a right of reimbursement and making a division of assets.¹⁵⁸ Both processes involve an independent exercise of discretion: (1) in determining of the right of reimbursement and (2) in making the division of community property. The second exercise of discretion, however, occurs only in cases of divorce or annulment and not in dividing property on the death of a spouse. In *Zeiba* the court went astray in failing to distinguish between a spouse's duty to discharge an obligation and the inappropriate use of funds to discharge the duty. The court held that no right of reimbursement arises from the use of community funds to discharge obligations judicially fixed in relation to a spouse's prior marriage.

There is no question that the creditor for whose benefit a judgment was granted against a Texas spouse prior to marriage may seek satisfaction from separate funds of the debtor-spouse or from community funds subject to that spouse's sole or joint control.¹⁵⁹ But if community funds are used to discharge such an obligation judicially fixed prior to marriage, the other spouse is as much deprived of his or her share of those assets as would have been the case of the debtor-spouse's voluntarily expending community rather than separate assets for any other separate purpose.

The commentators on old Spanish law are instructive on this point. As a matter of policy Juan Matienço¹⁶⁰ would have imposed a duty on common property *to pay* an obligation for support of a needy parent (and, a fortiori, a minor child) because it was *a duty of support* and because there might not be any separate property available to discharge the duty.¹⁶¹ Matienço, however, did not discuss the right of reimbursement of the community estate when the time came to divide community property on termination of a marriage. Juan Gutiérrez,¹⁶² on the other hand, assumed that a parent's duty of support would have been discharged with community funds and went on to say that the spouse whose duty is was to provide support should reimburse the community estate for the support provided.¹⁶³ To those commentators the point was so obvious as not to need further elaboration.

In many instances, of course, the debtor-spouse may not have any separate assets to pay for the support of children of a prior marriage. Further, the constructively defrauded spouse may have been fully aware of the pressing need to discharge premarital obligations when the marriage took

158. *Id.* at 787.

159. TEX. FAM. CODE ANN. § 5.61(a), (b) (Vernon 1993).

160. Matienço served on the high courts of Lima, Charcas, and Sima in mid-sixteenth Peru century before attaining the rank of senator of the Argentinian Chancery.

161. JUAN DE MATIENÇO, COMMENTARIA IN LIBRUM QUINTUM RECOLLECTIONIS LEGUM HISPANIAE ON RECOP. V.9.3, gl. 7, no. 10 (1580). But, by contrast, Matienço saw no policy-based reason to impose a duty on the community estate to pay for a tortious injury caused by only one of the spouses. *Id.* at gl. 7, no. 11.

162. c.1530 - 1618.

163. JUAN GUTIÉRREZ, PRACTICARUM QUESTIONUM CIRCA LEGES REGIAS HISPANIAE Q 129.1 (1606) where he noted that the same view had been expressed by DIEGO SALÓN DE PAZ, QUESTIONES CIVILES Q 8.18 (1576).

place. In such instances, these factors can be considered by the court in exercising its discretion (1) in fixing a right of reimbursement and (2) in dividing that and other community property on divorce rather than treating the judicial nature of the obligation of the debtor-spouse as determinative of the duty of reimbursement. On divorce and annulment reimbursement cases always present a two-step process, whereas in cases of disposition of property of a void marriage or on dissolution of a valid marriage by death, the second step involving equitable division of the community estate is not at issue. In the case of a claim for reimbursement against a deceased spouse's estate, the use of community funds to discharge a premarital contractual judgment-debt without any showing of countervailing community benefit gives rise to a right of community reimbursement. The use of community funds for payment of a judicially ordered monetary amount, whether for damages or for a support obligation, should not produce a different result.

In *Zieba* the court also made reference to consent of a non-transferor spouse in relation to a right of reimbursement. In most instances failure of the other spouse to express any opinion as to a disposition of community property by the sole manager is determinative of nothing. Nor is an expression of disapproval required in determining the application of reimbursement principles. The significance of an expression of approval, or seeming approval, may, however, have some bearing on a court's exercise of its discretion in determining whether there is a right of reimbursement.

The best way to avoid disputes with respect to claims for reimbursement of community assets used to discharge personal obligations or personal predilections of a spouse is to provide in a written partition that future income that either spouse uses for such purposes will be that spouse's separate property. An increasing number of premarital and marital partitions so provide. A counselor who represents a person about to enter into marriage with prior separate obligations to meet, or about to marry someone with such obligations, should advise his client of the usefulness of these devices to avoid future misunderstandings and disputes.

In *Pelzig*¹⁶⁴ the court also considered expenditures of community funds by a husband for the benefit of a former wife and a child of the former marriage, all pursuant to court orders and apparently with the knowledge of the wife. In discussing these matters, the court made the curious remark that there was "no evidence that these expenses benefited [the husband's] separate estate"¹⁶⁵ and hence the trial court was justified in exercising her application of equity in not finding a right of reimbursement in that instance. The appellate court put emphasis on the lack of deception of the wife and her failure to object to the husband's payment of the prior wife's divorce-attorney's fees though he was not judicially

164. 931 S.W.2d at 400-01.

165. *Id.* at 400. If an obligation is fixed prior to marriage, it is characterized as a separate debt though the creditor may reach solely or jointly managed community property to achieve satisfaction of it. TEX. FAM. CODE ANN. § 5.61 (Vernon 1993).

ordered to do so. The court also stressed the lack of evidence that the husband's "separate estate" was benefitted¹⁶⁶ in approving the trial court's denial of reimbursement in that instance. The court's limitation of the concept of reimbursement to tangible property interests is further indicated by a comment on the husband's expenditures of community funds to make payments for mortgage-interest, taxes, and insurance for the benefit of his separate land.¹⁶⁷ The court held that the measure of reimbursement in that regard was the amount that the community estate was benefitted by deductions taken for federal income tax purposes. The court reached this conclusion without reference to authority allowing reimbursement of one marital estate for payments for maintenance, interest and insurance of another marital estate without any regard for the extent of the ultimate tax benefits resulting from these payments as tax deductions.¹⁶⁸ But the notion that rights of reimbursement are generally limited to expenditure for interest in tangible property is very strange indeed and in this instance the court said nothing of the relevance of deception and objection.

Among the divorce cases in which appellate courts have rendered recently reported decisions, three dealt with expenditures for paramours. In two of these cases the dispositions of assets were treated as constructive frauds.¹⁶⁹ *Thomas v. Casale*¹⁷⁰ was somewhat different. The trial court had found that the community estate had been improperly depleted by the husband's disposition of community funds by depositing them in an account held with his paramour and in using some of the funds for her benefit, but the trial court's silence on the point suggests that there was no finding of actual fraud on the husband's part in making the expenditure of funds. On appeal, the paramour contested the sufficiency of the evidence supporting a finding of her knowledge of the community character of the funds or the husband's intent to defraud his wife. If such a finding were supported by the evidence, she would be liable under Family Code section 3.57¹⁷¹ to repay such funds deposited by the husband to the mutual account.¹⁷² The court held that the evidence was insufficient to show that the paramour had the requisite knowledge to make her person-

166. *Pelzig*, 931 S.W.2d at 400.

167. *Id.* at 401.

168. *See, e.g.*, *Brooks v. Brooks*, 612 S.W.2d 233, 238 (Tex. Civ. App.—Waco 1981, no writ); *Pruske v. Pruske*, 601 S.W.2d 746, 748 (Tex. Civ. App.—Austin 1980, writ dismissed); though some courts have refused to order reimbursement if the profits of the property do not exceed such expenses. *See Cook v. Cook*, 665 S.W.2d 161, 164 (Tex. App.—Fort Worth 1983, writ refused n.r.e.); *Hawkins v. Hawkins*, 612 S.W.2d 683, 684 (Tex. Civ. App.—El Paso 1981, no writ); *Colden v. Alexander*, 141 Tex. 134, 147-48, 171 S.W.2d 328, 334 (1943).

169. *Zieba*, 928 S.W.2d at 790; *Grossnickle*, 935 S.W.2d at 848.

170. 924 S.W.2d 433, (Tex. App.—Fort Worth 1996, writ denied).

171. TEX. FAM. CODE ANN. § 3.57 (Vernon 1993).

172. The court held that the Texas Business and Commerce Code's Uniform Fraudulent Transfer Act was irrelevant in this context because it was not shown that the husband-transferor was insolvent. TEX. BUS. & COM. CODE ANN. § 24.002(4) (Tex. UCC) (Vernon 1987).

ally liable to the wife. In *Carnes v. Meador*,¹⁷³ which was not a divorce case and thus one in which section 3.57 was inapplicable, the Dallas Court of Civil Appeals had held that in cases of *constructive fraud* a judgment should not be rendered against the recipient of reimbursable funds unless the transferor-spouse is unable to make satisfaction. In a case of actual fraud in which both the transferor and the transferee participated, both can be liable as joint-tortfeasors.

C. WRONGFUL DEATH ACTION AGAINST A SPOUSE

Dealing with the settlement of a husband's estate following his murder, which was instigated by his wife, a California court¹⁷⁴ has gone a step further than awarding punitive damages or fixing a constructive trust on the property in exacting a spousal penalty. During the marriage the husband had given his wife a joint tenancy interest in his separate realty.¹⁷⁵ As a punishment for her wrong, the court deprived the widow of her right of survivorship to the joint tenancy by analogy to the statutory treatment of such a joint tenancy interest on divorce.¹⁷⁶ In such a situation, a Texas widow would also lose such a joint tenancy interest, but in Texas the gift of the joint tenancy interest from the husband's separate property would be void under section 46 of the Probate Code.¹⁷⁷ If the spouses had created an *intervivos* right of survivorship to community property¹⁷⁸ or an *intervivos* partition of community property, a Texas court would have to deal with the same problem as that faced by the California court. In that instance a Texas court would impose a constructive trust on the right of survivorship in favor of the husband's heirs with respect to the husband's community interest but would not interfere with the wicked widow's taking that which was her own as a tenant in common, thus treating the right of survivorship as inoperative.

D. SPOUSAL LIABILITY TO THIRD PERSONS

The principal point at issue in *Love v. L K & P, Ltd.*¹⁷⁹ was liability of assignors of unendorsed notes. In absolving the assignors of any liability, the court stated that the spouses of the assignors would therefore also avoid liability.¹⁸⁰ That, of course, was not the entire explanation. The spouses were not liable because they were not parties to the transaction.

173. 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

174. Estate of Castiglioni, 47 Cal. Rptr. 2d 288 (Cal. Ct. App. 1995, rev. denied), discussed in Charlotte K. Goldberg, *Till Death Do Us Part*, L.A. DAILY J., Cal. Law Bus. Sec., Apr. 15, 1996, at 30-31.

175. CAL. PROB. CODE ANN. § 251 (1991).

176. *Id.*

177. TEX. PROB. CODE ANN. § 46 (Vernon 1986). The widow's right in that instance would not be saved by the contractual exception to the statutory rule. Chandler v. Kountze, 130 S.W.2d 327, 329 (Tex. Civ. App.—Galveston 1939, writ ref'd).

178. TEX. PROB. CODE ANN. §§ 451-462 (Vernon 1986 & Supp. 1997).

179. 920 S.W.2d 474 (Tex. App.—Waco 1996, writ denied).

180. *Id.* at 479.

Section 4.031 of the Family Code¹⁸¹ provides “a spousal non-liability law” rather than what the court termed a principle of “spousal liability.”¹⁸²

E. NATURE AND EXTENT OF THE HOMESTEAD

1. *Abandonment of the Homestead*

The Texas Constitution¹⁸³ provides that temporary renting of a family home does not cause it to lose its homestead character, but drawing the line between a homeowner's temporary and permanent removal from a home is often difficult. In *In re Leonard*¹⁸⁴ the couple had lived in their urban home since 1979, but in 1993 they moved to a rural community so that their daughter might attend school there. The wife and her mother held the rural property by a long term lease. The wife testified that the family intended to return to the urban home when the daughter reached a higher level in school and for the time being they rented their urban home. Although the couple had continued to list their telephone number at their urban residence from which their calls were forwarded, and they had continued to vote at their urban precinct, in their 1996 bankruptcy petition they stated that they resided at their rural address. When they later claimed the urban home as their homestead, a creditor asserted that they were barred by judicial estoppel from doing so. The bankruptcy court concluded, however, that identification of their current residence for bankruptcy purposes¹⁸⁵ does not preclude their claim of a homestead under state law. The court held that a homestead had been established in 1979. It was incumbent on the creditor to prove abandonment.¹⁸⁶ Relying on cases in which the debtor's position was weaker than that in the case before it,¹⁸⁷ the court concluded that the creditor had not met its burden of proof. The court commented that a homestead can be established on leased property,¹⁸⁸ but rarely, if ever, would the occupant of a leasehold make such an assertion in preference to claiming a freehold of his homestead.

A bankruptcy court dealt with the problem arising after the marriage of a man and woman who both have a homestead and one of them subsequently moves into the other's home. In *In re Brown*¹⁸⁹ the wife, who

181. TEX. FAM. CODE ANN. § 4.031 (Vernon 1993).

182. *Love*, 920 S.W.2d at 479.

183. TEX. CONST. art. XVI, § 51; TEX. PROP. CODE ANN. § 41.003 (Vernon 1984 & Supp. 1997).

184. 194 B.R. 807 (Bankr. N.D. Tex. 1996).

185. TEX. CONST. art. XVI, § 51; TEX. PROP. CODE ANN. § 41.003 (Vernon 1984 & Supp. 1997).

186. *Leonard*, 194 B.R. at 810.

187. *Rancho Oil Co. v. Powell*, 142 Tex. 63, 66, 175 S.W.2d 960, 963 (1943); *McKenzie v. Mayer*, 20 S.W.2d 238 (Tex. Civ. App.—Waco 1929, no writ).

188. *Leonard*, 194 B.R. at 811 (citing *Sullivan v. Barrett*, 471 S.W.2d 39, 43 (Tex. 1971), and the court might have added the more venerable authority of *Johnson v. Martin*, 81 Tex. 18, 16 S.W. 550 (1891)). See also *Capitol Aggregates, Inc. v. Walker*, 448 S.W.2d 830 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) (maintenance of a homestead by attaching a mobil home to leased premises).

189. 191 B.R. 99 (Bankr. N.D. Tex. 1995).

had been married three times by the time she filed for bankruptcy, had been awarded the family home in her second divorce notwithstanding that prior to the divorce she had already moved into the house of her third husband. At the time she moved, however, she was under restraint of the divorce court to enter the prior home. After her remarriage the wife filed for bankruptcy and claimed her prior marital home as her homestead. In the meantime, the claimed homestead had been leased to the wife's adult daughter and others, so that the wife would have funds to meet mortgage payments on the house, and the house was later listed for sale. When the tenants moved from the property about three weeks after the wife's filing for bankruptcy, the wife and her husband moved into the claimed homestead, where the wife testified she had always intended to live.

Although the court carefully pointed out¹⁹⁰ that a single person without children of a particular marriage can maintain a homestead in the property after divorce,¹⁹¹ the court concluded that the wife's claim failed because of the rule that a person cannot claim but one homestead at one time. In this case, as of the date of her bankruptcy-filing, the court observed that the wife had established that homestead in her third husband's house. The court thus supplied a clearer reason for its conclusion than is found in *In re Claflin*:¹⁹² that a single person who is temporarily out of possession of an existing homestead and becomes a part of a family dwelling in another homestead cannot maintain the prior homestead except by showing an intention of the family to establish a homestead at the former residence.¹⁹³ While there was some evidence in *Claflin* that the wife agreed with her new husband that she could maintain her existing homestead, there was no evidence that he moved there or that he gave up his existing homestead with an intention of moving to his wife's home so that it might be said that both were only temporarily removed from the wife's existing homestead. In *Brown* there was no such evidence¹⁹⁴ and in both instances the couple were living in the husband's existing residence at the time the petition for bankruptcy was filed.

In *Coury v. Prot*¹⁹⁵ the defendant appealed a federal district court's order to turn over certain residential property to satisfy a judgment. His defense was that though he had not occupied the house for several years, it was still his homestead. The trial court had concluded, however, that

190. *Id.* at 101.

191. TEX. CONST. art. XVI, § 50 (1876, as amended, 1973).

192. 761 F.2d 1088 (5th Cir. 1985), discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 40 Sw. L.J. 1, 18-20 (1986).

193. *Brown*, 191 B.R. at 101. There were nevertheless dicta, *id.* at 101-02, in which the court overstated its conclusion. The court suggested that it would be impossible for a person to maintain a homestead, of which he or she is temporarily out of possession, if he or she marries, and the new spouse, not living in a homestead, merely expresses an intent to occupy the temporarily unused homestead. In that instance there is no need for the family to prepare the old homestead for occupancy because the property is still a homestead, though the owner is temporarily absent.

194. *Id.* at 102.

195. 85 F.3d 244 (5th Cir. 1996).

the defendant had abandoned the property as his homestead. When the family moved from the property in 1991 they intended to return, although they had acquired a new house in France and all of their residential belongings were installed there. The wife moved back to Texas from France with the children for over a year in 1992-1993 but lived in another city. The debtor-husband discontinued his Texas address in 1993. When the husband's business kept him in France, the wife and children returned there. Thus, when the turnover order was made in 1994, the family had not resided in the house for three years. The Texas house had been leased after the debtor's initial move to France in 1991. The debtor, therefore, who had shifted all of his significant ties to France and maintained few if any ties to Texas, or the Texas house, had in fact abandoned the property as his homestead. The appellate court found no clear error in the district court's finding.¹⁹⁶

*In re Sandoval*¹⁹⁷ involved a claim of a homestead to which the debtors had moved after the filing of their Chapter 13 bankruptcy petition but before their case's conversion to a proceeding under Chapter 7. Finding that no policy reasons justify departure from the plain language of the statute,¹⁹⁸ the court concluded that the debtors' right to the homestead exemption has to be determined as of the date of the commencement of the original Chapter 13 case rather than the date of conversion to a case under Chapter 7.¹⁹⁹

The Fifth Circuit Court of Appeals dealt with an overt assertion of homestead denial in *In re McDaniel*.²⁰⁰ The debtor who was then occupying 165 rural acres as his home applied for a loan, for which he gave the land as security. He nonetheless denied in writing that the property, apparently the only real property he owned, was his homestead. In his later bankruptcy the owner, nonetheless, claimed the rural acreage as his homestead. The Fifth Circuit Court of Appeals affirmed the lower court's ruling that the homeowner was not estopped under such circumstances to claim the property as his homestead.²⁰¹ Even if the same situation occurs today under the 1995 amendment to the Texas Constitution, the same result would prevail. Even if the denial of homestead occupancy is under oath, the homeowner's denial is not binding except when he indicates that another property is his homestead.²⁰²

In *McDaniel* the court further held that the owner of the property, who was then a widower, might claim a family homestead of up to 200 acres rather than claim merely 100 acres as a single adult. The court so held because the widower had occupied the property as a homestead as part of

196. *Id.* at 255.

197. 103 F.3d 20 (5th Cir. 1997).

198. 11 U.S.C. §§ 522(b)(2)(A), 348(a) (1994).

199. *Sandoval*, 103 F.3d at 22-23.

200. 70 F.3d 841 (5th Cir. 1995).

201. *Id.* at 844.

202. TEX. CONST. art. XVI, § 50.

a family when his wife was still living.²⁰³

In another bankruptcy dispute,²⁰⁴ the court held that a forced prepetition sale of a homestead, unrecorded (and thus unperfected) at the date of bankruptcy, could be set aside by exercise of the trustee's avoiding powers under the Bankruptcy Code.²⁰⁵ The court did not address the further question whether on avoidance of the forced sale of the property it could be claimed by the debtor as his homestead. Even if the debtor was still in possession at the time of the sale and at the date of bankruptcy, it would seem that he could not claim the property as his homestead because he did not own the property at the date of bankruptcy.²⁰⁶

2. Proceeds of Homestead Sale

In *In re Malone*²⁰⁷ a bankruptcy court painstakingly clarified the precise meaning of the Texas statute that specifies that the proceeds of sale of a homestead are exempt for "six months after the date of sale."²⁰⁸ The court concluded that the period runs from the date of sale through the same day of the month six months hence. Thus, if the sale occurred on November 21, 1995, the starting date for counting six months is November 22, and the proceeds of the sale are exempt through May 22, 1996 (all 24 hours of that day). The number of actual days during the six months is irrelevant.

3. Descent of Homestead

The issue in *National Union Fire Insurance Co. v. Olson*²⁰⁹ was whether the homestead of an insolvent decedent's estate passed to his heirs free of all debts. In addition to an adult married son, the divorced insolvent was survived by a minor daughter who lived with her mother pursuant to her parents' divorce decree and had been supported by her father, the decedent. Under the Texas Constitution²¹⁰ and statutory law²¹¹ the homestead passes free of debt if the decedent is survived by a spouse, a minor child, or an unmarried adult child residing with the family. It is not required that the minor child be residing in the homestead.²¹² If there is a surviving minor child, all the heirs take the homestead free of debts except those for purchase money, unpaid taxes, and mechanics' work and materials.²¹³ The rights of the heirs to take the property free of debts of the decedent are not affected by the personal representative's subsequent

203. *M^cDaniel*, 70 F.3d at 844.

204. *In re Elam*, 194 B.R. 412 (Bankr. E.D. Tex. 1996).

205. 11 U.S.C. § 544(a)(3) (1995).

206. See Joseph W. M^cKnight, *Prefiling Exemption Planning: A National Perspective in* JOSEPH NORTON, ET AL., REPRESENTING DEBTORS IN BANKRUPTCY ¶ 3.04 (1988).

207. 201 B.R. 175 (Bankr. W.D. Tex. 1996).

208. TEX. PROP. CODE ANN. § 41.001(c) (Vernon 1984 & Supp. 1997).

209. 920 S.W.2d 458 (Tex. App.—Austin 1996, n.w.h.).

210. TEX. CONST. art. XVI, § 52.

211. TEX. PROP. CODE ANN. § 279 (Vernon 1980).

212. *National Union Fire Ins. Co.*, 920 S.W.2d at 461.

213. *Id.* at n.3.

sale of the homestead property or its abandonment as such, although a right of occupancy of the homestead by a family constituent will preclude a partition of the property.²¹⁴

4. Homestead Claimant's Assertion of Indigent-Rights for Appeal

With one judge dissenting, the Court of Criminal Appeals sitting *en banc* in *Newman v. State*²¹⁵ held that an intermediate appellate court might reasonably conclude that a person appealing a conviction was not entitled as an indigent to a court-compensated counsel and a free record for appeal if he owned an equity in urban family residential homestead and a business homestead as well as an equity in family personal property exemptions. In denying the appellant's requests, the court below had been aware of the fact that the prisoner had recently been adjudicated a Chapter 7 bankrupt and his wife was operating the remnants of the business to provide for their family.

F. LIENS ON HOMESTEAD PROPERTY

In *In re Rebector*²¹⁶ the debtor in a Chapter 13 bankruptcy proceeding sued for damages and to set aside a lien arising under a retail installment contract for home improvements under the Consumer Credit Code.²¹⁷ Under such a contract, as statutorily defined, the consumer pays a credit-price higher than the cash-price of what is bought so that the transaction may be financed by a third person, who may lend the purchase money to the buyer at interest. The latter transaction is outside the Consumer Credit Code. In *Rebector*, however, the contractor-seller was also the payee of a note for the price of the work done, although the note was later assigned to a third person. Because the note was *not given* to the third person, the court concluded that the transaction was subject to the Consumer Credit Code.²¹⁸ Thus, the lien on the debtors' realty under the terms of the note was invalid under the code,²¹⁹ and statutory damages and attorney's fees were, therefore, recoverable by the debtor.

Another Chapter 13-debtor brought an adversary proceeding against the Internal Revenue Service to challenge the validity of a federal tax lien against his homestead.²²⁰ In *In re Sills*²²¹ the Fifth Circuit Court of Appeals held that although (1) a portion of the tax assessed was erroneously

214. *Id.* at 462.

215. 937 S.W.2d 1 (Tex. Cr. App. 1996).

216. 192 B.R. 411 (Bankr. W.D. Tex. 1995).

217. TEX. REV. CIV. STAT. ANN. art. 5069, § 6.01-10 (Vernon 1987 & Supp. 1997).

218. *Rebector*, 192 B.R. at 414 (citing TEX. REV. CIV. STAT. ANN. art. 5069, § 6.02(15) (Vernon 1987 & Supp. 1997)).

219. *Id.* There was no violation of the code in the agreed time-price differential because the 18 percent agreed differential is the upper limit allowed. TEX. REV. CIV. STAT. ANN. art. 5069, § 6.02(15) (Vernon 1987).

220. Both the husband and wife were debtors in the Chapter 13 proceeding, but the challenge was made only by the husband in that the Revenue Service's claim was only against the husband's one-half interest in the community house.

221. 82 F.3d 111 (5th Cir. 1996).

identified in the notice of the federal tax lien as due for 1986 rather than for 1983 taxes, and (2) the property was purchased with a workers' compensation recovery exempt from seizure under the Revenue Code,²²² the lien was nonetheless valid. First, the court said that the minor defect in the notice of lien was insufficient to make it void in light of the purpose of filing to give constructive notice.²²³ As to the homestead claim, the court said that the tax lien does not constitute a seizure or a levy but only an assertion of a security interest which does not violate the provisions of the homestead exemption law.

In *Benchmark Bank v. Crowder*²²⁴ the Supreme Court of Texas considered a claim for equitable subrogation to a federal tax lien by the lender of funds to discharge the federal lien. Reversing the Dallas Court of Appeals denial of subrogation, the court concluded that the federal lien was valid under the supremacy doctrine of the federal Constitution²²⁵ and went a step further to hold that there is no significant difference between the consequences of renewing a valid lien and borrowing money to discharge a valid lien. The Dallas Court of Appeals had interposed the provisions of the Texas Constitution²²⁶ to demonstrate the difference.²²⁷ In reversing the lower appellate court, the court held that "[h]omestead owners must have the ability to renew, rearrange, and readjust the encumbering obligation to prevent a loss of the homestead through foreclosure."²²⁸ This commercially convenient view had already prevailed in the legislative proposal of the constitutional amendment narrowly approved by the people in 1995.²²⁹ In conformity with the conclusion of the United States Supreme Court in *United States v. Rodgers*,²³⁰ however, the court went on to conclude that the lienholder standing in the shoes of the federal government must compensate the non-taxpayer-wife, against whom no lien had been filed, for her interest in the homestead when foreclosing on its lien.²³¹

G. BANKRUPTCY PREEMPTION OF TEXAS HOMESTEAD LAW

A divided panel of the Fifth Circuit Court of Appeals concluded in *In re Davis*²³² that as a Texas homestead was liable for a non-dischargeable

222. I.R.C. § 6334(a)(7) (1994).

223. *Sills*, 82 F.3d at 113 (citing *Richter Loan Co. v. United States*, 235 F.2d 753, 755 (5th Cir. 1956); *In re Cennamo*, 147 B.R. 540, 543 (Bankr. C.D. Cal. 1992)).

224. 919 S.W.2d 657 (Tex. 1996).

225. U.S. CONST. art. VI, cl. 2.

226. TEX. CONST. art. XVI, § 51.

227. *Crowder v. Benchmark Bank*, 889 S.W.2d 525 (Tex. App.—Dallas 1994, no writ), noted in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1252 (1995).

228. *Benchmark Bank*, 919 S.W.2d at 661. See also *id.* at 662.

229. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 49 SMU L. REV. 1015, 1036-37 (1996) [hereinafter McKnight, 1996 Annual Survey].

230. 461 U.S. 677 (1983).

231. *Benchmark Bank*, 919 S.W.2d at 661-62.

232. 105 F.3d 1017 (5th Cir. 1997).

obligation under the Bankruptcy Code.²³³ Reversing the bankruptcy court and the district court,²³⁴ the appellate court held that liability for support obligations is plainly excepted under sections 522(c) and 523(a)(5) from the general rule of property exempted under section 522²³⁵ and the obligee for such liability may therefore proceed by ordinary means to satisfy liability without having recourse to the Texas turnover statute which specifically precludes that relief.²³⁶ The dissenting judge relied principally on the absence of any remedy in the Bankruptcy Code for enforcing liability.

H. PERSONAL PROPERTY EXEMPTIONS

In *In re Leask*²³⁷ a bankruptcy court explained that a bankrupt debtor may voluntarily commit a portion of his income by a wage-withholding order under a Chapter 13 plan, and thus the bankruptcy court's order to the debtor's employer to withhold the debtor's current wages for remission to the bankruptcy trustee was not in violation of Texas's constitutional prohibition of wage-garnishment.²³⁸

Two recent cases dealt with claims of exempt tools of trade. In *In re Baldowski*,²³⁹ the court followed the prevailing weight of authority that tools of trade used in a debtor's trade or profession need not be peculiarly adapted to that trade in order to be exempt under Texas law.²⁴⁰ Thus the booths, china, glasses, and table utensils of the debtor's restaurant were properly classified as her exempt property.

In the other case,²⁴¹ the debtor not only claimed his car as a tool of trade and therefore exempt property but also sought removal of a non-purchase-money lien thereon. There the court took a position contrary to current trends and the liberal intent of the legislature in enacting the current exemption laws. The court held the debtor-constable's car which he used in his employment to serve summons of process was not exempt as a tool of trade, although the court acknowledged that the use-test as applied in *Baldowski*²⁴² is "[t]he current test for determining whether an item [is] an exempt tool of trade in Texas"²⁴³ The court, nevertheless, concluded that "the [d]ebtor's use of the vehicle is too tenuous in relation to his employment as a constable to justify avoidance of [the] lien on the vehicle. In other words, this car is not 'necessary' to his alleged

233. 11 U.S.C. §§ 522(c), 523(a)(5) (1995).

234. *In re Davis*, 170 B.R. 892, 898 (Bankr. N. D. Tex. 1994), *aff'd*, 188 B.R. 544 (N.D. Tex. 1995), commented on in M^cKnight, 1996 *Annual Survey*, *supra* note 229.

235. *Davis*, 1105 F.3d at 1019-20.

236. *Id.* at 1023.

237. 194 B.R. 416 (Bankr. E.D. Tex. 1996).

238. *Id.* at 418 (citing TEX. CONST. art. XVI, § 28).

239. 191 B.R. 102 (Bankr. N.D. Tex. 1996).

240. *Id.* at 104 (citing *In re Legg*, 164 B.R. 69, 73 (Bankr. N.D. Tex. 1994)).

241. *In re Erwin*, 199 B.R. 628 (Bankr. S.D. Tex. 1996).

242. *Baldowski*, 191 B.R. at 104.

243. *Erwin*, 199 B.R. at 630. The court also stated that it was following the use-test as laid down in *In re Legg*, 164 B.R. at 69. *Id.* at 631.

trade—any car would be adequate.”²⁴⁴ The court’s conclusion is simply incomprehensible.²⁴⁵

Another pair of bankruptcy courts were also in disagreement concerning exemptions of interests in insurance policies. In *In re Borchers*²⁴⁶ Judge Clark reached the accepted conclusion that the broader exemption provided by the 1991 amendment to the Insurance Code²⁴⁷ prevails over the narrower amendments to the Property Code²⁴⁸ passed at the same legislative session. The legislative history of the Insurance Code amendment²⁴⁹ makes this point clear. It should also be noted that the two bills were drawn by different draftsmen and that the draftsman of the Property Code amendments was unaware of the proposals for amending the Insurance Code until after the committee hearings on his bill. Judge Clark’s suggestions for amendment of the Property Code²⁵⁰ should be promptly enacted.

In *In re Scott*²⁵¹ the court agreed that the Property Code needs prompt amendment²⁵² but nevertheless concluded that until amended the Property Code provision’s must be given effect by keeping life insurance policies within the value limitation provided in section 42.001.²⁵³

As a matter of federal exemption law (unaffected by Texas law) the Fifth Circuit Court of Appeals held in *In re Carmichael*²⁵⁴ that the right to receive payments from an individual retirement account (IRA) that gives the owner the right to receive payments under federal law after attaining the age of 59½ is exempt property under bankruptcy law²⁵⁵ although the IRA also allows receipt of payments prior to that age on payment of a penalty tax that is applicable to any IRA, even if the provision for paying the penalty is omitted from the document creating the IRA. The court went on to say that the provisions of the Bankruptcy

244. *Id.*

245. Commenting on the specific reference to “motor vehicles” used in a trade or profession added in 1991 to TEX. PROP. CODE ANN. § 42.002(2) (Vernon 1984 & Supp. 1997), the court stated that “adding an exemption for automobiles was not intended to allow debtors with vehicles having only a remote, or even a moderate nexus with their trade or profession to avoid a nonpossessory, nonpurchase-money lien via the bankruptcy process.” *Erwin*, 199 B.R. at 631. But defining or redefining property as exempt under state law automatically brings that property within the purview of 11 U.S.C. § 522(f)(1)(B)(ii) (1995) for avoidance of such liens. That is simply the effect of the Bankruptcy Code itself. The court’s point could be that the lien predated the 1991 amendment but the facts of the cases as related in the opinion do not so state.

246. 192 B.R. 698 (Bankr. W.D. Tex. 1996).

247. TEX. INS. CODE ANN. art. 21.22, § 1 (Vernon Supp. 1997).

248. TEX. PROP. CODE ANN. § 42.002 (12) (Vernon 1984 & Supp. 1997).

249. *See Borchers*, 192 B.R. at 704-05.

250. *See id.* at 705 n.13.

251. 193 B.R. 805 (Bankr. N.D. Tex. 1996).

252. *Id.* at 811.

253. *Id.* at 811-12 (citing TEX. PROP. CODE ANN. § 42.001 (Vernon 1984 & Supp. 1997)).

254. 100 F.3d 375 (5th Cir. 1996).

255. 11 U.S.C. § 522 (d)(10)(E) (1995). The court thus interpreted the phrase “debtor’s right to receive a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract” to include payments from IRAs.

Code²⁵⁶ that give the bankruptcy court power to limit the right to receive exempt payments “to the extent reasonably necessary for the support of the debtor and any dependent of the debtor” provide an effective means of restricting use of exempt funds to avoid abuse of the exemption.²⁵⁷

In allowing a debtor to remove a creditor’s nonpossessory, nonpurchase-money lien from exempt farm equipment in *In re White*,²⁵⁸ the bankruptcy court held that the creditor was not entitled to assert that the interest had become a “possessory” interest merely because the creditor had exercised a contractual right to take possession of the equipment following the debtor’s default in payment of his obligation.

IV. DISPOSITION OF MARITAL PROPERTY ON DIVORCE

A. DIVORCE PROCEEDINGS

1. Jurisdiction

In *Dankowski v. Dankowski*²⁵⁹ the husband appealed from a decree of divorce on the ground that the court lacked personal jurisdiction over him as a non-domiciliary who had not been served with process in Texas and as one who lacked minimum contacts with the state. He had not appeared at the trial, but a plea to the jurisdiction under Rule 120a²⁶⁰ had been made on his behalf at the outset of the trial and had been overruled by the court. His fatal error was in filing a motion for new trial, which constituted a general appearance.

2. Recusal

A motion for recusal must comply with Rule 18,²⁶¹ requiring a verified statement of the grounds for recusal. In *McElwee v. McElwee*²⁶² a motion was made to the presiding judge to recuse himself. The presiding judge’s associate judge, who does not appear to have considered the matter, had in years past been employed by his father who had represented the wife in a previous suit. Thus, it was argued in favor of the husband’s motion for recusal of the presiding judge that the latter was tainted by the associate judge’s father’s prior representation. Under these circumstances the associate judge would have been disqualified from hearing the matter, but the facts do not constitute grounds for *disqualification* of the presiding judge.²⁶³ The court did not comment concerning recusal of the presiding judge because the motion for recusal was improperly made.²⁶⁴

256. 11 U.S.C. § 522 (d)(10)(E) (1995).

257. *Carmichael*, 100 F.3d at 380.

258. 203 B.R. 613, 616-17 (Bankr. N. D. Tex. 1996).

259. 922 S.W.2d 298 (Tex. App.—Fort Worth 1996, writ requested).

260. TEX. R. CIV. P. 120a.

261. TEX. R. CIV. P. 18a.

262. 911 S.W.2d 182 (Tex. App.—Houston [1st Dist] 1995, writ denied).

263. *Id.*

264. *Id.*

3. Associate Judge's Findings in Writing and Notice of Appeal from Findings

In *Robles v. Robles*²⁶⁵ the First Court of Appeals concluded that a docket sheet entry is sufficient to constitute a written record of findings for an appeal from an associate judge's recommendations.²⁶⁶ Further, for the purpose of appeal an objection to the associate judge's conclusions must be filed prior to their being adopted by the presiding judge.

4. Correction of Judgment *Nunc Pro Tunc*

If a court enters a judgment containing a clerical error, the court may correct the error *nunc pro tunc*.²⁶⁷ In *Newsom v. Petrilli*²⁶⁸ an ex-wife brought suit in 1994 for a share of her ex-husband's employment benefits which she asserted had been awarded to her in their 1988 divorce. The decree prepared by the ex-wife's attorney had provided that the "Respondent's employment benefits" be divided between the parties. The respondent in the divorce, however, was the wife who had no employment benefits to divide. To correct the judgment the court substituted the word "Petitioner's" for "Respondent's." The initial error had not resulted from judicial reasoning or determination and was, therefore, a clerical error and not a judicial error.²⁶⁹

In *DeLaup v. DeLaup*²⁷⁰ the Fourteenth District Court of Appeals went very considerably further in approving a *nunc pro tunc* entry of judgment. The couple had reached a settlement of all issues incident to their divorce and testified to their terms of their agreement in open court. The agreement was then transcribed by the court reporter, and the judge approved its terms. A decree prepared by the husband's attorney was then signed by the judge. Almost six months after the trial court had lost plenary jurisdiction under Rule 329b,²⁷¹ the ex-wife filed a motion to enter a revised judgment *nunc pro tunc* or to reform the judgment. The decree had omitted several significant elements of the agreement including a provision for contractual alimony for the wife and detailed provisions for custody of the children. The court granted the motion and the ex-husband appealed. The Fourteenth District Court held that the agreement dictated into the record by the parties constructively complied with the provisions of Rule 11²⁷² (requiring that the agreement be in writing and signed by the parties²⁷³) and the statute of frauds (requiring that a

265. No. 01-94-00367-CV, 1996 Tex. App. LEXIS 3412 (Tex. App.—Houston [1st Dist.] Aug. 8, 1996, no writ) (not released for publication).

266. *Id.* at *12.

267. TEX. R. CIV. P. 316.

268. 919 S.W.2d 481 (Tex. App.—Austin 1996, no writ).

269. *Id.* at 483.

270. 917 S.W.2d 411 (Tex. App.—Houston [14th Dist.] 1996, no writ).

271. TEX. R. CIV. P. 329b(d).

272. TEX. R. CIV. P. 11.

273. *DeLaup*, 917 S.W.2d at 413 (citing *M^cLendon v. M^cLendon*, 847 S.W.2d 601, 608 (Tex. App.—Dallas 1992, writ denied)).

contract be in writing if not to be performed within one year).²⁷⁴ Because the alimony provisions of the contract *could* have been performed within one year, the agreement without actual writing and signatures was sustained.²⁷⁵ The court held alternatively that the agreement measured up to the standards of an enforceable judgment and thus avoided the strictures of the statute of frauds.²⁷⁶

5. Support and Attorney's Fees

In *Ex parte Kimsey*²⁷⁷ the El Paso Court of Appeals commented on the statutory obligation to supply necessities pending trial and, thus, further clarified the basis for awards for interim attorney's fees. On the husband's failure to respond to the court's order to pay \$50,000 into the registry of the court for additional attorney's fees, the wife filed a motion that the husband be held in contempt. Finding that he had \$20,000 in community funds available, the trial court ordered the husband jailed until he paid. At his habeas corpus hearing, the husband did not argue his inability to pay but that he was being imprisoned for debt contrary to the Texas Constitution.²⁷⁸ Relying on *Ex parte Hall*,²⁷⁹ the court repeated the familiar doctrine that the duty of familial support is not a debt "within Article I, Section 18, but a legal duty." Hence, an order to discharge that duty is enforceable by civil contempt.²⁸⁰

*Grossnickle v. Grossnickel*²⁸¹ was an appeal from a new trial for division of property on remand from a prior appeal. Because there was no appeal on the issue of the divorce itself, however, the court held that the ex-wife was not entitled to an order for support pending appeal because no appeal was taken on the divorce,²⁸² though an order for support has been allowed when the divorce itself is appealed.²⁸³

By way of dicta the court went on to overemphasize limitations on orders for payment of attorney's fees.²⁸⁴ The confusion stems from the Texas Supreme Court's decision in *Carle v. Carle*²⁸⁵ where the court dealt with orders for the payment of attorney's fees as ordinarily related to

274. TEX. BUS. & COM. CODE ANN. § 26.01 (Tex. UCC) (Vernon 1987).

275. *DeLaup*, 917 S.W.2d at 414 (citing *International Piping v. M.M. White*, 831 S.W.2d 444, 451 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Winograd v. Willis*, 789 S.W.2d 307, 311 (Tex. App.—Houston [14th Dist.] 1990, writ denied)).

276. *DeLaup*, 917 S.W.2d at 414 (citing TEX. BUS. & COM. CODE ANN. § 26.01 (Tex. UCC) (Vernon 1987); *McLendon*, 847 S.W.2d at 608; *Giles v. Giles*, 830 S.W.2d 232, 238 (Tex. App.—Fort Worth 1992, no writ)).

277. 915 S.W.2d 523 (Tex. App.—El Paso 1995, no writ).

278. TEX. CONST. art. I, § 181.

279. 854 S.W.2d 656 (Tex. 1993).

280. *Kimsey*, 915 S.W.2d at 526.

281. 935 S.W.2d 830 (Tex. App.—Texarkana 1996, no writ).

282. *Id.* at 848.

283. *See In re Joiner*, 755 S.W.2d 496, 499 (Tex. App.—Amarillo 1988), *modified on reh'g on the other grounds*, 766 S.W.2d 263 (Tex. App.—Amarillo 1988, no writ).

284. *Grossnickle*, 935 S.W.2d at 847.

285. 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950).

division of property on divorce. In numerous later instances,²⁸⁶ however, the intermediate appellate courts have not read the language in *Carle* as laying down a comprehensive rule for allowance of attorney's fees to preclude an order that a spouse pay the other spouse's attorney's fees as an element of necessities in an appropriate case. As long ago established,²⁸⁷ one spouse's bringing suit against the other for divorce allows the court to fix an obligation on the petitioner to discharge necessary costs as an element of support from any source as a personal obligation.

6. *Preservation of Property Pending Appeal*

In *Grossnickle*²⁸⁸ the court also relied on statutory authority defining the power to make temporary orders for preservation of property within thirty days after the perfection of an appeal.²⁸⁹ Hence, the trial court's subsequent order to limit the ex-wife's access to community assets was void.²⁹⁰

7. *Appeal: Acceptance of Benefits as Waiver of Defective Service*

In *Bloom v. Bloom*²⁹¹ the wife appealed by writ of error from a decree of divorce on the grounds of defective service of process. The San Antonio Court of Appeals held that any defects in personal service was cured by the appellant's acceptance of benefits of property division, relief from debt, and payments for child support. Her appeal was not brought under the narrow exception that the benefits accepted could not be affected by the success of the appeal.²⁹²

8. *Appeal: Effect of Bankruptcy Filing*

In *Chunn v. Chunn*²⁹³ a divorce had been filed in 1990. The community assets at issue included an interest in a corporation, which was a party defendant. Prior to the entry of the decree, the corporation filed for bankruptcy under Chapter 11. Four months later the bankruptcy court lifted the stay of proceedings²⁹⁴ only as to the trial proceeding, and the divorce-court then rendered judgment. The husband and the corporation then perfected their appeals. The initial question before the appellate court was whether the husband's filing of an appeal violated the

286. See *Capellan v. Capellan*, 888 S.W.2d 539, 544 (Tex. App.—El Paso 1994, writ denied); *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ denied). See also Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 47 SMU L. REV. 1161, 1190 (1994).

287. TEX. FAM. CODE ANN. § 3.59 (Vernon 1993).

288. *Grossnickle*, 935 S.W.2d at 850.

289. TEX. FAM. CODE ANN. § 3.58(h) (Vernon 1993).

290. *Grossnickle*, 935 S.W.2d at 850. The court also struck down the trial court's order that the wife make no comments in criticism of the court and its officers, *id.* at 851, as a denial of her rights of free speech.

291. 935 S.W.2d 942 (Tex. App.—San Antonio 1996, no writ).

292. *Id.* at 945-48 (citing *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002 (1950)).

293. 929 S.W.2d 490 (Tex. App.—Houston [1st Dist.] 1996, n.w.h.).

294. 11 U.S.C. § 362 (1995).

automatic bankruptcy stay. The appellate court held that the husband's papers filed to pursue his appeal merely constituted prematurely filed documents, which had no effect during the automatic stay²⁹⁵ that was subsequently lifted as to the appellate proceedings.²⁹⁶

9. Appeal: Findings and Conclusions

If findings of fact and conclusions of law are properly requested, the trial court must make such findings.²⁹⁷ If an appeal is taken and the court's failed to make the findings requested, the appellate court should abate the appeal and direct the trial court to correct its error.²⁹⁸ There are, however, some exceptions to this rule. If it is apparent from the record that the party complaining of a lack of findings and conclusions suffered no harm, the appeal need not be abated. For example, in *Tenery v. Tenery*²⁹⁹ where it was complained the trial court erred in making a disproportionate division of community property, the appellate court found that there was sufficient evidence in the record for the trial court to make such an appeal and thus that the appeal did not need not to be abated for lack findings and conclusions. In *Zieba v. Martin*,³⁰⁰ moreover, there was no fact in dispute because for the purpose of determining reimbursement the wife-appellant sought to rely on the husband's valuations, which were in the record. Hence, no abatement was necessary to allow findings to be made.

10. Bill of Review

Only the court rendering a decree of divorce or a higher court may properly modify that decree. Hence, an equitable bill of review to set aside the judgment must be brought in the same court that rendered the decree.³⁰¹

B. PROPERTY SETTLEMENT AGREEMENTS

1. Reaching an Agreement

In providing generally that an agreed judgment must be reduced to writing and signed by the parties, the draftsman of Rule 11³⁰² perhaps failed to perceive that such broad language, coupled with the established

295. *Chunn*, 929 S.W.2d at 493.

296. *Id.* at 494.

297. TEX. R. CIV. P. 297. See *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989).

298. TEX. R. APP. P. 81(a). See *Cherne Indus., Inc.*, 763 S.W.2d at 773.

299. 935 S.W.2d 430 (Tex. App.—San Antonio 1995, no writ); see also *Garcia v. Garcia*, No. 13-95-329-CV, 1997 Tex. App. LEXIS 112 (Tex. App.—Corpus Christi, Jan. 9, 1997, n.w.h.) (not designated for publication) (lack of findings and conclusions was harmless error and complainant was able to present her case without them in a child support modification case).

300. 928 S.W.2d 782, 786 (Tex. App.—Houston [14th Dist.] 1996, no writ).

301. *Pursley v. Ussery*, 937 S.W.2d 566, 568 (Tex. App.—San Antonio 1996, no writ).

302. TEX. R. CIV. P. 11. "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writ-

habits of judges and lawyers in familial disputes, would open the way to an intermitable succession of appellate squabbles on the compliance with that broad language. In almost every reported dispute concerning such agreed judgments the courts have nevertheless held that compliance with the broad terms of the rule has been achieved.

In *Clanin v. Clanin*³⁰³ the trial judge signed a brief manuscript order that had been signed by the parties. The order stated that the parties had agreed to terms of settlement which had been recorded by the court reporter. Although the husband later asserted that he had withdrawn his consent to the agreement prior to rendition of judgment, that assertion was evidently a fabrication.³⁰⁴ Although the record was apparently silent on some terms included in the formal decree, the appellate court treated these embellishments as reflecting the exercise of judicial power under section 3.63.³⁰⁵ But how those terms were conformed to the record is not revealed in the appellate opinion. In one instance, apparently because the terms of the formal decree with respect to filing an income tax return actually conflicted with the agreement recorded, the appellate court remanded the decree for correction by the trial court. The trial and appellate process exemplified here is one of casual inattention to detail in response to a rule that may be insufficiently tailored to the realities of practice of family law.

Further evidence of apparent misunderstanding of the process of reaching an agreed judgment is illustrated by *In re M^cIntosh*.³⁰⁶ There the parties, unaccompanied by counsel, met with a mediator and emerged with a draft of agreement, which they were to submit to their attorneys for review, after which, all concerned were to gather with the mediator within ten days to complete the agreement. Fifteen days later, the wife's attorney advised the mediator that the wife had decided not to accept the proposed agreement. Following the provisions of section 3.631,³⁰⁷ the trial court refused to treat the renounced proposed draft as agreed and the husband appealed. As a consequence, the time of the appellate court was wasted by a virtually frivolous appeal, as the Amarillo court indicated by allowing this decision to be reported. Whether there was a binding contract to mediate in that instance is not clear. That there was no mediated agreement in that instance was perfectly clear.³⁰⁸

ing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."

303. 918 S.W.2d 673 (Tex. App.—Fort Worth 1996, no writ).

304. *Id.* at 677.

305. TEX. FAM. CODE ANN. § 3.63 (Vernon 1993).

306. 918 S.W.2d 87 (Tex. App.—Amarillo 1996, no writ).

307. TEX. FAM. CODE ANN. § 3.631 (Vernon 1993).

308. *Davis v. Wickham*, 917 S.W.2d 414 (Tex. App.—Houston [14th Dist] 1996, no writ), was a somewhat similar appeal involving the repudiation of an attempted mediation of a child-custody modification suit.

2. *Terms of the Agreement*

Disputes with respect to terms agreed and their enforceability are distinct from those with respect to whether any agreement was reached. In *Buys v. Buys*³⁰⁹ the Texas Supreme Court considered the effect of a residuary provision of a property settlement agreement incorporated in a pre-*McCarty*³¹⁰ divorce decree covering property that included the husband's military retirement benefits. The specific terms of the agreement made no mention of those benefits but in the residuary clause provided that all property of the parties not specifically set aside to the husband would belong to the wife. In *McCarty* the United States Supreme Court later held on June 25, 1981 that military retirement benefits belonged to a pensioner alone.³¹¹ Within fifteen months Congress passed the Uniformed Services Former Spouses' Protection Act of 1982³¹² (effective February 1, 1983) to provide that such benefits should be divided on divorce under state law. In order to preclude further state court divisions of military retirement benefits not treated in pre-*McCarty* divorces, Congress provided in 1990 that

A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce . . . (including a court . . . approved property settlement incident to such decree) . . . was issued before June 25, 1981, and . . . did not treat . . . any amount of retired pay of the member as property of the member and the member's spouse or former spouse.³¹³

This statute seems to preclude all further attempts to divide military retirement benefits left undivided in pre-*McCarty* cases. This result was early indicated by the Texas Supreme Court in *Cameron v. Cameron*³¹⁴ and seemingly adhered to by that court in refusing a writ of error in *Powell v. Powell*.³¹⁵

The San Antonio Court of Appeals, from which the appeal in *Buys* was taken, had interpreted the 1990 congressional amendment to mean that only those decisions that specifically dealt with military retirement interests are covered by the 1990 amendment. Those that treated such benefits specifically were, of course, covered by *McCarty*. In reversing the court below, the Texas Supreme Court concluded that the 1990 amendment was not meant to address pre-*McCarty* cases resting on an application of state law, that is, the terms of the property settlement agreement, apart from any judicial intervention. Regrettably, such cases seem to

309. 924 S.W.2d 369 (Tex. 1996).

310. *McCarty v. McCarty*, 453 U.S. 210 (1981).

311. *Id.* at 235.

312. Pub. L. No. 97-252, 96 Stat. 730 (codified as amended at 10 U.S.C. § 1408(c)(1) (1983)). See *McKnight*, 1996 *Annual Survey*, *supra* note 229 at 1023-24.

313. 10 U.S.C. § 1408(c)(1).

314. 641 S.W.2d 210, 213 (Tex. 1982).

315. 703 S.W.2d 434 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

have been precisely what Congress meant to provide and may have been a consequence of the constitutional posture of the *McCarty* case. Specifically, “[a] court may not treat retired pay as property . . . if a final decree of divorce . . . (including a court . . . approved property settlement incident to such decree) . . . was issued before June 25, 1981, and . . . did not treat . . . any amount of retired pay”³¹⁶ The pre-*McCarty* trial court in *Buys* had not specifically mentioned retired pay, as a result of the general terms of the property settlement agreement. Although one would like to agree with the court’s conclusion and the intricate arguments that prompted it, that result seems precluded by the statute.

Very different concerns were before the Fort Worth appellate court in *Fryman v. Fryman*.³¹⁷ There, the couple’s property settlement provided for support and custody of their children and that the husband would pay the wife \$1,000 a month until her remarriage, death, or filing “on her behalf or on the behalf of the children any modification suit concerning” child support or custody. After the ex-wife brought suit to modify some provisions as to custody, the ex-husband sought a declaratory judgment that his obligation to pay contractual alimony was extinguished. The court granted the declaratory judgment sought by the ex-husband and the ex-wife appealed. The Fort Worth Court of Appeals held that the provision for termination of alimony payments as a consequence of bringing suit concerning the best interest of the children³¹⁸ interfered with the authority of the court in that regard and was therefore contrary to public policy and void.³¹⁹

In *Cavazos v. Cavazos*,³²⁰ two minor children through their mother as next friend brought suit against their father to enforce a trust which they alleged was created by their father on their behalf as part of the parents’ property settlement. The agreement itself referred to and incorporated by reference four schedules with respect to the couple’s assets and liabilities. An unsigned fifth schedule provided that stock of the husband’s business would be held in trust for the children. The fifth unsigned schedule was not incorporated by the terms of the agreement but was filed with the court, although not referred to in the court’s decree. The appellate court agreed with the trial court that the alleged trust was not enforceable as part of the contractual agreement as it was not incorporated into the agreement by the parties or by the court.³²¹

316. 10 U.S.C. 1408(c)(1) (1995).

317. 926 S.W.2d 602 (Tex. App.—Fort Worth 1996, writ denied).

318. Three prior cases dealing with child support had reached the same conclusion: *Leonard v. Lane*, 821 S.W.2d 275 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Hill v. Hill*, 819 S.W.2d 570 (Tex. App.—Dallas 1991, writ denied); *Hoffman v. Hoffman*, 805 S.W.2d 848 (Tex. App.—Corpus Christi 1991, writ denied).

319. *Fryman*, 926 S.W.2d at 605-06.

320. 941 S.W.2d 211 (Tex. App.—Corpus Christi 1996, writ requested).

321. *Id.*

C. MAKING THE DIVISION

In *Dankowski v. Dankowski*³²² the divorce court accorded no significance to a property settlement agreement entered into in connection with a void Taiwanese divorce, and the Fort Worth Court of Appeals affirmed that conclusion.³²³ The appellate court reiterated the subsisting rule that Texas divorce courts will not divide foreign realty except to the extent of ordering a party over whom the court has in personam jurisdiction to make a conveyance.³²⁴

In making the ultimate divisions of community property in *Grossnickle v. Grossnickle*,³²⁵ the court held that the spouse in possession of property was responsible for its deterioration in value due to neglect. All too often divorce courts tend to gloss over culpable inattention to marital property that is allowed to deteriorate in the course of the breakdown of a marriage. The appellate court's sensitivity to this point sets a much needed general standard for trial courts. By contrast, however, the appellate court, nevertheless, seemed too much inclined to exonerate the divorce court's failure to consider future federal tax consequences in making a property division.³²⁶ The same casual attitude toward ignorance of vital aspects of the federal tax law was expressed by the same court in *Harris v. Holland*,³²⁷ where the later consequences of dividing high basis and low basis assets was in issue. Although undue importance should not be made of this point and the Texarkana court's warning against inordinate emphasis on speculation and surmise³²⁸ should not be ignored, federal tax consequences of property division should not be casually disregarded.

In *Grossnickle*,³²⁹ the Texarkana court reasonably excused the trial court's almost inevitable failure to adhere to a consistent use of the value of assets at the date of divorce when making the division on remand at a much later time. Although the appellate court found errors in computation of the value of the community estate that, at most, could have amounted to an additional three percent of the total, the division was regarded as not so disproportionate as to constitute an abuse of discretion.³³⁰

In addition to very significant community rights of reimbursements which the trial court overlooked in making the division on divorce, the appellate court in *Zeiba v. Martin*³³¹ sensed a general abuse of discretion in making an excessively favorable property division in favor of the hus-

322. 922 S.W.2d 298 (Tex. App.—Fort Worth 1996, no writ).

323. *Id.* at 304.

324. *Id.* at 303.

325. 935 S.W.2d at 846.

326. *Id.* at 847-48.

327. 867 S.W.2d 86, 88 (Tex. App.—Texarkana 1993, no writ).

328. *Grossnickle*, 935 S.W.2d at 847.

329. *Id.* at 837.

330. *Id.* at 851.

331. 928 S.W.2d 782 (Tex. App.—Houston [14th Dist.] 1996, no writ).

band.³³² The appellate court also found an unreconcilable conflict in the amount of attorney's fees awarded to the wife that required remand.³³³ *Zieba*, however, was a somewhat unusual instance of wayward trial disposition. In *Farley v. Farley*,³³⁴ before the Eastland court on grounds similar to *Zieba*, the court found no abuse of discretion in making the property division but found an insufficiency of evidence to determine the reasonableness of attorney's and expert's fees awarded. The wife's sole evidence on such matters was insufficient.³³⁵

D. ENFORCEMENT

*Ex parte Waldrep*³³⁶ presented a situation which does not often occur. The contemnor-wife did not argue that the court's order was in any sense ambiguous or equivocal but that it was merely oral. The court had ordered the wife to deliver a particular car to a specific place at a specific time, but the order was not in writing and the wife failed to obey it. The majority of the court, nevertheless, held that the merely oral order was invalid.³³⁷

*Ex parte Swate*³³⁸ involved a protracted effort on the part of an ex-wife to recover a very large judgment from her prior husband, who had remarried and was later divorced from his subsequent wife. A receiver had been appointed at the instance of the first wife and the receiver had got an order against the second wife to "turn over any funds she received from the [divorce court]." On the second wife's failure to comply, she was found in contempt and ordered to pay the specific sum of \$10,000 to the receiver and a specific fine to the court. In making the commitment order without a further hearing, the court added that she should also make "suitable payment arrangements" to the receiver for over \$53,000. The Texas Supreme Court held that the commitment order was void for lack of procedural due process.³³⁹ In a concurring opinion, Justice Gonzalez went further in saying that the court also lacked authority to make the turnover order because a judgment had not been rendered against the second wife or someone under her control.³⁴⁰

A 1988 decree of divorce in *In re Wyly*³⁴¹ had ordered sale of certain realty and division of the proceeds between the parties. If the parties could not later agree on a sales price, it was further provided that a re-

332. *Id.* at 791. A suggestion of abuse of discretion in a post-divorce division of undivided assets in *Forgason v. Forgason*, 911 S.W.2d 893 (Tex. App.—Amarillo 1995, writ denied) as noted in M^cKnight, 1996 *Annual Survey*, *supra* note 229 at 1055-56, could not be resolved because of an inadequate record of property values.

333. *Zeiba*, 928 S.W.2d at 791.

334. *Farley v. Farley*, 930 S.W.2d 208 (Tex. App.—Eastland 1996, no writ).

335. *Id.* at 213-14.

336. 932 S.W.2d 739 (Tex. App.—Waco 1996, no writ).

337. *Id.* at 741.

338. 922 S.W.2d 122 (Tex. 1996).

339. *Id.* at 125.

340. *Id.*

341. 934 S.W.2d 175 (Tex. App.—Amarillo 1996, writ requested).

ceiver would be appointed. After unsuccessful efforts of the parties to sell the property within a year of the decree, the ex-husband moved for appointment of a receiver, but that motion was not acted on by the court, and the parties continued unsuccessfully to attempt to sell the property. In 1995 the ex-husband sought enforcement of the decree and reiterated his motion for appointment of a receiver. The ex-wife asserted that the ex-husband's motion was barred by the statute of limitation. Affirming the order of the trial court, the Amarillo Court of Appeals concluded that the original motion for appointment of a receiver was timely and because it had not been acted on by the court, the reiteration of the motion was also timely.³⁴²

Following common usage, the divorce court in *Soto v. Soto*³⁴³ awarded to each spouse the property in his or her possession. At the time, the husband had actual control of real property, the title of which stood in the names of both spouses. In her subsequent suit for partition of the property as undivided, the ex-wife asserted that because her name was on the deed, she was also in possession of the property as a matter of law. The El Paso Court of Appeals rejected this assertion. The court went on to say that in the context of divorce decrees (except as to retirement benefits), possession of property means physical control of the property or the power to achieve its immediate enjoyment.³⁴⁴

The argument advanced by the ex-wife in *Sanderlin v. Sanderlin*³⁴⁵ was also untenable. After the wife filed suit for divorce, the husband made a beneficiary-designation of his Texas governmental retirement benefits in favor of his wife. In a property settlement agreement later incorporated in the divorce decree, however, all rights in the husband's retirement benefits was awarded to him. The ex-husband died soon after the divorce, not having changed the beneficiary-designation. The ex-wife claimed the retirement benefits, which had been almost wholly the husband's separate property. Despite the terms of the settlement agreement, the ex-wife relied on Government Code section 824.101(d),³⁴⁶ which provides that "except as otherwise provided by law" a beneficiary designation of a Texas governmental retirement benefit controls, and Family Code section 3.633(e),³⁴⁷ which provides that its terms do not apply to benefits under the Texas public retirement system. Under the terms of the property settlement agreement, however, the effect of these provisions is that the contract supersedes the earlier beneficiary-designation.³⁴⁸

In *Fraser v. Fraser*,³⁴⁹ the ex-husband, prior to his bankruptcy, had

342. *Id.* at 177 (citing *Hicks v. First Nat'l Bank*, 778 S.W.2d 98, 101-02 (Tex. App.—Amarillo 1989, writ denied)).

343. 936 S.W.2d 338 (Tex. App.—El Paso 1996, no writ).

344. *Id.* at 343.

345. 929 S.W.2d 121 (Tex. App.—San Antonio 1996, writ denied).

346. TEX. GOV'T CODE ANN. § 824.101(d) (Vernon 1987).

347. TEX. FAM. CODE ANN. § 3.633(e) (Vernon 1993).

348. *Sanderlin*, 929 S.W.2d at 123-124.

349. 196 B.R. 371 (Bankr. E.D. Tex. 1996).

been ordered by a Connecticut divorce court to pay interest on funds appropriated by him from a family estate that his ex-wife was obligated to repay as executrix. The bankruptcy court held that this order of the divorce court constituted an alimony award to the ex-wife and was therefore not dischargeable under Bankruptcy Code section 523(a)(5).³⁵⁰

A recently reported bankruptcy case illustrates application of the 1994 amendment to section 523(a)(15) of the Bankruptcy Code.³⁵¹ Under that amendment a bankruptcy court may determine that the benefits to a debtor-obligor may outweigh the detriments to the payee under a divorce decree so that the decreed obligation is dischargeable in the debtor's bankruptcy. In *In re Gamble*³⁵² the bankruptcy court held that the debtor had had the ability to pay a \$100,000 note agreed to be discharged in settlement of the 1990 divorce and his financial condition was improved at the date of bankruptcy, the time for determination of ability to pay under Bankruptcy Code section 523(a)(15)(A). Neither of the ex-spouses, however, were in comfortable financial circumstances. The court held that the benefit of allowing a discharge to the debtor ex-husband did not outweigh the detriment to the ex-wife.³⁵³

E. OTHER POST-DIVORCE DISPUTES

Several recent disputes were very peripheral to the concerns of both spouses. In *Votzmeyer v. United States*³⁵⁴ a taxpayer-ex-husband was denied alimony-treatment of payments made to his former wife under the Internal Revenue Code.³⁵⁵ The couple was divorced in 1985 and a provision for contractual alimony was made a part of the divorce decree. In 1986, when the ex-husband became a bankrupt, his ex-wife successfully contested his attempt to discharge the debt. The bankruptcy court found that the debt was "in the nature of alimony" under the Bankruptcy Code.³⁵⁶ The United States was not a party to that particular dispute, although it was a creditor in the bankruptcy and had notice of the matter. In 1985 and from 1987 through 1990, the ex-husband deducted his contracted payments to his ex-wife from his gross income in his annual federal income tax returns and the ex-wife included the amounts received as part of her taxable income. The Revenue Service disallowed the ex-husband's deduction, and he sought a declaratory judgment sustaining his position. Although the federal district court concluded that it lacked subject matter jurisdiction to issue a declaratory judgment in this case,³⁵⁷ it went on to express the opinion that although the bankruptcy court decided the alimony issue for bankruptcy purposes, the finding was not con-

350. 11 U.S.C. § 523(a)(5) (1995).

351. 11 U.S.C. § 523(a)(15) (1995).

352. 196 B.R. 54 (Bankr. N.D. Tex. 1996).

353. *Gamble*, 196 B.R. at 58.

354. 202 B.R. 235 (S.D. Tex. 1996).

355. 26 U.S.C. § 71 (1995).

356. 11 U.S.C. § 523(a)(5)(B) (1995).

357. *Votzmeyer*, 202 B.R. at 236.

trolling for federal tax purposes.³⁵⁸ Although the Tax Reform Act of 1986³⁵⁹ removed the requirement that an effective alimony provision must terminate on the death of the receiving spouse, that act did not apply to earlier divorce decrees. Hence, the 1985 decree that did not specify termination on the payee's death did not allow payments to qualify for tax deductibility.

Three appellate cases dealt with disputes between divorced spouses and their attorneys. One malpractice case³⁶⁰ was defeated both by the failure to prove causation and by failure to be brought within the statute of limitation.³⁶¹ In another,³⁶² it was asserted that a cause of action asserted by a bankrupt ex-husband against his attorney was an asset of his bankruptcy estate. The bankruptcy court held that although the representation of the client occurred prior to the bankruptcy, the alleged loss accrued after the bankruptcy filing and thus the cause of action was not an asset of the bankruptcy estate.³⁶³ The third case³⁶⁴ involved a bankrupt-attorney against whom a judgment for malpractice had been rendered prior to his bankruptcy, and the judgment debt had been discharged. The bankruptcy court, however, allowed the creditor-client to proceed on the bankrupt's behalf with a malpractice claim in state court against his former lawyer's attorney but without the bankrupt-lawyer's consent. A summary judgement granted in favor of the defendant-attorney was affirmed by the Fourteenth District Court of Appeals, saying that a Texas creditor does not have an interest in his debtor's unasserted legal malpractice claim.³⁶⁵ In this instance, the bankrupt-lawyer had not asserted the claim because he was satisfied with his representation.³⁶⁶

358. *Id.* at 237.

359. Pub. L. No. 99-514, 100 Stat. 2085 (codified as I.R.C. § 1843(c)(2) (1986)).

360. *Hall v. Stephenson*, 919 S.W.2d 454 (Tex. App.—Fort Worth 1996, writ denied).

361. *Id.* at 468.

362. *In re Swift*, 198 B.R. 927 (Bankr. N.D. Tex. 1996).

363. *Id.* at 937.

364. *Dauter-Clouse v. Robinson*, 936 S.W.2d 329 (Tex. App.—Houston [14th Dist.] 1996, n.w.h.).

365. *Id.* at 332.

366. *Id.* One is reminded of *White v. InteCom, Inc.*, No. 93-94-00394-CV (Tex. App.—Austin Sept. 13, 1995, writ denied) (not designated for publication), noted in M^cKnight, *1996 Annual Survey*, *supra* note 229, at 1030, which involved an ex-husband's ineffective assignment of any potential claim for malpractice he might have against his lawyers notwithstanding that he asserted that he was well satisfied by their representation.

