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Family Law: Husband and Wife

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FAMILY LAW: HUSBAND AND WIFE

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I. STATUS

A. NON-MARITAL UNIONS

The subject of unisexual unions, or same-sex marriages as they are sometimes called with some perversity of language, has become a particular favorite of student editors.[1] Much of the writing on the subject has tended to be concerned with the recent Hawaiian case,[2] as well as the Congressional enactment popularly called the Defense of Marriage Act,[3] which purports to allow one state to ignore or discountenance such a union sanctioned by the law of another state.

The most recent appellate examination of claims arising from a unisexual arrangement in Texas was made in *Zaremba v. Cliburn*.[4] There it was asserted that a cohabital sexual relationship of seventeen years between two men had produced a partnership between them, and the dissolution of that association had produced grounds for legal recovery for breach of contract. In remanding the case to the trial court, the Fort Worth Court

1. Perhaps the most arresting title is Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996). But many other are available: *see* Carlos A. Ball, *Moral Foundations for Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997); David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997); David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997); Marc A. Fajer, *Toward Respectful Representation: Some Thoughts of Selling Same-Sex Marriage*, 15 YALE L. & POL'Y REV. 599 (1997); Kathryn Dean Kendell, *Principles and Prejudice: Lesbian and Gay Civil Marriage and the Realization of Equality*, 22 J. CONTEMP. L. 81 (1996); Lynne Marie Kohm, *The Homosexual "Union": Should Gay and Lesbian Partnerships be Granted the Same Status as Marriage?*, 22 J. CONTEMP. L. 51 (1996); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Diane M. Guillerman, Comment, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425 (1997); Rodney Patton, Comment, *Queerly Unconstitutional?: South Carolina Bans Same-Sex Marriage*, 48 S.C. L. REV. 685 (1997).

2. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *discussed in* Joseph W. M'Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1226 (1995); *see also* Baehr v. Miike, 910 P.2d 112 (Haw. 1996).

3. Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended in 28 U.S.C. § 1738 (1996)); *see* Arthur R. Landever, *The Constitutional Arguments For and Against the Defense of Marriage Act*, 11 AM. J. FAM. L. 23 (1997).

4. 949 S.W.2d 822 (Tex. App.—Fort Worth 1997, no writ).

of Appeals held that claims based on alleged promises made in relation to such an arrangement would fail without allegations of written evidence of such promises under the 1987 amendment to the Texas Statute of Frauds.[5] The plaintiff's failure to allege a signed promise in writing, therefore, made the plaintiff's pleading fatally defective and incurable by amendment.[6] The court made it clear in quoting from the legislative history of the amendment that the terms of the statute apply not to the promise of non-marital cohabitation itself but only to promises collateral thereto.[7] With respect to assertions of infliction of emotional distress arising out of an alleged exposure to disease, the appellate court concluded that the claimant might amend his pleading to restate that claim.[8]

B. Informal Marriage

Two cases considered together before the Texas Supreme Court[9] concerned the one-year limitation period provided in former section 1.91 of the Family Code (now a two-years period in section 2.401(b)) for asserting the validity of an informal marriage after the couple have separated. In both actions the informal marriage was asserted over one year, but less than two years, after the separation, and in both actions recovery was sought under the wrongful death and survival statutes.[10] In *Shepherd v. Ledford*[11] the existence of the elements necessary for an informal marriage were stipulated by the parties. On the issue of the one-year bar to the claim of the validity of the marriage the Fort Worth Court of Appeals had affirmed the trial court's judgment for the plaintiff on the grounds that the two-years limitation period in article 4590i, section 10.01[12] of the revised statutes prevails over the one-year period for assertion of a valid informal marriage.[13] The wrongful death action, therefore, succeeded under the facts alleged. In *Fuentes v. Transamerican Natural Gas Corp.*[14] the San Antonio Court of Appeals had reversed the trial court's summary judgment for the defendant and had also held that the two-years limitation period of section 10.01 prevails over the provision of the Family

5. *See* Tex. Bus. & Com. Code Ann. § 26.01(a), (b)(3) (Vernon 1987): "[A]n agreement made on . . . consideration of nonmarital . . . cohabitation . . . is not enforceable unless the . . . agreement, or a memorandum of it is (1) in writing; and (2) signed by the person to be charged with the . . . agreement. . . ." The court interpreted the statute to cover promises made prior but collateral to a relationship that continued after the amendment. *See Zaremba*, 949 S.W.2d at 827.

6. *See id.* at 829.

7. *See id.* at 827, 832-33 (following Hollom v. Carey, 343 N.W.2d 701 (Minn. App. 1984)).

8. *See id.* at 829.

9. *See* Shepherd v. Ledford, 41 Tex. Sup. Ct. J. 333, 1998 WL 30012 (Jan. 29, 1998).

10. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 71.004(a), 71.021(b) (Vernon 1997).

11. 926 S.W.2d 405 (Tex. App.—Fort Worth 1996), *aff'd*, 41 Tex. Sup. Ct. J. 333, 1998 WL 30012 (Jan. 29, 1998).

12. Tex. Rev. Civ. Stat. Ann. art. 4590i, § 10.01 (Vernon Supp. 1998).

13. *See Shepherd*, 926 S.W.2d at 410.

14. 933 S.W.2d 624 (Tex. App.—San Antonio 1996), *aff'd*, Shepherd v. Ledford, 962 S.W.2d 28 (Tex. 1998).

Code.[15] In *Shepherd v. Ledford*, in which the facts to prove the informal marriage were stipulated, the Texas Supreme Court disagreed with the court of appeals that there was any controlling conflict between the two statutes as to timely assertion of the claim.[16] Standing to sue under the Family Code had been satisfied by stipulation. In *Fuentes*, on the other hand, the plaintiff was barred from bringing her action because of her non-compliance with the provision of the Family Code.[17]

Since its amendment in 1995 and recodification in 1997, the one-year provision has been replaced with a two-year limitation in section 2.401(b) of the Family Code.[18]

With respect to the survivorship action in *Shepherd*, because the decedent had no descendants and only a personal estate, his entire estate vested in his widow, and she was, therefore, entitled to maintain the survivorship action as the decedent's heir at law.[19] In *Fuentes* there was no proved widow and, hence, the claimant had no standing to sue.[20]

C. Ceremonial Marriage

In its effort to strengthen marital bonds and, thus, to turn aside the mounting incidence of divorce, the Louisiana Legislature instituted a type of ceremonial marriage popularly called a *covenant marriage* that by its terms requires the couple, in applying for a license, to attest to having had counseling prior to marriage and to agree to have counseling prior to any effort to dissolve the marriage by divorce, as well as assenting to a waiting period of two years before a divorce may be granted.[21] It has been long argued,[22] without any apparent effect, that a standard Texas ceremonial marriage (with solemn vows of lifelong duration provable by the testimony of a large number of witnesses before whom the promises were made) produces a cause of action for breach of contract (if not a bar to divorce). One wonders whether this sort of written agreement will have the effect that the proponents of the Louisiana Act ascribe to the *covenants* provided there. The popularity of divorce in Texas is such that it is unlikely that the legislative contagion of such hopeful notions as those expressed by the Louisiana Legislature will spread to Texas.

D. Interspousal Tort

It was asserted in *Guerrero v. Memorial Medical Center*[23] that a wife's employer was liable for her death when she was murdered by her es-

15. *See id.* at 626-27.
16. *See Shepherd*, 962 S.W.2d at 32.
17. *See id.* at 34.
18. Tex. Fam. Code Ann. § 2.401(b) (Vernon Supp. 1998).
19. *See Shepherd*, 962 S.W.2d at 32.
20. *See id.* at 34.
21. *See* 1997 La. Sess. Law Serv. Act 1380 (H.B. 756).
22. *See* Joseph W. M'Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 23 Sw. L.J. 109, 128-30 (1978).
23. 938 S.W.2d 789 (Tex. App.—Beaumont 1997, no writ).

tranged husband on the employer's premises. The Beaumont Court of Appeals held that when the employer did not know and had no reason to know that the husband had mistreated his wife and was about to murder her, the husband's acts were unforeseeable by the employer, and the employer, therefore, had no duty to protect the wife from her husband.[24]

E. Loss of Consortium

In *Dalrymple v. The University of Texas System*[25] a university professor sued the university in connection with the termination of his employment, and his wife asserted a cause of action for loss of consortium as a consequence of intentional infliction of emotional distress by the employer. In the wife's appeal from a summary judgment in favor of the defendant the Austin Court of Appeals concluded that some facts can give rise to an employee's claim for intentional infliction of emotional distress in an employment context and, thus, the employee's spouse may assert a cause of action for loss of consortium in such circumstances when the employee's claims result in physical injury.[26]

A somewhat different point was before the Beaumont Court of Appeals in *Isern v. Watson*.[27] There the claim for loss of consortium for a spouses's physical injury was not in dispute. The defendant, however, complained that the claimant-husband might not assert three independent grounds for recovery in connection with the loss: (1) loss of his wife's services as a housewife; (2) loss of his marital rights; and (3) his loss of his wife's companionship and society. In the absence of any assertion of authority to the contrary the appellate court approved all three elements of damage for loss of consortium.[28]

II. CHARACTERIZATION OF MARITAL PROPERTY

A. Contract in Consideration of Marriage

Marsh v. Marsh[29] is a very odd case from the Fourteenth Court of Appeals. The husband contested the validity of a premarital agreement, but neither party sought a divorce, though the parties were separated, and the contestant did not assert that the agreement was merely a promise to make a gift.[30] Though the husband asserted at the trial that he did not enter into the agreement voluntarily, no appeal was taken on that point. The appeal turned wholly on whether the premarital agreement was un-

24. *See id.* at 795.
25. 949 S.W.2d 395 (Tex. App.—Austin 1997, pet. granted).
26. *See id.* at 404-05.
27. 942 S.W.2d 186 (Tex. App.—Beaumont 1997, pet. filed).
28. *See id.* at 197.
29. 949 S.W.2d 734 (Tex. App.—Houston [14th Dist.] 1997, no writ).
30. *See* Hibbler v. Knight, 735 S.W.2d 924, 926-27 (Tex. App. — Houston [1st Dist.] 1987, writ ref'd n.r.e.) (unenforceability of premarital agreement to make a gift), *commented on* in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 Sw. L.J. 1, 8-9 (1990).

conscionable,[31] a term that does not lend itself to general objective application in this context. Finally, the spouses' dispute had apparently wound up with a disagreement as to who should have paid the gift tax on the transaction, if one was due, but most of the promised gift (if such it was)[32] was never carried out.

As a sort of sideshow, the trial included testimony by two distinguished and seasoned experts on Texas family law, both Certified Family Law Specialists, who expressed opinions that were so different as to be not easily referable to the same provisions or the same code. The curious disparity of opinions aptly illustrates the meaningless quality of the term *unconscionable*, stripped of the element of fairness by an earlier decision of the same court,[33] and of the element of volition specifically provided as an independent *sole* test of validity in the preceding subparagraph of the statute.[34] Two years ago, a committee of the Family Law Section recommended repeal of the unconscionability-and-lack-of-disclosure test for enforceability of premarital and marital partitions and exchanges in former sections 5.46 and 5.55 of the Family Code (now sections 4.006 and 4.105) so that the sole test of validity would be *volition*, but with an additional provision setting out some badges of volition for the assistance of the finder of fact.[35]

The agreement in *Marsh* was simply an old-fashioned contract made in consideration of marriage, and it provided that the husband would set up a trust for the wife to include one half of his estate. The contract satisfied the writing requirement prescribed in the Texas Business and Commerce

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31. *See* TEX. FAM. CODE ANN. § 4.006(a)(2) (Vernon Supp. 1998). Lack of disclosure of the other spouse's financial condition, the other element of § 4.006(a)(2), was not discussed at length because the court failed to find unconscionability of the agreement. *See Marsh*, 949 S.W.2d at 743.

32. *See id.*; *see also* Miele v. United States, 637 F. Supp. 998, 1000 (S.D. Fla. 1986) (discussing agreement made in consideration of marriage and relinquishment of certain rights by the wife-to-be).

33. *See* Chiles v. Chiles, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

34. *See* TEX. FAM. CODE ANN. § 4.006(a)(2).

35. *See Recommendation of the Committee on Revision of Title 1 of the Family Code* (on file with the SMU Law Review Association), *approved by* the Council of the Family Law Section of the State Bar of Texas on May 10, 1996, to replace Texas Family Code §§ 5.46 and 5.55 (now §§ 4.006 and 4.105) with a single test for enforcement.

> § 5.46 Enforcement.
>
> (a) A premarital or marital agreement, partition, or exchange is not enforceable if the party against whom enforcement is sought proves that he or she did not execute the agreement, partition, or exchange voluntarily.
>
> (b) In determining whether a party acted voluntarily, consideration may be given to whether the party (1) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, did not voluntarily or expressly waive, in writing, any right to disclosure of the property or financial obligation of the other party beyond the disclosure provided, and did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party; or (2) acted as a result of the exertion of fraud, duress, or overreaching by the other party.
>
> (c) The standards of enforcement and defenses referred to in this section are the exclusive standards of enforcement and defenses.

Id.

Code, section 26.01, but article XVI, section 15 of the Texas Constitution had no bearing whatever on this contract. The contract was enforceable.[36]

B. Tracing

The community presumption, statutorily renumbered as section 3.003 of the Family Code[37] during the 1997 legislative session, maintains its determinative position in favor of community characterization of any "[p]roperty possessed during or on dissolution of a marriage."[38] The presumption in favor of the community estate must be rebutted as before by clear and convincing evidence.[39]

In *Winkle v. Winkle*[40] the court relied on an imprecise mix of tracing and contractual principles to characterize the purchase of a lot during marriage. Though the terms of the contract between the seller and buyer are not described, the down-payment on the contract of purchase was made with community property and the rest of the price was paid at closing with the husband's separate property. The court nevertheless relied on the down-payment in characterizing the purchase as a community lot and fortified this conclusion with the statement that the lot was "intended as a home of the community."[41] Although the intention of the buyer may assist the court in interpreting the contract of purchase, it is not the major consideration in determining the characterization of property as community or separate.[42] The court treated the payment of the husband's separate funds as establishing a mere right of reimbursement.[43] The imprecision of the court's opinion is such that the conclusions are not of very much value except as intimations to the approach to characterization by the Corpus Christi court.

C. Unvested Stock Options

In *Bodin v. Bodin*[44] the court concluded that unvested stock options received by the husband from his employer during marriage were community property if their receipt was merely contingent on his continued employment.[45] The court analogized the options to unvested military retirement benefits as in *Cearley v. Cearley*.[46] Thus, the options would be subject to division on divorce.[47] But how might they be exercised effec-

36. *See Marsh*, 949 S.W.2d at 743.
37. Tex. Fam. Code Ann. § 3.003(a) (Vernon Supp. 1998).
38. *Id.*
39. *See id.* § 3.003(b).
40. 951 S.W.2d 80 (Tex. App.—Corpus Christi 1997, pet. denied).
41. *Id.* at 88.
42. *See id.* (citing Welder v. Welder, 794 S.W.2d 420, 427 (Tex. App.—Corpus Christi 1990, no writ)).
43. *See id.* at 89.
44. 955 S.W.2d 380 (Tex. App.—San Antonio 1997, no writ).
45. *See id.* at 381.
46. 544 S.W.2d 661 (Tex. 1976); *see Bodin*, 955 S.W.2d at 381.
47. *See id.*

tively if the court awards them to the non-employee and the options can be exercised only by the person who earned them? Despite their potential future value, the value of the options at divorce is controlling for the purpose of judicial division.[48] Nor is the analogy to retirement benefits exact because stock options must be exercised with separate funds in the future.

D. Professional Goodwill

Salinas v. Rafiti[49] was not a family law case but a partnership cases, but it is important to family lawyers for the Texas Supreme Court's discussion of the distinction between commercial goodwill (a business asset of a partnership or corporation, reflecting its locality, name, and reputation, for example) and professional goodwill that "attaches to a professional person because of confidence in the skill and ability of the individual"[50] as exemplified by the 1972 opinion of the Texas Supreme Court in *Nail v. Nail*.[51] The *Salinas* decision is also significant for the Court's further analysis of the factors in valuation and characterization of business interests that the decision has provoked.[52]

E. Trust Income

In *Ridgell v. Ridgell*[53] the wife was the beneficiary of two testamentary trusts (numbers 2 and 4) from which she had the income for life and the corpus of each trust passed to her children after certain compulsory distributions of corpus were made to the wife (if then living) at fixed times. The court held that because the wife received the income from the trusts and had "expectancy interests" in corpus, the distributions of trust income were community property.[54] The court failed to note the significance of the intervals of time dividing the gifts in trust specified by the settlors of the trusts. The succession of gifts of income and of principal of the trust are distinct in time. The fact that parts of the corpus of the trust produced income payable to the beneficiary early in the life of the trust and that these parts of corpus might be distributable to the beneficiary at some later time should not affect characterization of income paid in the past. Further, to say that the beneficiary of a trust is the "real owner" of the "equitable or beneficial title to the trust property"[55] is a very misleading way of saying that rules of equity allow the beneficiary to enforce the

48. *See* Berry v. Berry, 786 S.W.2d 672 (Tex. 1990).
49. 948 S.W.2d 286 (Tex. 1997).
50. *Id.* at 290.
51. 486 S.W.2d 761, 763 (Tex. 1972). *See* Joseph W. M'Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 46 SMU L. Rev. 1475, 1484-85 (1993).
52. *See* George P. Roach, *The Texas Supreme Court Revisits Professional Goodwill*, 1998 State Bar [of Texas Family Law] Section Report 20 (no. 1, 1998). As a historical milepost, it is perhaps significant to observe that *Nail* was decided on the same day as Graham v. Franco, 488 S.W.2d 390 (Tex. 1972).
53. 960 S.W.2d 144 (Tex. App.—Corpus Christi 1997, no pet. h.).
54. *See id.* at 149.
55. *Id.* at 147.

trust. The court's conclusion that equitable right to income constitutes separate title in corpus is therefore wholly unjustified when it is realized that the beneficiary has no present entitlement to the corpus. The beneficiary's only present interest is the right to receive trust income and that right is therefore properly characterized as separate property. Until the happening of the events specified by the settlors, the beneficiary is not entitled to any of the trust corpus as a future gift of the settlors. This analysis has been followed in numerous cases beginning with the decision of the Texas Supreme Court in *Hutchison v. Mitchell*.[56] Over half a century ago, in an effort to give favorable federal tax treatment to such trust income as community property, federal courts interpreting Texas law reasoned that because the beneficiary *owns an equitable estate* in the trust corpus the income from that estate is community property.[57] But saying that the beneficiary *owns an equitable estate* in the corpus of a trust is merely a figure of speech denoting that the beneficiary in a court of equity may enforce the present right to income from the trust. In reality the income is the only present entitlement of the beneficiary. It was acquired by gift from the settlor of the trust and is, therefore, the beneficiary's separate property.[58] Two arguments may be adduced to oppose this conclusion. First, there is the sentimental and historically political one that the Supreme Court of Texas that decided *Hutchison v. Mitchell* in 1873 was not a properly constituted court, and its opinions are therefore not worthy of *stare decisis*.[59] That unreconstructed Confederate argument was noted but not followed by Hutcheson, C.J., in reaching the conclusion on federal taxation of trust income[60] that Congress finally approved by adopting the marital joint income tax return in 1948.[61] The second argument is based an Anglo-American legal state of mind that finds it difficult to comprehend the notion of a continuing gift not based on immediate delivery but made possible by a trust that subsists over a period of time and produces income that is delivered periodically. But a gift occurring over a period of time is precisely the most accurate way to describe the reality of this situation. A different argument, however, must support the assertion that the income of a self-settled trust is separate property because the settlor cannot make a gift to himself. But just as one may sell separate property and thus hold the proceeds of sale as separate property, a single person may transform his separate property irrevocably into some other interest. For example, the owner of separate

56. 39 Tex. 488 (1873). *See* Joseph W. M'Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 50 SMU L. REV. 1189, 1200 (1997).

57. *See* Commissioner v. Wilson, 76 F.2d 766 (5th Cir. 1935); Commissioner v. Zeus, 69 F.2d 969 (5th Cir. 1934).

58. *See* Regis W. Campfield, *Interspousal Transfers*, 32 Sw. L.J. 1091, 1134-62 (1979); Regis W. Campfield, *Wills & Trusts, Annual Survey at Texas Law*, 38 Sw. L.J. 53, 63 (1974).

59. *Per* Moore, C.J., in Taylor v. Murphy, 50 Tex. 291, 295 (1878); *see* James W. Paulsen & James Hambleton, *Confederates and Carpetbaggers: The Precedential Value of Decisions from Civil War and Reconstruction Eras*, 51 TEX. BAR J. 916 (1988).

60. *See* Commissioner v. Porter, 148 F.2d 566, 568 (5th Cir. 1945).

61. *See* Revenue Act of 1948, Act of April 2, 1948, ch. 168., 62 Stat. 110.

property may in effect translate separate property into nothing more than an income interest from that property by making the separate property the corpus of an irrevocable trust in favor of the settlor with no further interest in the settlor. In that case the settlor in effect changes the separate corpus to the separate income interest.[62] In the case of a trust settled by a married person for her own benefit, an effective argument against the conclusion that the income is separate property is available to the settlor's spouse: that the Texas Constitution's allowing spouses to partition income from separate property, or to allow one spouse *only* to give it to the other spouse, implies a constitutional prohibition of one spouse's unilateral act of creating a trust of separate property in order to turn the income from the trust into separate property.

The court in *Ridgell*[63] also dealt with the wife's self-settled trust (number 3). The court concluded that there was no need to characterize the income from that trust because the trust's loan to provide funds to buy particular realty was repaid with separate funds, "hence separate property begat separate property."[64] The analysis of the issue presented is not that simple though the facts concerning the loan are not described. If the trust (self-settled with separate funds) was a distinct entity and it borrowed the money to buy the realty on a note that could be satisfied by recourse only to the corpus of the trust (enlarged by a loan of a separate certificate of deposit lent by the settlor), the proceeds of the loan would seem to belong to the separate trust corpus. Even if constitutionally the trust had been nothing more than an agency account of the wife, the nonrecourse terms of the loan would have made the proceeds of the loan and the realty in which they were invested the wife's separate property. If, however, the loan were entered into by the wife of her agent without limitation of liability to her separate property, the loan proceeds would be community property regardless of the fact of their actual repayment with separate proceeds.[65]

F. Recovery For Personal Injury

In a recent article[66] Professor Pamela George dealt with the problems of proving the separate elements of a personal injury recovery when the injured plaintiff is later involved in a divorce. However close the bond of marriage may be at or soon after the injury, the personal-injury lawyer must be aware that the nature and stress of a severe injury may make a subsequent divorce almost certain if the death of the injured spouse does

62. *See* Lemke v. Lemke, 929 S.W.2d 662 (Tex App.—Fort Worth 1996, writ denied), *noted in* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law,* 50 SMU L. Rev. 1189, 1200 (1997). There, the trust was settled by a single person.

63. 960 S.W.2d 144 (Tex. App.—Corpus Christi 1997, no writ).

64. *See id.* at 150.

65. *See* Broussard v. Tian, 156 Tex. 371, 295 S.W.2d 406 (1956); Heidenheimer Bros. v. McKeen, 62 Tex. 229 (1885).

66. *See* Pamela E. George, *Whose Injury? Whose Property? The Characterization of Personal Injury Settlements Upon Dissolution of Marriage in Community Property States,* 32 Idaho L. Rev. 575 (1996).

not sooner dissolve the marriage. All too often the attorney's position in protecting the interest of the injured spouse is exacerbated by the fact that he was brought into the case by the victim's spouse, who may later be the petitioner for the resulting divorce. Thus, a difficult ethical problem is posed at the outset of representation which should be solved initially in order to avoid its arising later.[67] The same problems of characterizing the separate elements of recovery are encountered in an estate settlement as in a divorce, though the change of the law of intestate succession in 1987[68] has somewhat reduced the likelihood of an attorney's facing that problem because the surviving spouse's position is so much stronger as to the victim's community interest on intestacy, and the victim's needs are no longer in issue. The result that the victim's attorney should seek to achieve prior to divorce is a determination of the separate elements of the recovery that will bind both spouses. Assuring that result may nevertheless pose considerable difficulty.

In *Osborn v. Osborn*[69] the injured husband achieved a reversal and remand of the trial court's characterization of an entire personal injury recovery as community property because he was not given an opportunity to be heard after he filed a general denial in response to his wife's petition for divorce.[70] Although his posture for settlement may have been somewhat improved by his appellate victory, his ability to show the separate character of elements of his personal injury recovery faced all the difficulties discussed by Professor George.[71]

G. Retirement Benefits

Baw v. Baw[72] is another in a growing body of intermediate appellate court decisions[73] that define the mode for valuing the community component of a defined contribution retirement plan under which the employee spouse acquired an interest successively while unmarried and married. Following the prior cases, the Dallas Court of Appeals computed the community element of the spouse's interest by subtracting the amount contributed prior to marriage from the total amount of contributions at the end of the marriage.[74]

In *Boggs v. Boggs*[75] the Supreme Court of the United States concluded that the federal Employee Retirement Income Security Act of 1974 (ER-

67. Some thoughts of the late Everett Lord in this regard can be gleaned from the discussion of Martin v. General Electric Co., 586 F.2d 143 (9th Cir. 1978), in which he represented the injured plaintiff. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 28 Sw. L.J. 66, 71 (1974).

68. *See* Tex. Prob. Code Ann. § 45 (Vernon Supp. 1998).

69. 961 S.W.2d 408 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).

70. *See id.* at 412.

71. *See supra* note 66 and accompanying text.

72. 949 S.W.2d 764 (Tex. App.—Dallas 1997, n.w.h.).

73. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 50 SMU L. Rev. 1189, 1202 (1997).

74. *See Baw*, 949 S.W.2d at 767-68.

75. 117 S. Ct. 1754 (1997).

ISA)[76] preempts state property law so that a predeceasing non-employee spouse has no interest in a private retirement fund of the employee spouse[77] and, thus, cannot make an effective disposition over what would have been under state law the predeceasing spouse's community interest in the employee's private retirement fund created by his employer under ERISA.[78] Five members of the Court, with two justices joining in part,[79] concluded that in ERISA Congress amply demonstrated its intent to protect a *surviving* spouse of the employee and to preempt state law with respect the employee's *deceased* spouse.[80] The majority of the Court continued to read the anti-assignment and anti-alienation provisions of the statute in a peculiar way. Such provisions in federal law date back to efforts made by Congress to disengage the federal government from liability when its potential payees, American troops engaged in the Mexican War, attempted to assign their forthcoming pay to local merchants along the route of march. In *Hisquerdo v. Hisquerdo*[81] the Court applied those terms not to the voluntary act of a railroad worker whose retirement benefits were controlled by a federal act, but to an order of a California divorce court where he had been sued. In *McCarty v. McCarty*[82] the Court attributed the imposition of a judicial order to an involuntary military pension beneficiary in a California court. In *Boggs* the most that the employee-pensioner seems to have done toward making an assignment or an alienation was to be a domiciliary of Louisiana, where local property law allows the spouse of a prospective pensioner to share in his earnings.[83] That such perversion of language, even though abetted by a definition in the Federal Regulations,[84] does not embarrass the Court seems curious.

Neither the majority of the Court nor the dissenting justices seem to have found very much in the reasoning of the Fifth Circuit Court of Appeals with which they agreed. Two of the dissenting justices, however, asked this pointed question: "Given Congress'[s] purpose of allowing state courts to give first wives their community property share of pension assets, why would Congress have intended to include a silent implication that strips [the predeceasing wife] of an asset that may be the bulk of [the] community property—simply because, instead of divorcing [her husband], she remained his wife until she died?"[85] The answer, as the majority of the Court put it, is that Congress was primarily concerned with the

76. 29 U.S.C. § 1001 *et seq.* (1994).

77. Retirement plans maintained by charitable institutions and for governmental employees are exempt from the operation of ERISA. *See id.* § 1001.

78. *See Boggs*, 117 S. Ct. at 1757.

79. Kennedy, J., delivered the majority opinion in part of which Rehnquist, C.J., and Ginsburg, J., joined and from which Breyer and O'Connor, JJ., dissented, joined in part by Rehnquist, C.J., and Ginsburg, J.

80. *See id.*

81. 439 U.S. 572 (1979).

82. 453 U.S. 210 (1981).

83. As pointed out by Breyer, J., joined by O'Connor, J., dissenting, in *Boggs*, 117 S. Ct. at 1771-72.

84. *See* 26 CFR § 1.401(a)-13(c)(1)(ii), *cited in Boggs*, 117 S. Ct. at 1765.

85. *Boggs*, 117 S. Ct. at 1776 (Breyer, J., joined by O'Connor, J.).

welfare of the living and not the dead.[86] If it should be argued[87] that the estate of the predeceasing spouse may have a reimbursable claim against the surviving employee-spouse, the majority opinion rebutted such an argument.[88]

H. REIMBURSEMENT

More fundamental issues of reimbursement were dealt with in other cases. In *Marburger v. Seminole Pipeline Co.*[89] recovery for community reimbursement for benefits provided to a living spouse's separate realty was sought against third persons as compensation for interference with those rights as interests to real property. Though the defendants apparently failed to raise the point, a right of marital reimbursement had not arisen because the marriage of the parties had not been dissolved. But even if a right of reimbursement had arisen (as the court seemed to assume), the court made it clear that the right is not an ownership interest in realty that will support a cause of action for its injury,[90] as will a leasehold interest in the realty, for example.[91]

In *Winkle v. Winkle*[92] the husband sought reimbursement for his separate property used to construct a house on what the court termed a community lot. In taking this expenditure outside the supposed rule that separate funds used to discharge a couple's living expenses are not reimbursable,[93] the court relied on authorities awarding marital reimbursement for the separate payment of community debts,[94] thus, in effect, rejecting the supposed rule, which the court suggested should be confined to "transitory" acquisitions.[95]

In *Hunt v. Hunt*[96] the wife complained that the divorce court had not granted reimbursement for expenditure of community funds for support of the husband's child of a prior marriage. The appellate court alluded to the fact that community funds were also expended for the support of a child of the wife by a prior marriage and that there was no abuse of judi-

86. *See id.* at 1761.

87. *See* Julie McDaniel Dallison, Comment, *Disappearing Interests: ERISA Impliedly Preempts the Predeceasing Nonemployee Spouse's Community Property Interest in the Employee's Retirement*, 49 BAYLOR L. REV. 477, 499-504 (1997).

88. *See Boggs*, 117 S. Ct. at 1766.

89. 957 S.W.2d 82 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

90. *See id.* at 90 (citing Vallone v. Vallone, 644 S.W.2d 455, 458-59 (Tex. 1983)).

91. *See id.* at 90 n.13.

92. 951 S.W.2d 80 (Tex. App.—Corpus Christi 1997, writ denied); *see supra* notes 40-43 and accompanying text.

93. *See* Norris v. Vaughan, 152 Tex. 491, 502-03, 260 S.W.2d 676, 683 (1953). For criticism of this conclusion, see Joseph W. M'Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 Sw. L.J. 1, 15 (1989).

94. *See Winkle*, 951 S.W.2d at 89 (citing Penick v. Penick, 783 S.W.2d 194, 196 (Tex. 1988)); Jones v. Jones, 890 S.W.2d 471, 476 (Tex. App.—Corpus Christi 1994, writ denied); Graham v. Graham, 836 S.W.2d 308, 309-10 (Tex. App.—Texarkana 1992, no writ).

95. *See Winkle*, 951 S.W.2d at 89.

96. 952 S.W.2d 564 (Tex. App.—Eastland 1997, n.w.h.).

cial discretion in the trial court's decision,[97] citing *Pelzig v. Berkebile*[98] and *Zieba v. Martin*.[99] The court also relied on those two authorities in rejecting the wife's complaint for failure to reimburse the community estate for contractual alimony payments made to the husband's former wife.[100] This reliance suggests that the court regards such expense and payments as *unreimburseable* rather then reimbursable but properly denied in light of the equities of the case. If that is the court's view, it seems unacceptable; it is certainly appropriate that community funds be expended to discharge support obligations of a spouse arising prior to marriage, especially if no separate funds are available for that purpose, but it is equally appropriate that the community estate be reimbursed for expenditures of community funds to discharge responsibility of a spouse arising prior to a marriage to which the community estate is attributable. A distinction may be drawn, however, between the support of a child of a prior marriage, which is founded in a continuing duty of support, and maintenance of a former spouse, which is not based on a continuing duty of support but merely on the decree of the divorce court.

In affirming the trial court's denial of reimbursement for community funds used to pay state taxes for the husband's separate realty that produced community income and tax benefits for the community estate, the appellate court in *Hunt* evidently concluded that the equities of the situation justified the trial court's conclusion.[101]

Some courts continue to refer to *imposing* an equitable lien on property to secure payment of a reimbursement award[102] rather than recognizing that the equitable lien already exists and giving it effect by fixing a judgment lien on the security.[103] In some other contexts the term "equitable lien" may have a different connotation. In Corpus Christi, for example, the phrase may mean an equitable interest that is enforceable by contempt, as when a divorce court declares that one spouse holds funds as a trustee for the other spouse whose interest is secured by an equitable lien on the trust property.[104]

97. *See id.* at 568.

98. 931 S.W.2d 398, 400 (Tex. App.—Corpus Christi 1996, no writ).

99. 928 S.W.2d 782, 790 (Tex. App.—Houston [14th Dist.] 1996, no writ). The fact that the duty to pay a child support obligation was imposed by court order seems beside the point. The same can be said of any premarital judgment debt.

100. *See Hunt*, 952 S.W.2d at 568.

101. *See id.* at 569.

102. *See* Joseph W. M°Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 1831, 1866-67 (1992).

103. *See id.*

104. *See* Votzmeyer v. Votzmeyer, Tex. Ct. App. Rep. T2-98-06-225, no. 13-96-265-CV (Tex. App.—Corpus Christi, Feb. 5, 1998, no writ); *see also* M°Knight, *supra* note 102, at 1866.

III. CONTROL AND LIABILITY OF MARITAL PROPERTY

A. FAMILY CODE REVISION

Though there may be other codes or potential codes to which the time of the Legislative Council might have been more productively expended, the rearrangement and renumbering of all sections of Title 1 of the 1969 Family Code to three decimal points is not without merit. Though it is said that the presiding officers of each legislative house made it clear that this was a non-substantive revision, and no effort was made to amend it either in committee or on the floor of the Legislature, the revision was not in fact a non-substantive revision in the sense of the 1963 legislative plan[105] under which a revised provision is read as a mere reenactment of prior law. A recent judicial misunderstanding of that process is exemplified by the decision in *In re Garcia*,[106] where the Amarillo Court of Appeals misinterpreted the Legislative Council's 1995 non-substantive revision of Title 2 of the Family Code. In carrying out that revision, the Legislative Council omitted the word "immediately" in section 11.03(a)(8) of the Family Code (now section 102.003(9)) as surplusage.[107] The appellate court mistakenly interpreted the omission as a substantive change.[108] A similar alteration of language was made in the 1997 non-substantive revision of section 5.22(a) of Title 1 (as section 3.102(a)) by omission of the phrase "but not limited to" before the enumeration of some types of community property subject to a spouse's sole management.[109] The omitted phrase was inserted in 1967 *ex abundantia cautela*, but it was truly surplusage from the start. It is hoped that courts called on to interpret the non-substantive revision will honor the Legislative Council's intent.

In *Delp & Delp v. Douglas*[110] a couple brought a malpractice action against a law firm that had represented them. Soon after the suit was commenced, the husband filed for bankruptcy, but the wife was not a party to that proceeding. A third person, who had purchased the husband's claim from his trustee in bankruptcy, intervened in the couple's suit against their attorneys to dismiss the husband's claim. The appellate court held that the assignee lacked standing to dismiss the husband's claim because the husband's claim for malpractice was not assignable,[111] even though the husband's claim was a part of his bankruptcy estate.[112] In further discussing the effect of the husband's bankruptcy on the mal-

105. *See* 1963 Texas Gen. Laws, 1152, ch. 448.
106. 944 S.W.2d 725 (Tex. App.—Amarillo 1997, no writ).
107. Section 11.03(a)(8) had provided that a suit affecting the parent-child relationship might be filed by the person who had possession of the child if not less than six months "immediately preceding" the filing of the petition. The word "immediately" was omitted in the non-substantive revision.
108. *See Garcia*, 944 S.W.2d at 726-27.
109. *See* TEX. FAM. CODE ANN. §§ 5.22(a), 3.102(a) (Vernon Supp. 1998).
110. 948 S.W.2d 483 (Tex. App.—Fort Worth 1997, pet. granted).
111. *See Delp*, 988 S.W.2d at 489 (citing Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd)).
112. *See id.* at 490.

practice suit, the court held that because the wife's claim was her solely managed community property under old section 5.22(a), it was unaffected by the husband's malpractice claim, if any.[113] The court, however, put particular emphasis on the words "including but not limited to" in section 5.22(a) because it was argued that the wife's claim did not fit into any of the types of property specifically enumerated there.[114] The argument was without foundation. The wife's claim for which she had filed suit in her individual capacity was for personal injury for mental anguish, the recovery of which would be either her separate property or her solely managed community property.[115]

Old section 3.59, a remnant of the Divorce Act of 1841[116] dealing with temporary alimony, was also omitted from the 1997 statutory revision as its substance had long since been incorporated in old section 3.58(c)(2) (now section 6.502).[117] Following reiterated suggestion,[118] the Legislative Council also gave a new home in the Probate Code[119] to the unnumbered and untitled section, added at the 1971 session of the Legislature to deal with the appointment of a guardian to manage a spouse's separate property when he or she is missing on public service.

B. Spousal Destruction of Community Property

In *Kulubis v. Texas Farm Bureau Underwriters Insurance Co.*[120] the Texas Supreme Court granted recovery for the wife against her insurer for her fractional separate interest (shared with her husband's separate interest) in a mobile home intentionally destroyed by her husband. The right of recovery in the situation when the property destroyed is community property was reserved for further consideration.[121] That issue was before the Fort Worth Court of Appeals in *Chubb Lloyds Insurance Co. v. Kizer*.[122] In the meantime, however, two panels of the federal Court of Appeals had refused to reach the same conclusion for destruction of a

113. *See id.* at 493.
114. *See id.*
115. *See id.* at 494 (citing Cosgrove v. Grimes, 774 S.W.2d 662, 665-66 (Tex. 1989), as an authority for possible recovery). The wife's claim was, of course, specifically covered by the provisions of old sections 5.21 to 5.22(a)(3) and is covered by the provisions of the present sections 3.101 to 3.102(a)(3) as "recoveries for personal injuries." *See* TEX. FAM. CODE ANN. §§ 3.101-3.102(a)(3) (Vernon Supp. 1998).
116. *See* 1840-1841 Tex. Gen. Laws 19, § 8, at 21.
117. *See* TEX. FAM. CODE ANN. § 6.502(2) (Vernon Supp. 1998).
118. *See Recommendation of the Committee on Revision of Title 1 of the Family Code*, (on file with the SMU Law Review Association) *approved by* the Council of the Family Law Section of the State Bar of Texas on May 10, 1996; Joseph W. McKnight, *Commentary on Title 1 of the Family Code*, 21 TEX. TECH L. REV. 911, 1091-93 (1990); Joseph W. McKnight, *Commentary on Title 1 of the Family Code*, 13 TEX. TECH L. REV. 611, 770-72 (1982); Joseph W. McKnight, *Commentary on Title 1 of the Family Code*, 5 TEX. TECH L. REV. 281, 371-73 (1974); Joseph W. McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 SW. L.J. 31, 43-44 (1972).
119. *See* TEX. PROB. CODE ANN. §§ 886-886F (Vernon 1998). There is a reference to § 886A in TEX. FAM. CODE ANN. § 6.501(b) (1) (Vernon Supp. 1998).
120. 706 S.W.2d 953, 955 (Tex. 1986).
121. *See id.*
122. 943 S.W.2d 946 (Tex. App.—Fort Worth 1997, writ denied).

spouse's interest in community property in similar circumstances. But in *Travelers Co. v. Wolfe*,[123] the Amarillo Court of Appeals had allowed recovery for the ex-wife's share in such a loss after the couple's divorce decree had left the ex-spouses as tenants in common of their claim previously asserted against their insurer. In *Chubb Lloyds* the Fort Worth court concluded that a division on divorce should not affect an ex-spouse's subsequent right of recovery.[124] Ordinarily that conclusion is appropriate, but in concluding that the wife could not recover in *Chubb Lloyds* the court assumed that the recovery would be shared by both spouses as community property and overlooked the fact that the community interest had been effectively partitioned by the divorce decree.[125] As already pointed out,[126] this is the fundamental conceptual difficulty in dealing with such a community interest, though in this case the interest had been divided while the suit was pending. Evidently, the Fort Worth court did not perceive this point as overcoming the conceptual difficulty.[127]

A student essay has recently offered an analysis of various types of fraud on the community estate.[128] Though the diction and terminology are sometimes difficult to understand, the essay furnishes a good collection of authorities.

C. Forfeiture of Community Property

In *Bennis v. Michigan*[129] the Supreme Court of the United States divided five to four in holding that a Michigan law might constitutionally allow forfeiture of a car jointly owned by a husband and wife and used by the husband in violation of state law despite the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment to the United States Constitution. Thus, an objection that might be raised to the validity of spousal forfeiture laws is put aside.[130]

D. Designation and Extent of Homestead Property

Although in *In re Moody*[131] the court was unable to conclude that a

123. 838 S.W.2d 708, 712 (Tex. App.—Amarillo 1992, no writ).
124. *See Chubb Lloyds*, 943 S.W.2d at 952.
125. *See id.* at 952.
126. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 41 Sw. L.J. 1, 20 (1987). By oversight, Shepard's Citator failed to note that citation of *Kulubis*, and it may, therefore, have passed the attention of subsequent researchers.
127. *See Chubb Lloyds*, 943 S.W.2d at 952.
128. *See* Bradley L. Adams, Comment, *The Doctrine of Fraud on the Community*, 49 Baylor L. Rev. 445 (1997).
129. 516 U.S. 442, 446 (1996), *discussed in* Shelly D. Whatley, Note, *Baby, They Can Seize Your Car: Forfeiture Laws and Taking Property from Innocent Victims in Bennis v. Michigan*, 34 Hous. L. Rev. 1279, 1286 (1997).
130. Property oriented authorities involving Texas law on the point are modest. *See* United States v. D.K.G. Appaloosa, Inc., 630 F. Supp. 1540, 1555 (E.D. Tex. 1986); Amrani-Khaldi v. State, 575 S.W.2d 667, 668-69 (Tex. Civ. App.—Corpus Christi 1978, no writ).
131. 77 B.R. 566 (Bankr. S.D. Tex. 1987), *aff'd*, 862 F.2d 1194 (5th Cir. 1989).

transfer of a homestead had actually occurred and was therefore lost, it was clear that the rural land claimed as the debtors' homestead in *In re Cole*[132] had been transferred by them to a family limited partnership prior to their filing for bankruptcy. Thus, because the property was not owned by the debtors when they sought bankruptcy, the debtors could not claim the property as exempt from creditors' claims.[133] It was irrelevant that the parties to the transfer were mistaken about the effects of their acts. The debtors testified that they thought they had merely transferred the property to themselves.

In another bankruptcy case[134] the federal Fifth Circuit Court of Appeals concluded that in a conversion from a Chapter 13 to a Chapter 7 bankruptcy the status of property at the date of initial filing determines its homestead character rather than its condition at the time of conversion to the Chapter 7 proceeding. When the debtors made their filing under Chapter 13 of the Bankruptcy Code, they owned two urban residential properties; one was their home and the other was rented to tenants. The debtors claimed the first property as their homestead. In the course of the Chapter 13 preceding, the debtors found it impossible to meet the mortgage payments on the first property, allowed that property to be foreclosed by the lienholder, and moved into the second house, which they claimed as their homestead when they converted their Chapter 13 case to a Chapter 7 case. Following *In re Williamson*[135] which involved similar facts dealing with a conversion from a Chapter 11 to a Chapter 7 case, the federal appellate court concluded that the date of initial filing is the time for characterizing exempt property because conversion from one chapter to another does not create a new filing in bankruptcy but is merely a shifting from one chapter of the Bankruptcy Code to another for administration of the debtors' interests.[136] The court thereby rejected the argument successfully made in the Eighth Circuit in 1984[137] that policy concerns arising from administration under Chapter 13 justified departure from the plain language of the statute to produce a different result.[138] The court also relied on the 1994 amendment to the Bankruptcy Code[139] as showing subsequent Congressional intent with respect to the issue at hand, though the amended statute did not apply to the case before the court.[140]

It is rare that leasehold residential property is claimed as a homestead in bankruptcy. In *In re Nagel*[141] the bankrupt had entered into a residential lease contract for one year and agreed to pay (and did pay on going

132. 205 B.R. 382 (Bankr. E.D. Tex. 1997).
133. *See id.* at 385.
134. *In re Sandoval*, 103 F.3d 20, 22 (5th Cir. 1997).
135. 804 F.2d 1355, 1359 (5th Cir. 1986).
136. *See Sandoval*, 103 F.3d at 22.
137. *See In re* Lindberg, 735 F.2d 1087, 1089 (8th Cir. 1984).
138. *See Sandoval*, 103 F.3d at 23; 11 U.S.C. § 348(a) (1994).
139. *See* 11 U.S.C. § 348(f)(1)(A) (1994).
140. *See Sandoval*, 103 F.3d at 23.
141. 216 B.R. 397 (Bankr. W.D. Tex. 1997).

into possession) a security deposit of $1,100, a pet deposit of $1,000, and prepaid rent of $1,000. The bankrupt claimed the leasehold premises and the three deposits as exempt property under the Texas homestead law. Relying on *Capitol Aggregates v. Walker*,[142] in which the principle was announced that the rental of space in a mobile home park on which to moor a mobile home constituted the basis for claiming the mobile home as an improvement on homestead realty, the bankruptcy court concluded that the leasehold interest constituted the debtor's homestead.[143] The court then went on to hold that the deposits were also exempt as integral parts of the leasehold interest.[144] The court reasoned that just as all parts of a non-exempt executory contract must be assumed or rejected[145] in bankruptcy, the lease contract itself must also be exempt in toto or not exempt in toto.[146]

E. Liens on Homesteads

After a long and very costly campaign over many years, Texas's lending institutions have finally achieved potential access to what has been described as over one hundred billion dollars worth of homestead collateral. By a comfortable majority of sixty-six percent of the votes cast, an amendment to article XVI, section 50 of the Texas Constitution was adopted to allow owners to mortgage their homes as security for a general loan of money.[147] Thus, the limitation of the 1876 Constitution to allow borrowing against a homestead only for purchase of the property and its improvement or for payment of state taxes against it was repealed, though with a myriad of special provisions for the protection of borrowers and for the benefit of lenders.[148]

The amendment also provided a new concept in mortgaging a homestead by which the lender can extend to the borrower-fee- simple-owner of a homestead a series of loans against the collateral of the borrower's home, but with foreclosure of the homestead for non-payment barred during the borrower's lifetime unless the homeowner earlier abandons the property as a homestead or agrees to a fixed term after which foreclosure is allowed.[149] With some lack of felicity, as well as precision, this device is referred to in lenders' parlance as a "reverse mortgage" because the loan increases (due to the process of installment borrowing) rather

142. 448 S.W.2d 830, 832 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

143. *See Nagel*, 216 B.R. at 398. The court might have also relied on Johnston v. Martin, 81 Tex. 18, 21, 16 S.W. 550, 551 (1891), where occupancy of a five-year leasehold was held to be a homestead.

144. *See Nagel*, 216 B.R. at 398.

145. *See* 11 U.S.C. § 365(a) (1994).

146. *Nagel*, 216 B.R. at 399.

147. *See* Tex. Const. art. XVI, § 50. The Texas Supreme Court has promulgated Rules 735 and 736 concerning judicial foreclosure proceedings against homestead property. *See* Tex. R. Civ. P. 735, 736.

148. *See* Tex. Const. art. XVI, § 50. The text of the new section occupies almost seven full pages of the session laws.

149. *See id.*

than decreases (due to repayment) over a period of time.[150] Ordinarily such loans are not available to homeowners under the age of sixty-two. During the period of the loan, the borrower continues to pay property taxes, insurance premiums, and maintenance costs. Fees for such arrangements are expensive, and the expense includes an initial high charge in addition to monthly charges and mortgage insurance premiums.[151] The initial charges sometimes exceed the actual amount of the loan. Although the lenders' advertising of loans available under the amendment have continued the campaign of advertising benefits to promote the approval of the amendment, the extent of such lending is not yet apparent, but it does not seem to be very great despite an unsuccessful effort to get a headstart on the effective date of the amendment.[152]

The Texas Attorney General provided a restricted interpretation of *Inwood North Homeowners' Association, Inc. v. Harris*,[153] in reliance on *Boudreaux Civil Association v. Cox*.[154] It was concluded that a property owners association might foreclose on a homestead only if the association's lien attached prior to designation of the property as a homestead, and the association's interest amounted to a restriction running with the land.[155]

F. EXEMPT PERSONALTY

The bankrupt debtor in *In re Juhasz*[156] sought to remove a non-purchase money lien from a motor vehicle claimed as exempt as a tool of trade under Property Code section 42.002(a)(4).[157] The court rejected the debtor's claim that the property was exempt as a tool of trade because it was not particularly adapted for trade use.[158] While some authorities support the court's conclusion, others adhere to the older view that any item sought to be treated as a tool of trade must simply be one used in the trade but not peculiarly adapted to it.[159] In presenting this section of the Property Code to the Legislature in 1991 nothing was said about special adaptation of a vehicle to trade use, but the draftsman explained that exemption from creditors' claims extended to a motor vehicle other than those vehicles defined as exempt under section 42.002(a)(9).[160] The exemption was thus meant to liberalize rather than to restrict exemption of

150. An incrementally increasing loan is referred to by lenders as a "life-tenure loan," and if the loan is insured privately or by the Federal Home Loan Authority, the loan may continue beyond the time when the value of the home is less than the amount of the loan.
151. *See id.*
152. *See* OP. TEX. ATT'Y GEN. No. DM-452 (1997).
153. 736 S.W.2d 632 (Tex. 1987).
154. 882 S.W.2d 543 (Tex. App.—Houston [1st Dist.] 1994, no writ).
155. OP. TEX. ATT'Y GEN. No. 97-019 (1997).
156. 208 B.R. 32 (Bankr. S.D. Tex. 1997).
157. TEX. PROP. CODE ANN. § 42.002(a)(4) (Vernon 1994).
158. *See Juhasz*, 208 B.R. at 35 (citing *In re* Hincirik, 138 B.R. 835 (Bankr. N.D. Tex 1992); *In re* Weiss, 92 B.R. 677 (Bankr. N.D. Tex. 1988)).
159. *See* Dwight Olds & Philip Palmer, Jr., *Exempt Property in* CREDITORS' RIGHTS IN TEXAS 23, 51-54 (Joseph W. M°Knight, ed. 1963).
160. *See* TEX. PROP. CODE ANN. § 42.002(a)(9) (Vernon 1994).

vehicles.[161]

The Bankruptcy Code provides that a non-purchase-money lien may be removed from certain exempt personalty of the debtor when the lien impairs the exemption.[162] In *In re Gonzales*[163] the debtor in bankruptcy sought to remove a lien on household furniture exempt under section 42.002(a)(1). Although the creditor asserted that the lien was for purchase money of the furniture, the creditor was unable to show the extent of the lien and thus failed in his defense.[164]

The bankrupt in *In re Swift*[165] brought an action against his former employer for negligence in handling his retirement plan in such a manner that it lost its exempt character and passed to his creditors in bankruptcy. The defendant removed the action to the bankruptcy court, and the debtor there asserted that his cause of action was exempt as a replacement for the retirement plan that was itself exempt. The Fifth Circuit appellate court so ruled[166] and also concluded that the cause of action had accrued to the bankrupt before his bankruptcy petition was filed.[167] The cause of action thus became part of the bankrupt's estate to be treated as exempt property under Property Code section 42.0021.

In *In re Carmichael*[168] the exemption of an individual retirement account (IRA) was at issue solely under federal law because the bankrupt debtor had chosen federal rather than state exemptions.[169] Bankruptcy Code section 522(d)(10)(E) requires that in order to be exempt a debtor's right to receive a payment under a "stock bonus, pension, profitsharing, annuity or similar plan or contract" must entitle the owner to receive payments at age fifty-nine and a half, though the owner may receive payments sooner by paying a penalty.[170] The court held that an IRA is a "similar plan or contract" in the context of the statute and is therefore exempt under the Bankruptcy Code.[171]

IV. DIVISION OF MARITAL PROPERTY ON DIVORCE

A. DIVORCE PROCEEDINGS

1. Special Appearance

In *Dawson-Austin v. Austin*[172] the wife, who denied any ties to Texas,

161. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 SW. L. REV. 1831, 1857 (1992).
162. *See* 11 U.S.C. § 522(f) (1994).
163. 206 B.R. 133 (Bankr. N.D. Tex. 1997).
164. *See Gonzales*, 206 B.R. at 135 (citing *In re* Tesmetges, 87 B.R. 263, 270 (Bankr. E.D.N.Y.), *aff'd.*, 95 B.R. 19 (Bankr. E.D.N.Y. 1988)).
165. 129 F.3d 792 (5th Cir. 1997).
166. *See id.* at 802.
167. *See id.* at 798.
168. 100 F.3d 375 (5th Cir. 1996).
169. *See* 11 U.S.C. § 522(d)(10)(E) (1994).
170. *Id.*
171. *See Carmichael*, 100 F.3d at 377; *see also Gonzales*, 206 B.R. at 1136.
172. 41 Tex. Sup. Ct. J. 400 (1998). In a far easier case, the El Paso Court of Appeals held that an ex-wife could not attain personal jurisdiction over her ex-husband in a post-

filed *pro se*, as one instrument, a special appearance, a plea to the jurisdiction of the court, a plea in abatement, a motion to quash service of citation, and subject to all of those, an original answer. All of the facts except those of the special appearance were verified. Because of her failure to verify the facts of the special appearance as required,[173] and because the other pleas and motion were not specifically made subject to her special appearance, the special appearance was promptly overruled, and the court went on to hear argument on the motion to quash service of citation, though the wife made a motion to continue the special-appearance hearing. On the following day the wife filed a motion for reconsideration and filed an amended special appearance to verify the facts alleged, but the court denied the amended special appearance, and the Dallas Court of Appeals sustained that conclusion. In reversing the rulings of the lower courts, the Texas Supreme Court concluded that a properly amended special appearance must be filed before the party making it invokes the judgment of the court on any matter other than jurisdiction.[174] But the majority of the Court also concluded that other pleas may be made in the same instrument as the special appearance without waiving the special appearance and without an express statement that another plea is made subject to the special appearance.[175] In so ruling, the majority of the Court overruled *Portland Savings & Loan Association v. Bernstein*.[176] The effort to postpone the hearing that was made by the motion for continuance did not constitute a plea for affirmative relief and was, therefore, not contrary to the special appearance.[177]

In *Dawson-Austin* the parties had no minor children and there were only two claims before the court: the pleading for divorce and that for division of the estate of the parties. Family Code section 7.001[178] requires, in effect, that when both parties are personally before the court, those matters are not severable. The majority of the Court held that the special appearance sustained in this case was not made with respect to the power of the Court to grant the divorce but merely as to the division of property, and granting the special appearance had that jurisdictional effect, as section 6.308[179] (enacted in 1997) confirms.[180] In concluding that

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divorce business dispute merely by showing that he was a shareholder of a Texas corporation that did not do business in Texas, made an annual visit to see his mother in El Paso, and wrote one letter to her in his corporate capacity in 1994. *See* MacMorran v. Wood, No. 08-97-00024-CV, 1997 WL 763173 (Tex. App.—El Paso, Mar. 5, 1997, writ denied). In *In re* Reinauer, 946 S.W.2d 853, 859 (Tex. App.—Amarillo 1997, no writ), the dispute with respect to personal jurisdiction to clarify a decree may have been irrelevant.

173. *See* TEX. R. CIV. P. 120a(1).

174. *See Dawson-Austin*, 41 Tex. Sup. Ct. J. at 402.

175. *See id.*

176. 716 S.W.2d 532, 534-35 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1016 (1986); *see Dawson-Austin*, 41 Tex. Sup. Ct. J. at 403.

177. *See id.* at 403-04.

178. TEX. FAM. CODE ANN. § 7.001 (Vernon Supp. 1998); *see* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 SW. L. J. 1, 4 n.32 (1989).

179. TEX. FAM. CODE ANN. § 6.308 (Vernon Supp. 1998).

180. *See Dawson-Austin*, 41 Tex. Sup. Ct. J. at 405. An analogous jurisdictional situation is presented with regard to a parent-child dispute compulsorily joined in with a divorce

community property not before the court for division becomes a tenancy of the former spouse on divorce, the Court in *Busby v. Busby*[181] seemed to recognize the exception of oversight, that is, that the issues of divorce and division of property are severable when particular property is overlooked and is thus not before the court. But the exception as to lack of personal jurisdiction to divide property had not been authoritatively defined, though it might be inferred from several decisions of the intermediate appellate courts[182] and seems to have been in the minds of the draftsmen of section 9.204[183] when it was added to the Family Code in 1987.

In *Dawson-Austin* the Texas Supreme Court also rejected the domiciliary-husband's argument that the Texas situs of a stock certificate supplied minimum contacts with Texas, which allowed exercise of power to deal with the stock on divorce.[184] The husband's unilateral act of bringing the stock certificate to Texas did not supply jurisdiction to make an adjudication concerning any moveable property. Texas realty[185] was not at issue.

2. *Transfer*

In *Milton v. Herman*[186] a writ of mandamus was conditionally granted to vacate an order of a statutory probate court to transfer a divorce and parent-child proceeding for consolidation with a guardianship proceeding before the probate court. In this instance a suit for divorce had been brought by the wife against her incompetent husband, the guardianship of whose person and property was administered under the jurisdiction of the probate court. The appellate court held that because of the different nature of divorce and parent-child proceedings from guardianship proceedings generally, a great variety of matters would arise in relation to the division of property and the best interest of the couple's child so that transfer of the proceedings to the probate court was improper.[187] The case points up the continuing uneasy balance between the jurisdiction of family courts and probate courts with respect to the custody and control of minors and their property, as well as divorces involving wards of the probate courts, and these matters require legislative attention.

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petition under section 6.406(b) of the Family Code when the parent (not subject to the personal jurisdiction of the court) has actual custody of the child in a foreign jurisdiction. *See* TEX. FAM. CODE ANN. § 6.406(b) (Vernon Supp. 1998).

181. 457 S.W.2d 551, 554 (Tex. 1970).

182. In *Dawson-Austin*, 41 Tex. Sup. Ct. J. at 404, the Court cited Hoffman v. Hoffman, 821 S.W.2d 3, 5 (Tex. App.—Fort Worth 1992, no writ), to which should be added Redus v. Redus, 852 S.W. 2d 94, 95-96 (Tex. App.—Austin 1993, writ denied), and Redus v. Redus, 794 S.W.2d 418 (Tex. App.—Austin 1990, writ denied). *But see* Fox v. Fox, 559 S.W.2d 407, 410 (Tex. Civ. App.—Austin 1977, no writ) (cited by the dissenting judges in *Dawson-Austin*, 41 Tex. Sup. Ct. J. at 410).

183. TEX. FAM. CODE ANN. § 9.204 (Vernon Supp. 1998) (formerly TEX. FAM. CODE ANN. § 3.92 (Vernon 1995)).

184. *See Dawson-Austin*, 41 Tex. Sup. Ct. J. at 407.

185. *See id.*

186. 947 S.W.2d 737 (Tex. App.—Austin 1997, n.w.h.).

187. *See id.* at 740; TEX. PROB. CODE ANN. §§ 607-608 (Vernon Supp. 1998).

3. *Abatement on Death of a Party*

When death of a party to a divorce proceeding occurs prior to rendition of judgment, the line dividing the jurisdiction of divorce courts from that of probate courts is already well defined. Even though the divorce court in *Palomino v. Palomino*[188] had already heard all the evidence concerning division of property as well as matters concerning minor children, the death of a party abated the suit for divorce.

The timing of events in *Dearing v. Johnson*[189] was fundamentally different. On May 28, 1997, the court heard the testimony of the parties and orally granted a divorce. The husband died on July 13, and on July 30 the judge signed the divorce decree without knowing that the husband had died. The wife filed a motion for a new trial, and the motion was overruled. There was no appeal. The wife then sought a declaratory judgment that she was her husband's widow rather than a divorcee. The court's dismissal of her suit was affirmed by the Texarkana Court of Appeals.[190]

4. *Conduct of Trial*

In two cases writs of mandamus were sought for diverse objectives. The appellate court in *In re Carter*[191] denied the writ for quashing a subpoena and alleged abuse of discretion in levying sanctions[192] when the petitioner failed to show the inadequacy of his legal remedy by appeal or, in other instances, when the petitioner failed to lay a predicate for mandamus-relief by showing that the trial court had refused the relief sought.[193]

In re Bland[194] stands as a warning to any person involved in a divorce who neglects to procure a signed judgment prior to remarrying, though the ex-husband in that instance was lulled into a false sense of security by the judge's waiver of the thirty days' delay for remarriage[195] after rendition of an oral judgment of divorce. After the ex-husband had remarried and had begun to build a house on property awarded to him by the divorce court, his ex-wife refused to approve the judgment, and the court ordered the parties to proceed to a jury trial on the merits. The ex-husband petitioned for a writ of mandamus to compel the judge to sign the decree on the terms of the prior agreed settlement. The majority of the court denied the petition,[196] but Justice O'Connor would have stayed the

188. 960 S.W.2d 899 (Tex. App.—El Paso 1997, no writ). For an instance of death of a party pending trial of a suit for clarification of a divorce decree, see Wilson v. Uzzel, 953 S.W.2d 384 (Tex. App.—El Paso 1997, n.w.h.).
189. 947 S.W.2d 641 (Tex. App.—Texarkana 1997, n.w.h.).
190. *See id.* at 642.
191. 958 S.W.2d 919 (Tex. App.—Amarillo 1997, n.w.h.).
192. *See id.* at 923.
193. *See id.* at 925.
194. 960 S.W.2d 123 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).
195. *See* TEX. FAM. CODE ANN. §§ 6.801(a), 6.802, 2.009(a)(6)(B) (Vernon Supp. 1998).
196. *See Bland*, 960 S.W.2d at 124.

trial in order to have further argument on the law in light of the ex-wife's withdrawal from the settlement agreement on which the oral judgement was based.[197] Justice O'Connor recognized that in *Ex parte Chunn*[198] her court had granted a new trial in response to a petition for a writ of habeas corpus after the trial court had rendered a judgment for divorce based on a settlement agreement, and she registered her strong disagreement with that holding.[199]

The situation in *Baw v. Baw*[200] was very different from that in *Bland* and was very ambiguous. Although the decree entered in *Baw* stated that the parties agreed to the findings of the court, and their purported agreement was borne out by language on the signature page of the decree, their attorneys approved it "as to form only." The husband's testimony at the trial had made it clear that he was not in agreement with the part of the court's finding with respect to which he appealed. Though the appellate court ultimately affirmed the conclusion of the trial court, the appellate court made it clear that the husband had "not explicitly and unmistakably" given his consent to the entire decree.[201]

In *Childs v. Argenbright*[202] the sanctions complained of for abuse of discovery in a divorce proceeding were largely, but not wholly, referable to matters relating to the parent-child relationship, but the court's decision was not so limited. The trial court imposed monetary sanctions against the wife's attorney (but not against his client) for the attorney's failure to respond to discovery requests, his excessive objections to those requests, and his use of objections for the purpose of delay.[203] One of the appellant's defenses of his conduct was that opposing counsel's interrogatories were excessive under the thirty-answer limit,[204] but although he complained of the number of the interrogatories, he had not attempted to avail himself of a protective order. In response to the appellant's further assertion that opposing counsel had failed to initiate a resolution of the discovery dispute,[205] the court suggested that either party may initiate such an effort, but it is the responsibility of the movant for sanctions to certify that the attempt had been made.[206]

In *Fiore v. Fiore*[207] the appellate court considered the consequences of

197. *See id.* at 124-25.
198. 881 S.W.2d 912 (Tex. App.—Houston [1st Dist.] 1994, no writ).
199. *See Bland*, 960 S.W.2d at 124-25.
200. 949 S.W.2d 764 (Tex. App.—Dallas 1997, n.w.h.).
201. *Id.* at 767.
202. 927 S.W.2d 647 (Tex. App.—Tyler 1996, no writ).
203. The appellate court's reluctance to impose sanctions in *Baw*, 949 S.W.2d at 768, may be termed *jurisprudential*, that is, the lack of assurance that an intermediate appellate court in a common law system may feel toward recognizing the emergence of a new rule of judge-made law not yet authoritatively addressed by the highest appellate court. For a sanctions case involving an attorney's misconduct at the appellate level, see Johnson v. Johnson, 948 S.W.2d 835, 840-41 (Tex. App.—San Antonio 1997, writ requested).
204. *See* TEX. R. CIV. P. 168(5).
205. *See* TEX. R. CIV. P. 166(b)(7).
206. *See Childs*, 927 S.W.2d at 653; TEX. R. CIV. P. 166(b)(7).
207. 946 S.W.2d 436 (Tex. App.—Fort Worth 1997, writ denied).

the judge's dismissal of a juror. Twelve jurors had been empaneled in a divorce case in which the husband's adultery was alleged. After hearing the evidence for several days, one of the jurors reported to the judge that she had become strongly biased against the husband because he closely resembled her former son-in-law who had committed adultery while married to her daughter. The judge, therefore, concluded that the juror was disqualified, and he dismissed her because she could not be impartial toward the husband. The husband immediately made a motion for a mistrial, which the court denied, and the trial continued with eleven jurors. After the court had rendered judgment, the husband appealed, asserting that he had been denied his constitutional right to trial by jury. The Government Code provides that "[a] person is disqualified to serve as a petit juror . . . if he . . . has a bias or prejudice in favor of, or against, a party. . . ."[208] The husband argued that the juror was nonetheless not rendered disabled within the meaning of the Texas Constitution[209] or the Texas Rules of Civil Procedure.[210] Disability from sitting as a juror has been long equated to physical or mental incapacity.[211] The dismissal of a juror who is not disabled is an abuse of the court's discretion if there is no agreement of the parties to proceed with fewer jurors. Thus, the trial court committed reversible error.[212]

5. *Bill of Review*

At the 1997 Session the Legislature passed an amendment to the Civil Practice and Remedies Code to codify and amend the law of equitable bills of review.[213] The Governor vetoed the bill as unwise and unconstitutional for unspecified reasons.[214] An effort toward reform is likely to be renewed and refined.

6. *Unappealable Orders*

In *Normand v. Fox*[215] the trial court found that numerous telephone calls made by a man to his former wife constituted family violence requiring a protective order, and the husband appealed. The Waco Court of Appeals held that it lacked jurisdiction to review such an order because it

208. TEX. GOV'T CODE ANN. § 62.105(4) (Vernon Supp. 1998). Section 62.201 provides that in a district court a civil jury is composed of twelve persons unless the parties agree to fewer.

209. The Texas Constitution requires that a district court jury consist of twelve members unless not more than three jurors die or are "disabled from sitting." TEX. CONST. art. V, § 13.

210. *See* TEX. R. CIV. P. 292.

211. *See* Houston & Texas Cent. Ry. v. Walker, 56 Tex. 331 (1882).

212. *See Fiore*, 946 S.W.2d at 438.

213. *See* H. B. 506, adding chapter 67 to the Civil Practice & Remedies Code; *Legislative Update*, 60 Tex. Bar J. 813 (1997).

214. The Governor's veto message (41-2687) of June 20, 1997 said that the bill was "contrary to U.S. Supreme Court precedent and unwisely changes the common law statute of limitations on bills of review." Veto Message of Gov. Bush, Tex. H.B. 506, 75th Leg., R.S. (1997).

215. 940 S.W.2d 401 (Tex. App.—Waco 1997, no writ).

was not the sort of order that could be reviewed and the order did not seem to qualify as a final order.[216] The court nevertheless indicated some contrary authority as to the finality of such orders,[217] but a dissenting judge concluded that the order was a final one.[218] The court noted, however, that a writ of mandamus is an appropriate remedy to challenge such orders not subject to appeal.[219] But sensing undesirable results in that approach, the court suggested the amendment of the Family Code to provide for review of protective orders.[220]

7. Interim Attorney's Fees

In *Keim v. Anderson*[221] the husband sued his wife for divorce. The wife hired an attorney to represent her, and the court ordered the husband to pay $1,050 for the wife's attorney's fees in connection with discovery and further interim attorney's fees of $5,000 to be paid in installments of $1,000. The husband made only one installment payment. The wife's counsel then withdrew, and the wife hired other counsel. Several days later the parties entered into a written agreement concerning division of property and matters concerning their minor children, and each party agreed to "pay debts incurred by them during the separation,"[222] but debts incurred in the litigation were not specifically mentioned apart from the husband's agreement to pay the wife's current attorney $3,500. The trial court accepted the parties' agreement, and the divorce was granted. Later the same day the wife's prior attorney filed a plea in intervention to claim her interim attorney's fees, and the trial court ordered inclusion of the unpaid fees of $4,000 as part of the divorce decree. The husband appealed the inclusion of the additional attorney's fees, which at the date of the hearing amounted $5,750.[223] In a carefully reasoned opinion the appellate court concluded that the trial court had rendered a final judgment orally and that the intervention of the wife's prior attorney was improperly considered after judgment was rendered.[224] The court further held, however, that the case should be reversed and remanded because the trial court could not have altered the settlement agreement of the parties but should have an opportunity to accept the agreement as stipulated, or to set aside the agreement in order to consider the intervention, or to reject the agreement on the ground that it did not constitute a just and right division.[225] Although it was not argued that a plea in intervention was really necessary (apart from the effects of the prior attorney's withdrawal), one wonders how the trial court should have responded to a

216. *See id.* at 402-03.
217. *See id.* at 403-04.
218. *See id.* at 404-05 (Vance, J., dissenting).
219. *See id.* at 404.
220. *See id.* at 404 n.6.
221. 943 S.W.2d 938 (Tex. App.—El Paso 1997, no writ).
222. *Id.* at 940.
223. Just how the arithmetical calculation was arrived at is not clear.
224. *See id.* at 943.
225. *See id.* at 946.

mere motion by the prior attorney to insert provisions in the judgment concerning her fees that had been omitted by oversight. Appellate courts in many instances have treated attorneys as parties for the purpose of awarding fees,[226] and in this instance the court had made orders relating to the prior attorney, and those orders had not been altered or vacated.[227]

B. Property Settlement Agreements

1. Mediation

Although simple property settlements without judicial encouragement continue to be negotiated and litigated in the aftermath of divorce, an order to mediate has become an increasingly popular judicial means of prompting parties to reach a mutually agreeable solution of spousal disagreement in the context of divorce. Court-ordered mediation under chapter 154 of the Civil Practice and Remedies Code is thus urged upon litigants so that they can not only commence talks but also make actual progress toward the settlement of disputes. Within the last decade a remarkably large body of appellate precedent has been developed through judicial efforts to shift the venue of dispute from courtrooms to mediation chambers,[228] although many of the disputes that have arisen in civil contexts have not been oriented to family law. In *In re Ames*[229] the Amarillo Court of Appeals attempted to meld the provisions of chapter 154 with section 3.631(a) (now 7.001(a)) of the Family Code to produce a binding settlement in a family dispute,[230] but in subsequent instances when the court-ordered mediated settlement has been repudiated by one party before judgement, as in *Cary v. Cary*,[231] the courts have allowed withdrawal under section 7.001(a).[232] Otherwise, as the court said in *Cary*, court-ordered mediation would be transformed into binding arbitration.[233] Although the court there went on to say that an action for breach of contract still lies against the withdrawing party,[234] one wonders what practical value such causes are likely to produce in family litigation.

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226. *See* Joseph W. M'Knight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 459 n.274 (1976), for an old collection of cases to which might be added a recent instance in which attorney's fees were awarded to the wife's attorneys without formal intervention. *See In re* Hudson, 107 F.3d 355 (5th Cir. 1997). The award of attorney's fees was treated as binding in the ex-husband's subsequent bankruptcy proceeding. *See also* Joseph W. M'Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 415, 438 (1991), *discussing* Rossen v. Rossen, 792 S.W.2d 277, 278-79 (Tex. App.—Houston [1st Dist.] 1990, no writ).

227. *See Keim*, 943 S.W.2d at 945-46.

228. *See id.*

229. 860 S.W.2d 590, 591 (Tex. App.—Amarillo 1993, no writ). For a discussion of this case, see Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 47 SMU L. REV. 1161, 1188-89 (1994).

230. *See Ames*, 860 S.W.2d at 592-93.

231. 894 S.W.2d 111 (Tex. App.—Houston [1st Dist.] 1995, no writ).

232. *See, e.g., id.* at 112.

233. *See id.* at 113.

234. *See id.*

In *Alvarez v. Reiser*[235] the Eastland Court of Appeals enforced a mediated divorce settlement agreement that was by its terms irrevocable but was nevertheless repudiated by the wife prior to judgment. The agreement in issue was entered into under Family Code section 153.0071(f),[236] which then made such agreements applicable to family disputes beyond the subject matter of the parent-child relationship. That section was repealed in 1997 and replaced with Family Code section 6.602, which provides in section 6.602(a)(1) that the mediated settlement is not subject to revocation if the agreement "provides in a separate paragraph that the agreement is not subject to revocation."[237] In apparent response to *Spinks v. Spinks*,[238] an unsuccessful attempt to enforce an agreement affecting the parent-child relationship that had not complied with the underlining as well as capitalization requirements of section 153.0071(e), the new provisions of section 6.602(b) do not require that the irrevocability provision of the agreement not to revoke be capitalized or underlined.[239]

Though the dispute in *Dennis v. Smith*[240] arose under section 153.0071 and solely concerned the parent-child relationship, it is nonetheless suggestive of results that might ensue under a chapter 6 mediation agreement. The Houston First District Court of Appeals held that by the language of the statute the trial court may "recommend" but can not require that parents resort to alternative dispute resolution before litigating enforcement or modification of the terms of their agreement incorporated in the divorce decree.[241]

2. *Terms of Property Settlement Agreements*

In *In re Thornburg*[242] the parties had filed a written (Rule 11) settlement of all claims between them in their divorce, and both agreed not to appeal from the order of the court based on their settlement, which included an order that the husband turn over certain property to his wife. The husband appealed that order. The Texarkana Court of Appeals held that the agreement was binding and would have been binding even if the husband had tried to withdraw from it before it was filed with the court,[243] though he had not done so. The court sanctioned the husband for filing a frivolous appeal.[244]

The property settlement agreement at issue in *Wilson v. Uzzel*[245] was negotiated by the parties to a 1977 divorce and was incorporated in the

235. 958 S.W.2d 232 (Tex. App.—Eastland 1997, writ requested).
236. TEX. FAM. CODE ANN. 153.0071(f) (Vernon Supp. 1998).
237. TEX. FAM. CODE ANN. § 6.602(a)(1) (Vernon Supp. 1998).
238. 939 S.W.2d 229 (Tex. App.—Houston [1st Dist.] 1997, no writ).
239. *See* TEX. FAM. CODE ANN. § 6.602(b)(1).
240. 962 S.W.2d 67 (Tex. App.—Houston [1st Dist.] 1997, no pet. h.).
241. *See id.* at 74. Justice O'Connor dissented on other aspects of the case but not on this one.
242. 946 S.W.2d 97 (Tex. App.—Texarkana 1997, no writ).
243. *See id.* at 99.
244. *See id.*
245. 953 S.W.2d 384 (Tex. App.—El Paso 1997, n.w.h.).

decree. The couple had agreed to division of the husband's pension benefits in terms of percentages of the amount received on retirement. When the ex-husband retired in 1993, the ex-wife was paid a portion of his benefits as calculated according to the decree. After a while the ex-husband realized that the formula agreed to by the parties was inconsistent with prevailing principles of judicial division of pension interests and brought suit for alleged overpayment received by his ex-wife and clarification of the decree. Although the trial court may have lacked the power to make the division as agreed by the parties, in that a part of the husband's separate entitlement was included in payments to the ex-wife, the appellate court held that the unappealed order incorporating the settlement agreement must nevertheless stand under the rule of res judicata and was, therefore, not subject to revision.[246] But even if there had been grounds for clarification, the court said that the decree could not have been clarified in this instance because the ex-husband died prior to judgment in this suit.[247] A retrospective clarification could not be granted because the ex-husband's benefits ceased with his death, and a clarifying order could not be made that would be enforceable by contempt under the statute.[248] The court evidently concluded that the statute for clarification would thus preclude *any* relief against the ex-wife for overpayment provided that such an overpayment could be shown under an improperly broad final judgment.

Resolution of the ex-spouses' dispute in *Hurley v. Hurley*[249] was also grounded in an analysis of their property settlement agreement, which gave the ex-wife a percentage in value of the ex-husband's retirement benefits if and when received. The suit for clarification of the 1984 divorce decree was brought soon after the ex-husband's retirement. Again, the court concluded that the spouses' agreement might deprive either or both of them of separate property, though that result was beyond the divorce court's power in dividing the marital property.[250] Although the ex-husband argued that the value of his pension interest at the time of divorce was controlling, the agreement stated that the ex-wife should have one-half of the benefits if and when received, and the ex-wife's entitlement to death benefits paid in relation to the ex-husband were dealt with in the same way. The court is required to enforce the decree as written[251] without modification and, as written, the decree incorporated the agreement of the parties which indicated that division of retirement benefits would be controlled by their value at the time of receipt by the pensioner.

In *Wiley v. Sclafani*[252] the property settlement agreement of the parties

246. *See id.* at 390-91 (citing Baxter v. Ruddle, 794 S.W.2d 761 (Tex. 1990)).
247. *See id.* at 391.
248. *See* TEX. FAM. CODE ANN. § 9.007 (Vernon Supp. 1998).
249. 960 S.W.2d 287 (Tex. App.—Houston [1st Dist.] 1997, no pet. h.).
250. *See id.* at 289 (citing Baxter v. Ruddle, 794 S.W.2d 761, 762-63 (Tex. 1990)).
251. *See* TEX. FAM. CODE ANN. § 9.006 (Vernon Supp. 1998).
252. 943 S.W.2d 107 (Tex. App.—Houston [1st Dist.] 1997, no writ).

incident to their 1979 divorce provided that the husband would be awarded a community duplex subject to the right of the wife to a fixed part of the income and a right to share in a certain fraction of the net proceeds of sale. In 1986 the ex-wife filed a petition to rescind the contract and to appoint a receiver to sell the duplex. The court did not respond to the first request but appointed the receiver, and although the parties then sought to sell the property, they were unable to do so. In late 1987 the ex-wife again sought appointment of a receiver to sell the property, and a receiver was appointed by agreement of the parties. In early 1992 the amicable relations of the parties deteriorated and much confusion ensued as to sale of the property and maintaining the receivership.[253] In 1993 the receiver sought to abate the receivership, but the court denied that and other motions. In 1994 the ex-husband filed for relief under chapter 13 of the Bankruptcy Code, but the receiver was nonetheless authorized by the Texas court to continue to collect rents from the property and to commence proceedings to sell it. In 1995 the court granted the ex-husband's motion for summary judgement in the ex-wife's 1986 suit for appointment of a receiver on the ground that the ex-wife's claims were barred under section 3.71 of the Family Code (now section 9.006).[254] The court ultimately vacated the receivership and thus deprived the receiver and his counsel of their fees because the receivership was deemed void *ab initio*, but they were nonetheless awarded modest costs against the ex-husband.[255] The receiver's unsuccessful appeal demonstrates some of the perils of receivership in such casual and disorderly post-divorce proceedings.

C. MAKING THE DIVISION[256]

In making a "just and right" division of "the estate of the parties" under section 7.001[257] the court must not encroach on separate property of one of the spouses, though occupancy of a separate homestead may be allowed for the benefit of minor children,[258] and a lien may be fixed upon separate realty as security for benefits received by that property, reimbursed to the other spouse.[259] Certain property interests may also be

253. An appeal from the court's order denying the relief sought was dismissed for want of jurisdiction. *See* Sclafani v. Sclafani, 870 S.W.2d 608, 613 (Tex. App.—Houston [1st Dist.] 1993, writ denied), *commented on* in Joseph W. M°Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1270 (1995).

254. *See* TEX. FAM. CODE ANN. § 9.006 (Vernon Supp. 1998).

255. *See Wiley*, 943 S.W.2d at 111; TEX. R. CIV. P. 141.

256. For an incisive general introduction to this subject, see Barbara Anne Kazen, *Division of Property at the Time of Divorce*, 49 BAYLOR L. REV. 417 (1997). As an introduction it replaces the rather primitive analysis of Joseph W. M°Knight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413 (1976), and its rather dated supplement. *See* Joseph W. M°Knight, *How to Deal with Texas Matrimonial Property on Divorce*, once included in PRENTICE-HALL Divorce Taxation Service [¶ 551] (1983).

257. TEX. FAM. CODE ANN. § 7.001 (Vernon Supp. 1998).

258. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 141-42 (Tex. 1977).

259. *See* Heggen v. Pemelton, 836 S.W.2d 145, 146 (Tex. 1992); McGoodwin v. McGoodwin, 671 S.W.2d 880 (Tex. 1984).

precluded from division under federal law. Federal veterans' disability benefits fall under this exclusion. In *In re Reinauer*[260] by a divorce decree entered in 1979, the wife was awarded a share of the husband's military retirement benefits when he should retire. In 1992 the husband was retired because of disabilities, and after waiving a portion of his service retirement benefits, he began receiving federal veterans' disability benefits.[261] The ex-wife then sought a determination of the scope of the 1979 decree with respect to the ex-husband's benefits. The Amarillo Court of Appeals held that insofar as the ex-husband was entitled to disability payments from the federal Department of Veteran Affairs, the trial court's decree could not alter them.[262]

Section 7.001 speaks only of division of "the estate of the parties," which, of course, means assets. Although there is no statutory authority to direct payment of debts, divorce courts have long exercised that authority as an aspect of making a just and right division of property. One or both spouses will always be personally liable for any debt arising during their marriage, either as a principal or as the agent of the other spouse. But the divorce court cannot deprive a creditor of a right to enforce a debt except for reasons stemming from the formation of the debt itself.[263] If a spouse incurs liability, that liability is not affected by the divorce unless the debt is paid or is barred from collection by operation of law. In *Johnson v. Johnson*[264] the husband objected on appeal to his being ordered to pay a debt of an amount beyond the value of community assets awarded to him. Thus, the liability would fall on his present and future separate property. The personal liability for the debt is not clearly discussed, but it appears that it was a mutual obligation incurred by the spouses in buying a car, which was awarded by the court to the wife, whereas the husband alone was ordered to pay the remaining liability. It further appears that without her consent, the husband had sold the wife's separate car for which no debt was owed. Thus, in this instance, the equities supported the court's order that the husband pay the obligation, and he may have been at least jointly liable for payment already.[265] If the ex-wife should have to pay the debt, she could recover compensation from her ex-husband on the basis of the divorce court's order.[266]

In *Winkle v. Winkle*,[267] the trial court also required the husband to exe-

260. 946 S.W.2d 853 (Tex. App.—Amarillo 1997, writ denied).

261. He therefore began to receive benefits under 38 U.S.C. §§ 5305, 3101 *et seq.* (1994).

262. *See Reinauer*, 946 S.W.2d at 857-58 (citing, *inter alia, Ex parte* Burson, 615 S.W.2d 192 (Tex. 1981), and *Ex parte* Johnson, 591 S.W.2d 453 (Tex. 1979)).

263. *See* Broadway Drug Store v. Trowbridge, 435 S.W.2d 268 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ).

264. 948 S.W.2d 835 (Tex. App.—San Antonio 1997, writ requested).

265. *See id.* at 838.

266. *See* Cooper v. Dalton, 581 S.W.2d 219, 221-22 (Tex. Civ. App.—Corpus Christi 1979, no writ); Walker v. Walker, 527 S.W.2d 200, 204 (Tex. Civ. App.—Fort Worth 1975, no writ).

267. 951 S.W.2d 80 (Tex. App.—Corpus Christi 1997, writ denied); *see supra* notes 40-43, 92-95 and accompanying text.

cute what was called a vendor's lien on his separate property and community property awarded to him for securing a money judgment awarded to the wife in order to make an equitable division of the property. The appellate court denied the trial court's power to impose a lien for this purpose on the separate property of the husband not benefitted by the sum expended.[268]

A further lien was said to have been imposed by the divorce court on "the separate corporation" of the husband for efforts of the husband expended in enhancing its value. One wonders how such a lien was imposed. In *Jensen v. Jensen*[269] the Texas Supreme Court said that a money judgment should be awarded to the other spouse for such purposes rather than purporting to put a lien on separate shares of stock in a corporation whose value is enhanced by expenditure of a community effort of the owner-spouse.

The principal issue in *Winkle*, however, was one of fact: whether the husband had given false or misleading information to federal customs authorities in relation to the wife's importing business that caused fines to be imposed against her for which the husband should indemnity her. As time went on, however, the differences between the spouses became a struggle to control the business while they went their separate ways romantically. The court found that the record did not support the alleged accusations of customs-informing, and hence the imposition of a lien against the husband's separate property to secure payment of the indemnity was unwarranted factually as well as legally improper.[270] These accusations were in the nature of allegations of tortious wrongs, though just how the matter was pleaded is not indicated in the report, and argument at the trial seems to have focused on division of assets rather than analysis of that issue.[271]

In *M'Mann v. M'Mann*[272] the ex-husband appealed from his former wife's unsuccessful effort to enforce a property settlement agreement. Though the agreement mandated that attorney's fees would be awarded only to the successful litigant, the trial court awarded attorney's fees to the ex-wife and awarded none to the ex-husband. The appellate court held that the terms of the agreement must prevail,[273] and statutory requirements for asserting claims under a statute are beside the point when

268. *See Winkle*, 951 S.W.2d at 87.

269. 665 S.W.2d 107, 110 (Tex. 1984). The appellate court also denied the power of the divorce court to put a lien on separate property of the husband unrelated to his corporate interest to secure the award of reimbursement for community effort expended in favor of the separate corporate interest. *See Winkle*, 951 S.W.2d at 88. Inept as the divorce court's efforts may have been in *Winkle* in dealing with various reimbursement problems, they seem relatively competent when compared to those of the trial court in *In re* Cassel, No. 07-96-0268-CV, 1997 WL 260099 (Tex. App.—Amarillo, May 19, 1997, n.w.h.).

270. *See Winkle*, 951 S.W.2d at 87.

271. *See id.* at 84-85.

272. 942 S.W.2d 94 (Tex. App.—Houston [1st Dist.] 1997, no writ).

273. *See id.* at 97-98.

a claim is based on an agreement.[274]

As in writing contracts, in the preparation of judgments great attention to the choice of words is required, but none of us can foresee all eventualities. In *Stanley v. Riney*[275] a suit was brought as a consequence of an annulment to seek division of undivided community property. But for the specific provisions of section 9.201 of the Family Code, it might have been effectively argued that because a decree of annulment dissolves a marriage *ab initio*, there is no property to divide. That section, however, provides otherwise.[276] The trial court's decree had provided that "no community property was accumulated during the marriage other than personal effects . . . [and] that each party hereto take as his or her separate property all such property as is presently in his or her possession."[277] Thus, each party was awarded personal effects only. Among the wife's possessions was a winning lottery ticket. In the ex-husband's suit for a division of the property that was undivided on annulment, the trial court concluded that the lottery ticket did not constitute "personal effects" and that the lottery ticket and its proceeds were therefore undivided. The Tyler appellate court agreed.[278]

In *Soto v. Soto*[279] in 1985 the trial court had awarded the husband all real and personal property in his "possession" and awarded the wife nothing. In 1988 the ex-wife brought suit for partition of property undivided in the decree. The ex-wife approved the decree as to form only. Thus, the decree was not a consent decree, and it was subject to interpretation by the law of judgments rather than the law of contracts and intent of the parties was therefore irrelevant. The court's decree in favor of the husband was in these terms: "All real and personal property in Respondent's [husband's] possession. All clothing, jewelry, and other personal effects in the possession of or subject to the control of Respondent [husband]."[280] The appellate court made this observation: "We thus cannot determine whether the court awarded Husband all real estate plus the personal property in his possession or all real property in his possession and all personal property in his possession."[281]

Although it seems clear that the trial court meant the latter and also included in its award to the husband "[a]ll clothing, jewelry and other personal effects" which might be subject to his control if not in his possession,[282] the appellate court went on to say that the error of ambiguity, if any, was harmless because the trial court found that the husband

274. *See id.* at 97 (complying with TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001-.002 (Vernon 1988)).

275. No. 12-97-00056-CV, 1998 WL 35173 (Tex. App.—Tyler, Jan. 29, 1998, no pet. h.).

276. *See* TEX. FAM. CODE ANN. § 9.201 (Vernon Supp. 1998).

277. *Stanley*, 1998 WL 35173, at *2.

278. *See id.*

279. 936 S.W.2d 338 (Tex. App.—El Paso 1996, no writ).

280. *Id.* at 340.

281. *Id.* at 342.

282. *Id.*

was in actual possession and control of all of the realty in issue.[283] Thus, there was no undisposed realty to divide as the ex-wife had alleged.

The appellate court went on to say that the ex-wife also challenged the trial court's finding that she had failed to bring suit within two years as required by section 3.90(c) of the Family Code (now section 9.202), but that challenge lacked substance and was therefore beside the point.[284] The meaning of the statute of limitation is, however, perhaps worthy of comment. The provisions of sections 9.201 to 9.204, originally enacted in 1987, provide that a claimant for division of undivided assets must bring suit within two years of discovering that the other ex-spouse has unequivocally repudiated the claimant's interest.[285] But if one of the parties to the divorce or annulment dies before any proceeding for division is brought or fails to bring suit within two years of the discovery of repudiation, the property is still held as a tenancy in common subject to equal partition.[286]

In *Wilde v. Murchie*[287] the Texas Supreme Court held that interpretation of a judgment may require examination of the record of the trial, as well as the language of the decree. The 1968 divorce decree awarded the community home to the husband; the wife received a money-judgment "as her equity in the community home,"[288] and a lien was put on all of the husband's real and personal property for the payment of the judgment. The ex-husband did not pay the judgment debt. The ex-wife abstracted her judgment in July, 1968 and reabstracted it in July, 1978 but did not further abstract it until October, 1988. Thus, the lien was lost under the statute then in effect.[289] On the ex-husband's death in 1992 the home passed to his devisee who later brought suit for a declaratory judgment as to her title. The trial court's judgment in favor of the devisee was reversed by the Corpus Christi Court of Appeal's holding that the lack of express language of divestiture to the home caused at least one-half of the title to remain in the ex-wife. The Texas Supreme Court found this approach to interpretation of the judgment erroneous.[290] Rather, the Court said, "[l]ike other judgments, courts are to construe divorce decrees as a whole . . . giving effect to all that is written."[291] Although there was no express divestiture of the wife's interest in the home, "the decree liquidated her equity interest in the property and stipulated that [the husband] assume all existing debts on the property."[292] Thus, the Court concluded that the decree was meant to award the home solely to the

283. *See id.*
284. *See id.* at 343.
285. *See* TEX. FAM. CODE ANN. §§ 9.201-9.204 (Vernon Supp. 1998).
286. *See id.*
287. 949 S.W.2d 331, 332-33 (Tex. 1997).
288. *Id.* at 332.
289. *See id.* at 333 (citing Constance v. Constance, 544 S.W.2d 659, 660 (Tex. 1976)).
290. *See id.* at 332.
291. *Id.* at 333.
292. *Id.*

husband.[293] This interpretation was borne out by the wife's original petition for divorce in which she stated that her husband "may have the house to do with as he pleases."[294] Clear language in the decree to divest the wife's interest or a clear statement of the husband's sole interest would have obviated this dispute.

D. MAINTENANCE FOR AN EX-SPOUSE

Not only in the 1995 statutory amendment to section 8.001[295] (providing for an award for ex-spousal maintenance) but in all instances of statutory amendment, the provision of the enacting statute as to the effective date of the statute must be carefully considered in any suit affected by the statute. Two appellate courts have considered the effective date provision of the amendment to be applied "only to an action filed on or after" September 1, 1995.[296] The question was whether a counter-petition filed or amended after the effective date in response to a petition filed before the effective date is "an action" within the terms of the statute. In *Ex parte Casey*[297] the husband's petition for divorce was filed on August 30, 1995. The wife asserted that she was not served and had no notice of the pending suit until after the effective date of the amendment. She filed her counter-petition for divorce on October 20, 1995, and the court granted her ex-spousal maintenance. The ex-husband refused to pay as ordered and was committed to jail for contempt of the order.[298] The husband in *Crenshaw v. Crenshaw*[299] filed his suit for divorce one month before the effective date of the ex-spousal maintenance statute, and his wife filed a counter-petition a week later. She amended her counter-petition six days after the statute became effective and sought ex-spousal maintenance. In *Ex parte Casey*[300] the Fourteenth District Court of Appeals, relying on rule 97,[301] held that Texas counter-claims are not permissive and therefore follow the date of the original suit.[302] The court also concluded that it was the obvious intention of the Legislature, as expressed in plain language, to allow the first filing to control the applicability of the statute.[303] In *Crenshaw* the San Antonio court also held that the counter-claim is not an action and followed the holding of the Hous-

293. *See id.*

294. *Id.* The Court also said that the subsequent conduct of the parties is relevant to the construction of an ambiguous judgment and that the lapse of twenty-four years before the ex-wife's assertion of a half-interest in the property supported its construction of the decree. *See id.*

295. TEX. FAM. CODE ANN. § 8.001 (Vernon Supp. 1998) (originally TEX. FAM. CODE ANN. § 3.9601 (Vernon Supp. 1997)).

296. *See* 1995 Tex. Gen. Laws 3543, ch. 655, § 10.02, at 3577.

297. 944 S.W.2d 18 (Tex. App.—Houston [14th Dist.] 1997, no writ).

298. *See id.* at 19.

299. 957 S.W.2d 171 (Tex. App.—San Antonio 1997, no pet. h.).

300. 944 S.W.2d at 20-21.

301. TEX. R. CIV. P. 97.

302. *See Casey*, 944 S.W.2d at 20.

303. *See id.* at 21.

ton court.[304] A contrary view has nevertheless been expressed: a counter-petition is an original suit, and its filing after the effective date of the statute should govern the applicability of the statute to the counter-petition because it was in the counter-suit that maintenance was sought.[305] The view has also been expressed that the ex-spousal maintenance provision could face a constitutional attack,[306] though no such attack has yet materialized. A successful constitutional challenge seems very unlikely.

E. Effects of Bankruptcy

Although resort to bankruptcy will not discharge liability for support obligations, that remedy continues to be sought.[307] In *In re Swate*,[308] for example, the federal Fifth Circuit Court of Appeals held that a lump sum award for future support of the ex-wife as provided by the parties in an agreement incident to divorce and later reduced to a judgment debt in a state court proceeding was not a debt that would be discharged in the ex-husband's bankruptcy.[309] In this instance the ex-husband twice sought recourse to the Bankruptcy Court for relief from the debt, and on the second occasion the court relied on the *res judicata* effect of the prior bankruptcy decree that preceded the state court's judgment reducing the support order to a judgment debt.[310] Although the ex-husband presented a number of ingenious arguments to support his position, they were all refuted by the court. The court said that because both ex-spouses were parties to both bankruptcy proceedings, a mutual estoppel of the parties operated to preclude either party from relitigating issues previously adjudicated.[311]

In *In re Chunn*[312] the Fifth Circuit court for the first time resolved the issue of whether an order granting relief from a bankruptcy court's automatic stay is a final and appealable order. In this instance the husband had appealed from some aspects of a Texas divorce decree and then filed suit for bankruptcy. The state court had ordered the husband to make home mortgage payments as part of his child-support obligation, and his non-payment prompted his ex-wife to move for contempt of the state court's order. The wife then sought to lift the automatic stay in the bank-

304. *See Crenshaw*, 957 S.W.2d at 172.
305. *See* Kazen, *supra* note 256, at 438-39.
306. *See* Denise Causey Haugen, Comment, *Texas and Alimony: The Possibility of Constitutional Attack*, 34 Hous. L. Rev. 477 (1997).
307. 11 U.S.C. § 523(a)(5) (1994) precludes discharge of support obligations, and 11 U.S.C. § 523(a)(15) (1994) excepts some other claims related to property settlement agreements. *See* Benice B. Donald & Jennie D. Latta, *The Dischargeability of Property Settlements and Hold Harmless Agreements in Bankruptcy: An Overview of § 523(a)(15)*, 31 Fam. L. Q. 409 (1997); Richard H. W. Maloy, *Using Bankruptcy Court to Modify Domestic Relations Decrees: Problems Created by § 523(a)(15)*, 13 Fam. L. Q. 433 (1997).
308. 99 F.3d 1282 (5th Cir. 1996).
309. *See id.* at 1286.
310. *See id.* at 1285-86.
311. *See id.* at 1290.
312. 106 F.3d 1239 (5th Cir. 1997).

ruptcy court so that the state court's order could be enforced.[313] The bankruptcy court lifted the stay. The Fifth Circuit court held that the husband could appeal the bankruptcy court's order.[314] The appellate court also held that the bankruptcy court had properly lifted the stay for the enforcement of the child-support order.[315]

A somewhat different dispute was before the bankruptcy court in *In re Topper*.[316] At the time of the couple's 1994 divorce the husband had not divulged the existence of certain community corporate shares in his inventory of community property in the hope that he could defraud his wife of her community interest in them. The divorce decree did not specifically divide the shares but provided that any community property not specifically divided would be equally divided between the parties. The ex-wife later discovered the existence of the shares and transferred her interest in them to a third person. In the ex-husband's later bankruptcy proceeding the transferee sought the shares transferred to him. In making the order requested, the bankruptcy court held that although the bankrupt claimed ownership of the shares, the ex-wife's interest as defined in the decree was not a part of the bankrupt's estate.[317] The court analogized the stock (once held in the name of the bankrupt-husband) to a trust-property held by a bankrupt-trustee.[318]

F. Other Post-Divorce Disputes

Sever v. Massachusetts Mutual Life Insurance Co.[319] involved a contest over proceeds of a life insurance policy. The husband contracted for the insurance policy during marriage and named his wife as the beneficiary. When the couple was divorced, the court awarded the policy to the husband and ordered him to maintain a policy of life insurance in the amount of $50,000 on behalf of his only child as long as he had an obligation to pay for the child's support. After the divorce the ex-husband told his insurance agent that he did not desire to change the designation of the policy's beneficiary, but he made no further arrangements concerning the policy. The child was still a minor when the father died. The appellate court held that the ex-wife could not take as beneficiary of the policy because the insured ex-husband had not redesignated her as beneficiary in accordance with section 9.301 (formerly 3.632) of the Family Code,[320]

313. *See Ex parte* Chunn, 933 S.W.2d 534 (Tex. App.—Houston [1st Dist.] 1995, no writ). Because the court's order (for which the ex-husband was confined for contempt of court) required him to make future payments that were not yet due, his writ of habeas corpus was granted, and he was released from confinement. The same result can be anticipated in response to a similar order for confinement for failure to pay future maintenance for an ex-spouse.

314. *See Chunn*, 933 F.3d at 535.

315. *See id.* at 535 (citing 11 U.S.C. § 362(b)(2)).

316. 212 B.R. 255 (Bankr. S.D. Tex. 1997).

317. *See id.* at 257.

318. *See id.* at 258 (citing *In re* Unicorn Computer Corp., 13 F.2d 321 (9th Cir. 1994)).

319. 944 S.W.2d 486 (Tex. App.—Amarillo 1997, writ denied).

320. Tex. Fam. Code Ann. § 9.301 (West Supp. 1998).

and the information supplied to the insurance agent was irrelevant in satisfying compliance with the statute.[321] Because the insured ex-husband had not named an alternate beneficiary, the proceeds were payable to his estate, though a constructive trust of $50,000 was imposed on the proceeds of the policy in favor of the decedent's minor child.[322]

At the 1997 legislative session the effect of Probate Code section 481 on non-terminable powers of attorney was altered by the enactment of section 485A, which provides that on divorce or annulment of a principal-spouse and an agent-spouse, a power of attorney between them is terminated.[323]

Robinson v. Robinson[324] dealt with the effects of efforts of former spouses toward making contractual post-divorce adjustment in liability under a property settlement agreement. Much of the dispute turned on the proof of facts alleged by each former spouse, but the result is instructive in that it serves as a warning against imprecise post-divorce arrangements to readjust liabilities and assets without judicial intervention.

The couple's agreement included a provision that the husband would pay the wife $1,000 a month for one year. By its terms the agreement could be modified only by an instrument in writing signed by both parties. After the ex-husband had paid one-half of the installments, he wrote an angry letter that elicited a poignant and ambiguous response which he took to mean that he need not make the six future payments. But he did not thereupon sign the ex-wife's letter in compliance with the terms of the agreement so that it might be termed an agreed amendment. The ex-wife's later demand for the future payments was interpreted by the majority of the court as a termination of her prior "offer" to waive the payments.[325]

321. *See Sever*, 944 S.W.2d at 491.
322. *See id.* at 492.
323. *See* TEX. PROB. CODE ANN. § 485A (Vernon Supp. 1988).
324. 961 S.W.2d 292 (Tex. App.—Houston [1st Dist.], 1997, n.w.h.).
325. *See id.* at *6.