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## Family Law: Husband and Wife

Joseph W. McKnight

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# FAMILY LAW: HUSBAND AND WIFE

*Joseph W. McKnight\**

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## I. STATUS

### A. NON-MARITAL UNIONS

**A**LTHOUGH academic sources continue to provide ample discussion of unisexual unions, the quantum of litigation they produce is evidently small.<sup>1</sup> The Internal Revenue Service has concluded that though a same-sex domestic partner is not interpreted as a spouse for

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1. Several symposia addressed such matters. See, e.g., Forum, *Sexual Morality and the Possibility of Same Sex Marriage: The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS, 97 (1997); Symposium, *Interjurisdictional Marriage Recognition*, 32 CREIGHTON L. REV. 1 (1998); Symposium, *Law and Politics of Marriage, Loving v. Virginia After 30 Years: Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage*, 47 CATH. U.L. REV. 1231 (1998); Symposium, *Queer Matters: Emerging Issues in Sexual Orientation Law*, 8 UCLA WOMEN'S L.J. 165 (1998); Symposium, *Constructing Family, Constructing Change: Shifting Legal Perspectives on Same-Sex Relationships*, 7 TEMP. POL. & CIV. RTS. L. REV. 245 (1998); and Symposium, *Law and the Politics of Marriage: Loving v. Virginia After Thirty Years*, 12 BYU J. PUB. L. 201 (1998). Individual essays also examined the subject. See, e.g., Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735 (1998); Jennifer Wriggins, *Maine's "Act to Protect Traditional Marriage and Prohibit Same-Sex Marriage": Questions of Constitutionality under State and Federal Law*, 50 ME. L. REV. 345 (1998); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Mark Strasser, *Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice*, 29 RUTGERS L.J. 271 (1998); Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339 (1998).

most tax purposes, such a domestic partner may be a dependent for the purposes of tax treatment of health benefits.<sup>2</sup>

A heterosexual non-marital union, however, produced an appellate discussion in Bexar County. In *O'Farrill Avila v. González*<sup>3</sup> a female cohabitant brought an action against her former male cohabitant for breach of an alleged contract concerning the purchase of a home and a monthly payment for her remaining in the city and staying at home with their daughter. Unlike the dispute in *Zaremba v. Cliburn*,<sup>4</sup> which turned on the complainant's failure to produce written evidence of the promises sought to be enforced in relation to a unisexual relationship, a written agreement signed by both parties was before the court in this instance.<sup>5</sup> The whole court agreed that the written contract between the parties and the seller of realty was sufficient to meet the statutory requirement of a signed writing to support the plaintiff's evidence of a contract to repay the plaintiff's payment of \$60,000 toward the purchase of a house (in the name of a corporation) in which the plaintiff had lived with the child.<sup>6</sup> Two members of the court agreed that a written agreement between the parties also sufficiently supported the enforcement of the plaintiff's allegations of a further contract that the plaintiff would care for the child during its formative years (until settled in school) at the rate of \$5000 a month. The terms of the written agreement entered into in Mexico City, presumably in Spanish, are not quoted but are summarized by the majority of the court as "a bare promise to make monthly payments" to the plaintiff without "mention of duration of these payments or of any return promise made by [the plaintiff]."<sup>7</sup> The dissenting judge said that "[o]n the state of this record, I do not believe it is remotely possible to 'understand what the promisor undertook.'"<sup>8</sup> The majority of the court, however, relied on the doctrine of past-performance, as evidenced by the testimony of the plaintiff, to support a finding of a contract of reasonable duration for staying with and caring for the child.<sup>9</sup> The majority also supported the trial judge's award of attorney's fees of \$25,000 (twelve and a half percent of the monetary award for breach of the two contracts) and allowed interest thereon from the date on which the appeal was perfected.<sup>10</sup>

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2. See 1 Ltr. Rul. 98-500011 (Dec. 14 1998).

3. 974 S.W.2d 237 (Tex. App.—San Antonio 1998, no pet.).

4. 949 S.W.2d 822 (Tex. App.—Fort Worth 1997, no pet.). For further discussion see Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 51 SMU L. REV. 1047, 1048 (1998).

5. See TEX. BUS. & COM. CODE ANN. § 26.01(a), (b)(3) (Vernon 1987).

6. See *O'Farrill Avila*, 974 S.W.2d at 242.

7. *Id.* at 242.

8. *Id.* at 250, Duncan, J., dissenting, citing *T. O. Stanley Booth Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992).

9. See *id.* at 243-49.

10. See *id.* at 249-50.

## B. INFORMAL MARRIAGE

The ever-present foes of the institution of informal marriage (marshaled by the unsuccessful counsel in *Estate of Claveria v. Claveria*<sup>11</sup>) significantly crippled the doctrine in 1989 by amending the Family Code to provide that any assertion of an informal marriage was required to be brought within one year of the end of alleged marital cohabitation.<sup>12</sup> In *Transamerican Natural Gas Corp. v. Fuentes*<sup>13</sup> (without expressing any doubt of its constitutional validity),<sup>14</sup> the Supreme Court of Texas reiterated its conclusion in *Mossler v. Shields*<sup>15</sup> that the one-year statute of limitation, if effectively asserted, bars reliance on an informal marriage. That statute was also fatal to a tardy effort to disprove an alleged informal 1993 marriage in *Lavelly v. Heafner*.<sup>16</sup> In 1995, however, the Family Code was again amended to provide that if an informal marriage is not asserted for a period of two years after termination of a cohabital relationship, there is merely a presumption of no agreement to marry between the parties.<sup>17</sup> This amendment controls all suits commenced after September 1, 1995, but does not affect those suits already barred by the 1989 act.<sup>18</sup> In 1997 section 2.401 was also amended<sup>19</sup> to provide that a minor (without mention of removal of disabilities of minority) may not be a party to an informal marriage or execute a declaration of informal marriage (as though the declaration might somehow be effective despite the lack of an informal marriage to declare). But the Legislature nevertheless left provisions in place by which parental consent might be given for such marriages.

In *Lee v. Lee*<sup>20</sup> a wife brought suit for divorce in April 1994 after she and her husband had ceased living together in January of that year. The

11. 615 S.W.2d 164 (Tex. 1981).

12. For a brief legislative history of the enactment of § 1.91(b), Act of June 14, 1989, 1989 Tex. Gen. Laws ch. 369, § 9 at 1461 (effective Sept. 1, 1989), see Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 Sw. L.J. 1, 2-3 (1990). See also *Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998). In 1989 the opponents of the principle of informal marriage also achieved suppression of the provision of § 1.91, enacted in 1969 to codify the conclusion in *Consolidated Underwriters v. Kelly*, 15 S.W.2d 229 (Tex. Comm'n. App. 1929, judgment adopted), *aff'g Kelly v. Consolidated Underwriters*, 300 S.W.2d 981 (Tex. Civ. App.—Beaumont 1927), that an agreement of a couple to be married might be inferred from a finding of cohabitation as a married couple and their holding themselves out to the public as married. The substantive effects of this amendment were defined in *Russell v. Russell*, 865 S.W.2d 929, 931 (Tex. 1993).

13. *Sub nom* *Shepherd v. Ledford*, 962 S.W.2d 28, 35 (Tex. 1998). For a discussion of this decision see McKnight, *supra* note 4, at 1049-50.

14. See *White v. State Farm Mutual Auto. Ins. Co.*, 907 F. Supp. 1012, 1018 (E.D. Tex. 1995). *But see Dannelley v. Almond*, 827 S.W.2d 582, 585 (Tex. App.—Houston [14th Dist.] 1992, no writ).

15. 818 S.W.2d 752, 754 (Tex. 1991).

16. 976 S.W.2d 896, 899 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

17. See TEX. FAM. CODE ANN. § 2.401(b) (Vernon Supp. 1998).

18. See *Lavelly*, 976 S.W.2d at 898 n.2. As dealt with on motion for rehearing, *Simpson and Angerer v. Patel*, No. 07-97-0107-CV, 1998 WL 389012 (Tex. App.—Amarillo July 13, 1998), seems to be a case on point.

19. See 1997 Texas Laws, ch. 1362, § 1.

20. 981 S.W.2d 903 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

couple had been ceremonially married in December 1993, but at the trial, which commenced in October 1995, the court allowed an amendment of the wife's pleading that an informal marriage had existed between the parties since January 1992. The trial court found that the informal marriage had been proved. In his appeal the husband did not appear to have raised a point of error on the timeliness of the trial amendment under the 1989 act, which had not been repealed, though some of its provisions had been amended by the 1995 act. Rather, the husband contested the trial court's finding that the couple had held themselves out to the public as married, and thus, in the absence of this vital element of informal marriage, the existence of the informal marriage had been erroneously found. With one judge dissenting, the appellate court concluded that several isolated instances when the wife asserted their marriage to relatives and friends and some references to her as "Mrs. Lee" by customers and friends did not constitute compliance with the statutory requirement of holding themselves out to the public as being married.<sup>21</sup> While relying on *Winfield v. Renfro*<sup>22</sup> and *Estate of Giessel*,<sup>23</sup> the majority of the court stressed that each case must turn on its own particular circumstances. In this instance, the majority concluded that the alleged husband had failed to hold the woman out to the public as his wife.<sup>24</sup>

The assertion of an informal marriage in *Villegas v. Griffin Industries*<sup>25</sup> fell to two fatal obstacles. Though the court seems to have assumed that the facts were sufficient to prove the elements of an informal marriage, the one-year statute of limitation for proof of the marriage was in effect when the suit was brought.<sup>26</sup> Thus, even if the marriage met all the requirements of a valid informal marriage, its assertion of validity was barred. Further, because the husband had a living wife at the time the marriage was contracted, the informal marriage would have been void until the impediment was removed. Though that informal marriage would have been treated as valid once the impediment was removed,<sup>27</sup> there was no proof that the impediment had been removed prior to the husband's death. Finally, the alleged wife was unable to show that she was a putative wife of the decedent because she knew of the impediment. Even if she had acted in good faith and without knowledge of the impediment and thus was a putative wife, she would still have been barred from recovery for her husband's wrongful death because a putative spouse lacks standing to sue for such a cause of action as a matter of law.<sup>28</sup>

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21. *See id.* at 907.

22. 821 S.W.2d 640, 648 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

23. 734 S.W.2d 27, 31-32 (Tex. App.—Houston [1st Dist.] 1987, no writ).

24. In her dissenting opinion Justice Mirabal responded to this conclusion by saying that there was considerably more than a scintilla of evidence to support the assertion of an agreement to marry and of holding each other out as husband and wife in Texas. Cohabitation of spouses was apparently conceded.

25. 975 S.W.2d 745 (Tex. App.—Corpus Christi 1998, no pet.).

26. *See id.* at 749 n.1.

27. *See id.* at 750 n.4.

28. *See id.* at 749.

In two other civil actions that reached the appellate courts, proof of informal marriages presented some difficult evidentiary questions. *Ballesteros v. Jones*<sup>29</sup> was a suit brought by an allegedly informally married woman against her attorney for professional malpractice after he had recommended and negotiated an inadequate settlement prior to a trial for divorce. It was therefore necessary that the woman prove the validity of her informal marriage, and in this case, after he had already received a beneficial settlement, she had the advantage of her alleged husband's favorable testimony. The woman was able to demonstrate to a jury's satisfaction that the relationship of seventeen years duration eventually constituted a valid marriage once two impediments were removed: (1) the woman's own marriage existing at the start of the relationship and terminated by divorce and (2) the man's marriage, which was finally terminated by his wife's death. After the removal of both impediments, the alleged marital relationship subsisted for seven years during which all the elements of an informal marriage were proved to have existed.<sup>30</sup> The evidence supporting the jury's verdict seems to have been remarkably thin.<sup>31</sup> Despite a considerable conflict of evidence on holding themselves out to the public as husband and wife, the Dallas Court of Appeals also sustained the trial court's finding of an informal marriage in *Pickens v. Broadwater*.<sup>32</sup> In criminal cases, however, efforts to prove informal marriages in order to suppress evidence of an alleged spouse were less successful.<sup>33</sup>

### C. INTERSPOUSAL TORTS

The point most frequently overlooked in relation to interspousal torts is that prior to the Texas Supreme Court's decision to abrogate the doctrine of spousal immunity in *Bounds v. Caudle*<sup>34</sup> there was no clear recognition of tortious liability between spouses.<sup>35</sup> Despite some misty observations concerning actionability of claims for actual fraud in relation to dispositions of community property, the remedy available for such acts

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29. 985 S.W.2d 485 (Tex. App.—San Antonio 1998, no pet.). This is an en banc review on motion for rehearing. It is striking that roughly five years elapsed from the date of the motion and the substituted opinion, during which time all of the judges who had constituted the original panel had left the court.

30. The trial jury found that an informal marriage had been proved but the trial judge granted the attorney's motion for judgment notwithstanding the verdict. The appellate court reversed this conclusion because the verdict was supported by some evidence.

31. Although the cohabital relationship of the man and woman had evidently ceased for over a year prior to her filing suit for divorce in 1988, the trial began prior to enactment of the 1989 statute.

32. No. 05-96-00614-CV, 1997 WL 796998 (Tex. App.—Dallas Dec. 31, 1997).

33. See, e.g., *Colburn v. State*, 966 S.W.2d 511 (Tex. Crim. App. 1998); *Medel v. State*, No. 01-97-00960-CR, 1998 WL 653459 (Tex. App.—Houston [1st Dist.] Sept. 24, 1998); *Aylor v. State*, No. 04-94-00759-CR, 1997 WL 136479, (Tex. App.—San Antonio Mar. 26, 1997).

34. 560 S.W.2d 925 (Tex. 1977).

35. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 32 Sw. L.J. 109, 110 (1978).

was far from clear.<sup>36</sup> Thus, in the absence of a defined doctrine of tortious liability *there were no interspousal torts*. Since *Bounds* was decided, however, there has been a tendency among many lawyers to assume that the rules of tortious liability between spouses is the same as that prevailing among strangers. In the absence of any prior rules, that conclusion seems unjustifiable. A determination of the scope of the doctrine of interspousal torts has just begun. The Texas Supreme Court has a difficult road ahead in this regard.

Thus far the court has only considered a spouse's fraudulent misrepresentation of a pending divorce proceeding in relation to the running of the statute of limitation.<sup>37</sup> More recently in *Schlueter v. Schlueter*<sup>38</sup> the court distinguished a right of reimbursement for hiding community assets in anticipation of divorce and tortious liability for the infliction of physical injury and emotional distress. In *Schlueter* the wife, as respondent and counter-petitioner in a suit for divorce, sought damages against her husband (and his father for assisting him) for secreting community assets in anticipation of divorce. Prior to filing his petition for divorce the husband had not only sold a business to his father at a price that was somewhat less than its value but had also transferred a significant amount of money to him. The jury found that \$12,850 would compensate the community estate for their acts and also awarded punitive damages of \$50,000 against the husband and \$15,000 against his father. In three instances over the last twenty-five years the Texas Supreme Court has allowed recovery for interspousal personal injury claims, the most recent of which was a divorce case.<sup>39</sup> In each instance, however, the recovery constituted the separate property of the injured spouse. Although the acts complained of in *Schlueter* were intentional, the proprietary deprivation that resulted was not against a separate interest. Here the majority of the court drew the line between the sort of recovery allowed between spouses and that which is not actionable: Interspousal tortious recovery may be had for loss to a separate property interest but not for secreting community property in anticipation of a divorce proceeding, though the divorce court may award a monetary judgment for restitution of monetary loss to the community estate if there is insufficient community property on hand for that purpose. Because there is no independent tort cause of action for wrongful disposition of community assets, the wronged spouse cannot re-

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36. See *Stramler v. Coe*, 15 Tex. 211, 215 (1855); *Mahoney v. Snyder*, 93 S.W.2d 1219 (Tex. Civ. App.—Amarillo 1936, no writ); *Bettis v. Bettis*, 83 S.W.2d 1076 (Tex. Civ. App.—El Paso 1935, no writ); *Dunn v. Vinyard*, 234 S.W. 99 (Tex. Civ. App.—Texarkana 1921); *aff'd on other grounds*, 251 S.W. 1043 (Tex. Comm., App. 1923, recommendation adopted) (summarizing the pre-1913 law of actual fraud).

37. See *Oliver v. Oliver*, 889 S.W.2d 271 (Tex. 1994), *discussed in* Joseph W. M<sup>c</sup>Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1230-31 (1995).

38. 975 S.W.2d 584 (Tex. 1998).

39. See *Bounds*, 560 S.W.2d at 925; *Price v. Price*, 732 S.W.2d 316 (Tex. 1987); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993). The issue of damages was not alluded to in *Oliver v. Oliver*, 888 S.W.2d 271 (Tex. 1994).



cover punitive damages from the other spouse.<sup>40</sup> Although the casual use of such phrases as "community recovery" or "fraud on the community" may sometimes so suggest, "the community estate" is not an entity that may assert a claim in a divorce context or any other.<sup>41</sup> Such phrases are merely figures of legal speech rather than terms of art. Although the court did not discuss the point, the community estate in such instances is made whole by a right of reimbursement, which entails neither an award of interest or punitive damages.<sup>42</sup> It appears to follow that in the reimbursement context the distinction between intent to harm the other spouse in making such a disposition of community property is no longer significant. As to "the heightened culpability of actual fraud" on the husband's part,<sup>43</sup> the trial court may consider it in making the division of community property on divorce.<sup>44</sup> Finally, the Texas Supreme Court reversed the award of attorney's fees for the wife, not because of any relationship to the recovery denied for exemplary damages but because of its apparent penal effect with respect to the successful appellant-husband.<sup>45</sup>

The community property disposed of in *In re Herring*<sup>46</sup> was meant to be kept by the recipient rather than returned to the spouse who transferred it, and the transfer was not made in anticipation of divorce. In *Herring* the wife on several occasions made gifts of community funds to her son by a prior marriage without her husband's knowledge. Over four years after the wife's death the husband brought suit against the administrator of his wife's estate and the son for the money transferred as a constructive fraud and also sought damages for conspiracy. The defendants asserted that the plaintiff had discovered the transfer (or should have discovered the transfer) over four years before bringing suit and that his claim was therefore barred by the four-years statute of limitation for the transfer<sup>47</sup> and by the two-years statute of limitation for conspiracy.<sup>48</sup> A summary judgment was rendered in favor of both defendants on the basis of the statutes of limitation, and the plaintiff pursued his appeal only against the transferee-son. The appellate court held that a conspiracy claim would have been barred by the two-years statute. The later decision in *Schlueter* precludes an interspousal tortious claim as subsumed in the right of marital reimbursement. Because a right of reimbursement does not arise until the marriage terminates,<sup>49</sup> the applicable statute of limitation begins to run as soon thereafter as the plaintiff knew or ought

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40. See *Schlueter*, 975 S.W.2d at 589.

41. Just as a decedent's estate is not an entity as the court pointed out in *Gregg v. Barron*, 977 S.W.2d 654, 656 (Tex. App.—Fort Worth 1998, no pet.), the community estate is not an entity in that or other contexts.

42. See *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984).

43. The award of exemplary damages against the husband's father, nevertheless, stood because no appeal was taken from it.

44. See *Schlueter*, 975 S.W.2d at 589.

45. See *id.* at 590.

46. 970 S.W.2d 583 (Tex. App.—Corpus Christi 1998, no pet.).

47. See TEX. CIV. PRAC. & REM. CODE § 16.004(a)(3) (Vernon 1986).

48. See *id.* § 16.003(a).

49. See *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964).

to have known the facts supporting the constructively fraudulent disposition.<sup>50</sup> In this instance the court held that the four-years statute had not run on the transfer.<sup>51</sup>

#### D. SPOUSAL GUARDIANSHIP

The capacity of one spouse to act as guardian of the person or property of the other spouse was only moderately explored by the appellate court in *Trimble v. Texas Department of Protective & Regulatory Service*.<sup>52</sup> Though the husband objected to the appointment of a state agency as guardian of his mentally incapacitated (but ambulatory) wife, the trial court exercised its judgment in favor of the agency as the guardian of her person and property in light of the husband's inability to serve and the refusal of other family members to undertake responsibility for her situation. As to guardianship of his wife's estate, the husband interposed his power under section 883 of the Probate Code to manage the community estate when his spouse was judicially declared incompetent.<sup>53</sup> The appellate court pointed out that the trial court's exercise of its discretion in favor of appointment of the agency was nonetheless proper although the husband might, under section 884, demand control of the community estate, but he had failed to do so.<sup>54</sup>

In a very different context, the court in *Stubbs v. Ortega*<sup>55</sup> once more held that a spouse's guardian might institute and maintain a suit for that spouse's divorce.<sup>56</sup> In that context, however, the other spouse would seem clearly unable to act as guardian of the incapable spouse.

#### E. STATE EMPLOYMENT

Texas has long maintained rules against spousal nepotism in state employment in order to avoid favoritism in appointment of spouses to state offices of profit when the other spouse exercises the power to appoint. Aspects of these statutes were discussed in two opinions of the Texas Attorney General.

As in the administration of other statutory regulations there are instances of seeming iniquities. In June 1996 the Brooks Independent School District closed its school in Encino, and as a consequence many of the teachers resigned their positions as school district employees, though a lawsuit was brought to reestablish the school. During the following

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50. *See id.* at 565.

51. *See Herring*, 970 S.W.2d at 590.

52. 958 S.W. 2d 906 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

53. *See* TEX. PROB. CODE ANN. § 883 (Vernon 1987).

54. *See Trimble*, 958 S.W.2d at 914.

55. 977 S.W.2d 718 (Tex. App.—Fort Worth 1998, no pet.).

56. *See id.* at 722 (citing TEX. HEALTH & SAFETY CODE ANN. § 576.001 (Vernon 1992)). *See also* *Wahlenmaier v. Wahlenmaier*, 750 S.W.2d 837, 838 (Tex. App.—El Paso 1988, writ denied). *See generally* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 Sw. L.J. 1, 27-28 (1989). For jurisdiction of a probate court in such matters see *In re Graham*, 971 S.W.2d 56 (Tex. 1998).

year the husband of one of those teachers who had resigned was elected to the school district board. The lawsuit was thereafter successfully pursued with the result that the district reopened the closed school and sought the opinion of the Attorney General whether it might rehire the school board member's wife, who had been employed by the school district for twenty-five years prior to her resignation.<sup>57</sup> The response was that to do so would be a violation of the Texas statute.<sup>58</sup> There is an exception to the application of the rule transgressed: If the person appointed had previously held the position for a long term "immediately before" the election at which the spouse was elected.<sup>59</sup> In this instance, however, the teacher had not been employed by the school board "immediately before" the election but by a private group which was conducting a school in the facilities by permission of the board while the public school was closed. The literal interpretation of the statute produced a very harsh result.

In another instance the anti-nepotism rule was not seen to be violated.<sup>60</sup> In 1995 the Randall County criminal district attorney employed a paid victim-assistance coordinator. Because the district attorney and the victim-assistance coordinator planned to be married, and because paid positions tend to invoke the provisions of the anti-nepotism law and unpaid positions do not, the district attorney and the sheriff, who had an unfilled position of an unpaid crime-victim liaison on his staff, suggested that the position in the district attorney's office be made an unpaid position and the position in the sheriff's office be made a paid position.<sup>61</sup> The County Commissioners changed the descriptions of the two positions. Thereafter the position of victim-assistance coordinator continued to be filled by the incumbent without pay, and the sheriff also hired her to fill the newly-compensated position of crime-victim liaison. After the district attorney and the dually-titled liaison-coordinator were married, the Attorney General was asked whether there was a breach of anti-nepotism rules. The Attorney General first stated that "it does not appear, from the facts you have presented, that the prosecutor and the sheriff have contravened chapter 573 by trading otherwise prohibited nepotistic appointments" and concluded that no violation of the anti-nepotism rules had occurred.<sup>62</sup>

#### F. LOSS OF CONSORTIUM

In *Howard v. Fiesta Texas Show Park, Inc.*,<sup>63</sup> the appellate court once again stressed the derivative nature of a spouse's claim for loss of consortium. Thus, any defense that defeats the claim of the primary victim pre-

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57. See Op. Tex. Att'y Gen. No. LO-98-046 (1998).

58. See TEX. GOV'T CODE ANN. § 573.041 (Vernon 1988).

59. *Id.* § 573.062(a).

60. See Op. Tex. Att'y Gen. No. LO-98-098 (1998).

61. See *id.*

62. *Id.*

63. 980 S.W.2d 716 (Tex. App.—San Antonio 1998, no pet.).

cludes recovery by the derivate claimant as well.<sup>64</sup>

## II. CHARACTERIZATION OF MARITAL PROPERTY

### A. PREMARITAL PARTITION

The waning incidence of appellate contest of the validity of premarital partitions suggests either that in recent years such arrangements have been less frequently employed or that they are being more skillfully negotiated, drawn, and executed.<sup>65</sup> Commentators nonetheless continue to stress ethical concerns in drafting such agreements as well as other pitfalls of negotiation.<sup>66</sup>

The premarital agreement at issue in *Bernhardt v. Scheifley*<sup>67</sup> had been executed in 1970, a decade before a partition of future community assets was authorized. The agreement provided correlatively that each spouse's separate property along with "all increases thereof, additions thereto, and mutations thereof," should remain separate and subject to the owner's sole control and that "any expenditure . . . made by the parties for the conservation, preservation, or maintenance" of separate estates during the marriage that might give rise to a reimbursement claim by the community estate should "inure to the sole benefit of the party" whose separate property was benefited.<sup>68</sup> The spouses died within two years of each other, and each estate sought an interpretation of the terms of the agreement in its favor. The wife's executrix asserted that all income of separate properties was community property, whereas the husband's executor argued that the terms of the agreement provided that all income from separate properties was the separate property of the spouse whose property produced the income. Although there was no seeming contest of invalidity of the partition, each estate moved for summary judgment in reliance on the curious conclusion of the Texas Supreme Court in *Beck v. Beck*<sup>69</sup> that the 1980 constitutional amendment was meant to validate such prior undertakings.<sup>70</sup> The trial court found for the husband's estate, and the wife's executrix appealed. The Beaumont Court of Appeals concluded that neither estate was entitled to summary judgment, because the agreement was ambiguous and remanded the case to the trial court.

If the agreement in *Bernhardt* is examined in the context of the law at the time it was entered into, its meaning is fairly clear in the absence of

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64. *See id.* at 719 (citing *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 738-39 (Tex. 1980)).

65. The latter suggestion seems borne out by the wife's failure to pursue her appellate attack on validity of the antenuptial agreement in *Lueg v. Lueg*, 976 S.W.2d 308, 309, 312 (Tex. App.—Corpus Christi 1998, no pet.).

66. *See* Dennis L. Becker & Laura O. Pomeroy, *For Richer, for Poorer: Strategies for Premarital Agreements*, 12 PROB. & PROP. 54 (1998); Lewis Becker, *Ethical Concerns in Negotiating Family Law Agreements*, 30 FAM. L.Q. 587 (1996).

67. No. 09-96-404-CV, 1998 WL 472491 (Tex. App.—Beaumont Aug. 13, 1998).

68. *Id.* at \*1.

69. 814 S.W.2d 745, 749 (Tex. 1991). *See generally* Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 45 Sw. L.J. 1831, 1839-41 (1992).

70. *See id.* at 749 (citing TEX. CONST. art. XVI, § 15 (1876, as amended)).

controlling evidence of the intent of the parties that might be gleaned from external sources. Few, if any, informed lawyers in 1970 would have felt altogether confident of success when providing in a premarital partition that income from separate property could be defined as separate property, though the provision that neither party could claim a right to reimbursable benefits rendered to separate property on the part of the community estate is not beyond what a lawyer of the time might have regarded as subject to agreement. Thus, the meaning of "additions" to separate property is reasonably clear. As to "mutations" of separate property, that is a term of art meaning changes in form that do not affect the character of the property. Though the term was not used in the statute defining separate property, it has been a defining element of the community management statute (now section 3.012) since its enactment in 1967.<sup>71</sup> The term "increase" had been removed from the statute defining separate property when the provision of the 1967 act became effective on January 1, 1968,<sup>72</sup> but its history as a term of art *not* including income and revenues from separate property dates back to the decision of the Texas Supreme Court in *Blane v. Hugh Lynch & Co.*<sup>73</sup> in 1859. Thus, carefully analyzed, the language of the agreement in *Bernhardt* is not ambiguous.

## B. TRACING

### 1. *Commingled Accounts*

The initial factor in characterizing property acquired by a married couple is the presumption that all property acquired during marriage is community property.<sup>74</sup> In the absence of proof that an acquisition was made lucratively as opposed to onerously, the community presumption prevails.<sup>75</sup>

Until the early 1970s funds in active accounts were treated by appellate courts as beyond segregation into separate and community increments.<sup>76</sup> Then *Sibley v. Sibley*<sup>77</sup> began to be relied on for the proposition that funds removed from an account of commingled separate and community funds were presumed to be community withdrawals. Although the *Sibley* decision did not stand for that proposition,<sup>78</sup> the alleged authority seemed to fill a perceived need for a means of tracing commingled community and separate funds in an active account that has been accepted by

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71. See TEX. FAM. CODE ANN. § 3.102 (Vernon Supp. 1999), formerly § 5.22.

72. See TEX. FAM. CODE ANN. § 3.002 (Vernon Supp. 1999), formerly § 4619 of the 1967 act and § 5.02 of the Family Code of 1969.

73. 23 Tex. 25 (1859).

74. See TEX. FAM. CODE ANN. § 3.003 (Vernon Supp. 1999).

75. See *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972). See also *Scott v. Estate of Scott*, 973 S.W.2d 694, 695 (Tex. App.—El Paso 1998, no pet.).

76. See *M<sup>c</sup>Kinley v. M<sup>c</sup>Kinley*, 496 S.W.2d 540, 543-44 (Tex. 1973) (involving the \$16,000 Dallas Federal Savings certificate).

77. 286 S.W.2d 657 (Tex. Civ. App.—Dallas 1955, writ *dism'd w.o.j.*).

78. See Joseph W. M<sup>c</sup>Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 35 Sw. L.J. 93, 104-05 (1981).

many intermediate appellate courts.<sup>79</sup> *Hill v. Hill*<sup>80</sup> is a recent example. At marriage the husband had an account in which \$7500 of separate property had been deposited. During the marriage that account was depleted to \$4900 before the deposit of a gift of \$10,000 was made to the account to bring the level of the account to \$14,900. Due to withdrawals the account was then depleted to \$7900. Another gift of \$14,700 was deposited to bring the balance to \$22,600. Many other uncharacterized deposits and withdrawals were made to and from the account. The court assumed that these withdrawals "consumed first the community and then the separate funds."<sup>81</sup> The lowest balance was \$17,300, which was thought to be separate property only. Hence, the trial court's award to the husband of that amount as his separate property was affirmed.<sup>82</sup> Thus, the tracing doctrine has succumbed, at least in part, to techniques of accounting, but the underlying reasons on which the accounting is based seem meritless.

In *Sibley* the husband as custodian for his wife of her separate property deposited her funds in a community bank account. On divorce, the wife sought return of her property. After the wife's funds had been deposited in her husband's account, many payments had been made from the account, but the account balance had never dipped below the amount of the wife's funds deposited there. The appellate court held that the husband-fiduciary was deemed to have paid out community funds before exhausting any of the wife's funds. This holding based on fiduciary principles has been often cited in support of the proposition that in *any* situation of commingling of separate property with community funds, the community funds will be deemed to be paid out first.<sup>83</sup> Such citation is a gross misstatement of the holding in *Sibley*. But by treating each withdrawal as a *transaction*, the conclusion may still be defended as an application of the community presumption. Even so, each withdrawal is more properly characterized as being of the same character as the fund from which it was taken. That is, if the fund at the time of withdrawal is forty percent separate and sixty percent community, the withdrawal should reflect the same mix.<sup>84</sup> The decision in *Sibley*, however, actually rested on neither a

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79. See *Barrington v. Barrington*, 290 S.W.2d 297, 304 (Tex. Civ. App.—Texarkana 1956, no writ); *Horlock v. Horlock*, 533 S.W.2d 52, 58 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed) (a wholly gratuitous observation); *Harris v. Ventura*, 582 S.W.2d 853, 856 (Tex. Civ. App.—Beaumont 1979, no writ); *Snider v. Snider*, 613 S.W.2d 8, 11 (Tex. Civ. App.—Dallas 1981, no writ); *Gibson v. Gibson*, 614 S.W.2d 487, 489 (Tex. Civ. App.—Tyler 1981, no writ); *Anderson v. Gilliland*, 677 S.W.2d 105, 107 (Tex. App.—Dallas 1984), *rev'd in part on other grounds*, 684 S.W.2d 673 (Tex. 1985); *Welder v. Welder*, 794 S.W.2d 420, 425, 432, 433 (Tex. App.—Corpus Christi 1990, no writ); *Hill v. Hill*, 971 S.W.2d 153, 158 (Tex. App.—Amarillo 1998, no pet.); and *Camp v. Camp*, 972 S.W.2d 906 (Tex. App.—Corpus Christi 1998, no pet.).

80. 971 S.W.2d 153 (Tex. App.—Amarillo 1998, no pet.). The figures given in the text have been rendered in nearest hundreds of dollars.

81. *Id.* at 159.

82. *See id.*

83. *See, e.g., supra* note 79 and accompanying text.

84. *See Love v. Robertson*, 7 Tex. 6 (1851); *Duncan v. United States*, 247 F.2d 845 (5th Cir. 1957).

transactional nor a proportionate withdrawal analysis but on a principle of fiduciary duty.<sup>85</sup> When he had mixed his wife's separate funds in an account containing community funds, the fiduciary-husband was deemed to deplete funds subject to his own control before those received in his fiduciary capacity.<sup>86</sup>

The principle of presumed community withdrawal from any commingled fund that is said to rest on *Sibley* does not actually rest on *Sibley* but on misattributions to *Sibley*. If a spouse mixes his own separate funds with those of the community, all withdrawals should have the same proportional content as the funds from which they came. Applying a more rigorous *fiduciary* standard, all withdrawals for a frivolous, wasteful, or unexplained purpose could be charged to the separate estate of the managing spouse leaving community property as the residue.

A dispute in *Hunt v. Hunt*<sup>87</sup> also involved the characterization of funds withdrawn from a bank account. The husband's ledger showed that he had deposited the proceeds of \$23,800 payable to him under his father's life insurance policy to a checking account at that time showing a balance of less than \$6000, presumed to be community property. He also showed from his ledger that he had then withdrawn over \$13,000 from the account to purchase a motor home. The prior separate deposit and the amount of the purchase were deemed sufficient by the Eastland court to sustain the trial court's finding that the purchase was *wholly* from the separate funds.<sup>88</sup> The conclusion does not seem based on any rational principle.

The decision in *Bahr v. Kohn*<sup>89</sup> turned on the inability of the wife to trace separate assets. After a large judgment had been rendered against the husband in Maryland, the couple acquired 263 rural acres of Texas land and made it their home. Sometime thereafter the judgment creditors filed their judgment in the county where the land was located. The couple promptly transferred 63 non-homestead acres to the wife with a recital that she had furnished the purchase price with her separate property. The judgment creditors then brought suit against the couple to assert that the conveyance to the wife was a fraudulent transfer of the debtor-husband's assets. The defendants denied the plaintiffs' assertion without any pleading or affirmative defense but were allowed to introduce evidence that the funds for purchase of the entire acreage came from the wife's separate funds as recited in the deed to the wife. The court properly rejected the plaintiffs' arguments concerning admissibility

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85. See *Sibley*, 286 S.W.2d at 660-61.

86. See *Giesler v. Giesler*, 309 S.W.2d 949, 950 (Tex. Civ. App.—San Antonio 1958, no writ); *Hartman v. Crain*, 398 S.W.2d 387, 389 (Houston [14th Dist.] 1966, no writ); *Trevino v. Trevino*, 555 S.W.2d 792, 798 (Tex. Civ. App.—Corpus Christi 1977, no writ); *Kuehn v. Kuehn*, 594 S.W.2d 158, 161 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); *Duncan v. United States*, 247 F.2d 845, 854 (5th Cir. 1957).

87. 952 S.W.2d 564 (Tex. App.—Corpus Christi 1997, no writ).

88. See *id.* at 567.

89. 980 S.W.2d 723 (Tex. App.—San Antonio 1998, no pet.).

of the defendants' evidence and went on to consider the tracing issue. While living outside Texas, the couple had sold a farm in New Jersey at a considerable profit. Although it was alleged that some of the assets used to buy the farm had been a gift to the wife from her mother, the couple seems to have relied principally on a partition of the proceeds of sale as proof of the separate character of the wife's funds ultimately used to buy the Texas realty. But whether or how that partition had taken place and how the funds maintained their separate character within the account were not explained, though there was evidence that funds from a New Jersey bank account into which the wife had deposited her allegedly partitioned share of the proceeds of sale had been used to make the Texas land purchase. All considered, the wife's evidence fell considerably short of tracing her separate funds into the Texas realty.<sup>90</sup>

## 2. *Creation of a Corporation*

In *Hunt* the court also concluded that a corporation created during the marriage was a separate corporation because it was capitalized with separate property, in that instance equipment acquired by the incorporating spouse prior to his marriage and hence the spouse's separate property.<sup>91</sup> By application of the principle that the corporation has no reality until capitalized, this conclusion seems sound in that any other test would preclude the creation of a separate corporate interest during marriage.

### C. INCEPTION OF TITLE

#### 1. *Acquisitions Made Prior to Marriage and After Divorce*

As a general rule property acquired prior to marriage and after divorce are the separate property of the acquiring future spouse or ex-spouse. Thus, a partnership interest in real property and a mineral royalty-interest acquired prior to marriage and an interest in a partnership formed before marriage to handle particular personal property (e.g., helicopters) were so characterized in *Hunt*.<sup>92</sup> Similarly, earnings of an ex-spouse subsequent to divorce are separate property.<sup>93</sup>

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90. *See id.* at 728-30.

91. *See id.* (relying on *Allen v. Allen*, 704 S.W.2d 600 (Tex. App.—Fort Worth 1986, no writ) (incorporation after 8 months of marriage of proprietorship formed prior to marriage but without any showing of the marital character of the property used for capitalization). *See also* *Vallone v. Vallone*, 644 S.W.2d 455, 457 (Tex. 1982) (incorporation of business during marriage with capitalization supplied with both separate and community property in determined amounts); *Holloway v. Holloway*, 671 S.W.2d 51, 56-57 (Tex. App.—Dallas 1983, writ dismissed) (corporation formed during marriage and capitalized with separate property is separate property); *In re York*, 613 S.W.2d 764, 769-70 (Tex. App.—Amarillo 1981, no writ) (a corporation formed and capitalized with both separate and community assets during marriage); and TEX. BUS. CORP. ACT arts. 3.04-3.05 (Vernon 1980 & Supp. 1999)).

92. *See id.* at 567-68.

93. *See* *Butler v. Butler*, 975 S.W.2d 765, 768 (Tex. App.—Corpus Christi 1998, no pet.). *See also* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law* 44 Sw. L.J. 1, 8-9 (1990) (cash payment for contract of service performed after divorce under contract entered into during marriage).



In *Phillips v. Phillips*<sup>94</sup> the ex-wife claimed a part of the proceeds of sale of grain planted prior to divorce but harvested afterwards. Apparently relying on federal regulations with respect to crop insurance and disaster relief funds received for the partial failure of prospective crops, the trial and appellate courts concluded that the crops were "in existence" prior to the divorce because planting the crops had already begun.<sup>95</sup> Old Spanish law also concluded that the characterization of a crop depended on marital status when the crop was planted.<sup>96</sup>

## 2. Term Life Insurance Policy

In *Camp v. Camp*<sup>97</sup> the husband, who had acquired a term policy of life insurance prior to marriage, named his mother as the beneficiary of the policy. His widow contested the designation on the ground that the policy was community property. In affirming the trial court's judgment in favor of the mother<sup>98</sup> the Corpus Christi court relied wholly on the provision of section 312.011 (13) of the Government Code that life insurance policies and "the effects of life insurance policies" are property.<sup>99</sup> The wife's only argument in favor of reversal was that an interest in a term life insurance policy was "too ephemeral to constitute property."<sup>100</sup> The court, therefore, stressed the statutory phrase "the effects of life insurance policies."<sup>101</sup> The court might, at least, have cited *Estate of Cavanaugh v. Commissioner of Internal Revenue*<sup>102</sup> in support of its conclusion.

### D. CAUSES OF ACTION FOR PERSONAL INJURY

At the time of the trial of the wife's suit for divorce in *Osborn v. Osborn*<sup>103</sup> both the husband and wife had pending suits for injury. The husband failed to appear at the trial for divorce, and the court, presumably applying the community presumption,<sup>104</sup> found that the husband's chose in action was wholly community property and in its division of community property awarded part of the husband's potential recovery to his wife. The Houston Court of Appeals reversed and remanded the case for re-division. The court observed that "[t]here is no presumption that a potential recovery for personal injuries to the body of a spouse is commu-

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94. 951 S.W.2d 955 (Tex. App.—Waco 1997, no writ).

95. *Id.* at 956.

96. See JUAN MATIENÇO, COMMENTARIA IN LIBRUM QUINTUM RECOLLECTIONES LEGUM HISPANAE (1580) ON RECOP. V. 9.4 gl. 1, no. 4 at 264, *commented on in* JOSEPH W. MCKNIGHT & WILLIAM A. REPPY, JR., TEXAS MATRIMONIAL PROPERTY LAW 47-48 (2d ed. 1998).

97. 972 S.W.2d 906 (Tex. App.—Corpus Christi 1998, no pet.).

98. See *id.* at 909.

99. TEX. GOV'T CODE ANN. § 312.011 (13) (Vernon 1988 & 1999 Supp.).

100. *Camp*, 972 S.W.2d at 909.

101. *Id.*

102. 51 F.3d 597, 601-05 (5th Cir. 1995). See Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1238-40 (1995).

103. 961 S.W.2d 408 (Tex. App.—Houston [1st Dist.] 1997, no writ).

104. See TEX. FAM. CODE ANN. § 3.102 (Vernon Supp. 1999).

nity property” and indicated that various aspects of the spouses’ recovery might be of a separate or community character.<sup>105</sup> That assertion is, of course, incorrect. In saying that any estimate by the husband or wife as to the dollar amount of recovery would be purely speculative in such circumstances, the appellate court seemed to hold that any tort actions between spouses must be resolved before a division of the community property can be made.<sup>106</sup>

#### E. RETIREMENT BENEFITS

In *Lipsey v. Lipsey*,<sup>107</sup> the wife on divorce asserted a community interest in her husband’s retirement trust, a section 401(k) capital accumulation plan. The husband had retired prior to their marriage. The corpus of the trust had considerably increased in value during the marriage due to increases in the market value of the portfolio and additions to the corpus by accumulation of gains realized by the sale of investments and dividends from securities held as part of the trust corpus. The Fort Worth Court of Appeals held that these additions during marriage were all made in accordance with the premarital terms of the trust in full compliance with federal regulations without any apparent participation of the beneficiary-husband.<sup>108</sup> The trust corpus evidently included no marital compensation from the retired employee and the community estate had no interest in the trust corpus. The court expressed no opinion on the character of discretionary distributions from the trust during marriage (of which there were none in this instance), but in light of *Lemke v. Lemke*,<sup>109</sup> decided by the same court in 1997, the court would likely have rejected the argument that such distributions would have had a community character.

In dividing the community element of retirement benefits, to which a spouse is, or may become, entitled to a portion, a divorce decree should define the portion of the payments to which the non-pensioner is, or will be, entitled with as much precision as possible. The community element is usually computed by using a mathematical formula in terms of the pensioner’s present or future entitlement. In *Albrecht v. Albrecht*<sup>110</sup> the ex-husband-pensioner appealed the divorce court’s order defining the ex-wife’s share of his military pension rights after less than five years of marriage. Apparently because of the husband’s failure to present evidence of the value of his pension interest at divorce, the trial court used the formula prescribed in *Taggart v. Taggart*<sup>111</sup> to define the non-pensioner’s

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105. *Id.* at 414.

106. *See id.* at 414-15.

107. 983 S.W.2d 345 (Tex. App.—Fort Worth 1998, no pet.).

108. *See id.* at 351.

109. 929 S.W.2d 662 (Tex. App.—Fort Worth 1997, no pet.). This case is discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 50 SMU L. REV. 1189, 1200-01 (1997).

110. 974 S.W.2d 262 (Tex. App.—San Antonio 1998, no pet.).

111. 552 S.W.2d 422, 424 (Tex. 1977).

share. In *Taggart*, however, the formula defined the value of the retirement benefits at retirement rather than value of the benefits at divorce because the divorcing pensioner was already retired in that instance. The *Taggart* formula also specified the years (or months) of service at retirement rather than years (or months) of service at divorce for the same reason.<sup>112</sup> In *Taggart* it was necessary to compute the *value* of the non-pensioner-spouse's interest in the pension benefit because the pensioner was already retired.<sup>113</sup> In the case of an unretired pensioner, the differences in the formulas used are significant because of the Texas Supreme Court's direction in *Berry v. Berry*<sup>114</sup> that the non-pensioner's interest in the retirement benefits of an unretired pensioner is limited to the value of the pension interest at the date of divorce. Otherwise the pensioner-spouse would be deprived of what would be a separate property interest in his pension benefits accruing after the divorce. Thus, in *Albrecht*, the San Antonio appellate court remanded the case to the trial court for a re-division of the pension interest by using the *Berry* formula.

The problems dealt with only a few weeks earlier by a slightly different panel of the San Antonio court in *Contreras v. Contreras*<sup>115</sup> was vastly more complicated. In that instance, several years after the divorce decree (and long after an appeal might have been pursued) the ex-wife moved for clarification of her interest in her ex-husband's military retirement benefits. At the time of divorce the husband had not retired, but he had retired by the time the clarification order was entered. What the trial court had purported to enter as an order clarifying the divorce decree actually went beyond clarification to change the original division of the community portion of the retirement benefits contrary to Family Code section 3.71 (now section 9.007)<sup>116</sup> by substituting a version of the *Berry* formula for that of the *Taggart* formula in the original decree.<sup>117</sup> The appellate court evidently appreciated the great difficulty of wording an appropriate order for division of the community portion of the retirement benefits of the ex-husband (who for almost thirty years had served in the Marine Corps, a military reserve unit, and the Army) and at the same time not running afoul of the provisions of section 9.007. The court therefore directed the trial court to seek the assistance of the military service paying the benefits to calculate those benefits.<sup>118</sup>

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112. For a comparison of the two formulas see *Albrecht*, 974 S.W.2d at 263-64.

113. See *id.*

114. 647 S.W.2d 945, 946-47 (Tex. 1983). See also *May v. May*, 716 S.W.2d 705, 710 (Tex. App.—Corpus Christi 1986, no writ).

115. 974 S.W.2d 155 (Tex. App.—San Antonio 1998, no pet.) (Hardberger, C. J. and López and Green, JJ. constituted the panel. In *Albrecht*, Angelini, J. replaced Green, J. but in both instances López, J. wrote the opinion of the court.)

116. TEX. FAM. CODE ANN. § 9.007 (Vernon Supp. 1999).

117. See *Albrecht*, 974 S.W.2d at 157-58.

118. See *id.* at 158-59.

## F. RIGHT OF REIMBURSEMENT

In several recent appellate cases dealing with dissolution of marriage on divorce, the court has discussed claims for reimbursement of the community estate for support of spouses and children of former marriages.<sup>119</sup> The issue was again discussed in *Butler v. Butler*<sup>120</sup> with respect to support of an illegitimate child born of the husband during the marriage. The trial court found that \$30,000 of community funds had been expended for such support and that amount should be awarded to the wife. Distinguishing the holding in *Norris v. Vaughan*<sup>121</sup> (as to non-reimbursement of separate property used for living expenses) as applying only to familial support and relying on section 154.069(a),<sup>122</sup> the court justified the amount of community reimbursement on the ground that "because [the wife's] net resources are excluded from consideration in setting [the husband's] child support obligation, the obligee is restricted to looking only to [the husband] for satisfaction of [his] individual child support obligation."<sup>123</sup> The court also distinguished its denial of reimbursement in *Pelzig v. Berkebile*<sup>124</sup> because the wife in that instance had full knowledge of the husband's prior support obligations before she married him and neither before nor during marriage did she seek to prevent the use of community funds for their discharge or satisfaction. In *Butler*, on the other hand, the wife did not know of the husband's child or his use of community funds for its support. In light of the right of each spouse to sole management of earnings and income from that spouse's separate property, this distinction is unconvincing except to refute the soundness of the conclusion in *Pelzig*.<sup>125</sup> In seeming further refutation of its reasoning in *Pelzig*, the court went on to say that the situation before it in *Butler* was analogous to that of an award of community reimbursement for a husband's expenditures on women other than his wife during marriage.<sup>126</sup>

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119. For a discussion of some of these cases see Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 51 SMU L. REV. 1047, 1059-60 (1998) and Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 50 SMU L. REV. 1189, 1210-13 (1997).

120. 975 S.W.2d 765 (Tex. App.—Corpus Christi 1998, no pet.).

121. 152 Tex. 491, 502-03, 260 S.W.2d 676, 683 (1953).

122. See TEX. FAM. CODE ANN. § 154.069(a) (Vernon 1996) (no reliance on net resources of the spouse of the obligor in calculating amount of child support was to be ordered). The court seemed to treat this section as referring to resources of the wife, the present spouse of the father of the child.

123. *Butler*, 975 S.W.2d at 769.

124. 931 S.W.2d 398, 400 (Tex. App.—Corpus Christi 1996, no writ).

125. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 50 SMU L. REV. 1089, 1212 (1997), with respect to lack of consent of one spouse for the other's handling of solely managed community property.

126. See *Butler*, 975 S.W.2d at 769 (citing *Morrison v. Morrison*, 713 S.W.2d 377, 379 (Tex. App.—Dallas 1986, writ dism'd)).

## III. CONTROL AND LIABILITY OF MARITAL PROPERTY

## A. MANAGEMENT OF COMMUNITY PROPERTY

The dispute in *Ozlat v. Hua and Nguyen*<sup>127</sup> turned on section 3.104 of the Family Code. The husband was the record title holder of a residential lot on which a house was in course of construction by his arrangement. The husband entered into a written earnest-money contract with the plaintiffs to sell the completed house and lot. The seller presumably later found a buyer for a better price and therefore refused to carry out his contract with the buyers who thereupon sued the seller for damages for breach of contract. The seller's defense was that the property was jointly managed community property and that his wife had refused to consent to the sale. The buyers, who were unaware of the managerial status of the property, relied successfully on the provisions of section 3.104: a third person dealing with a spouse who holds record title to realty can rely on that spouse's authority to deal with the property in the absence of knowledge to the contrary.<sup>128</sup>

In *First State Bank of Three Rivers v. Martin*<sup>129</sup> the Corpus Christi Court of Appeals dealt with the validity of one spouse's purported renewal of a note and deed of trust lien executed by both spouses. As the statute of limitation for enforcement of the note and lien was about to run, the husband unilaterally had purported to renew the obligation once prior to his wife's death and twice thereafter. The wife died after the statute of limitation would have run for enforcement of the note and deed of trust. The purported later extensions of the note and lien were executed by the surviving husband after he had closed the estate of his late wife as independent executor. The claimants to the realty subject to the lien sought to remove the cloud of the lien on their title. The first purported renewal of the note and lien occurred prior to the running of the statute of limitation on all installment payments on the note, but the limitation period had run on the entire note and lien prior to the payee's effort to foreclose the lien *if the husband's first renewal of the note was invalid*.<sup>130</sup> The title to the realty on which the lien was executed was held in the names of both spouses. Thus, the court concluded that the property over which the lien was asserted had been subject to the joint management of the spouses in the absence of any showing of an agreement between them to the contrary.<sup>131</sup> Hence the husband's unilateral renewal

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127. No. 01-97-00568-CV, 1998 WL 255142 (Tex. App.—Houston [1st Dist.] May 21, 1998).

128. See TEX. FAM. CODE ANN. § 3.104 (Vernon Supp. 1999).

129. 1997 Tex. App. LEXIS 5129 (Tex. App.—Corpus Christi 1997, writ denied).

130. See TEX. CIV. PRAC. & REM. CODE §§ 16.004(a)(3), 16.035 (Vernon 1986); *First State Bank of Three Rivers*, at \*11, \*13.

131. See *First State Bank of Three Rivers*, at \*13. See TEX. FAM. CODE ANN. § 3.102(c) (Vernon Supp. 1999); *Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200, 201-02 (Tex. 1974). Although the court's paraphrase of the meaning of section 3.102(c) is somewhat too broad in light of section 3.102(a) and (b), which the court failed to cite, the court's conclusion is accurate. See also Joseph W. McKnight, *Commentary on Title 1 of the Family Code*, 21 TEX. TECH L. REV. 911, 1071, 1076-77 (1990).

of the note and lien was ineffective during his wife's lifetime. As to his purported renewal of the obligation on which the statute of limitation had already run, he had no authority as community survivor to do so, because he could not have qualified as community survivor after having acted as the decedent's independent executor, in which capacity he had already closed the administration of her estate.<sup>132</sup>

#### B. SPOUSAL DESTRUCTION OF COMMUNITY PROPERTY

In 1986 the Texas Supreme Court decided that a spouse as co-owner of an insurance policy might recover against the insurer for a separate interest in the property destroyed by the wrongful act of the other spouse.<sup>133</sup> Thereafter, in five reported appellate instances when a community interest of a spouse was sought to be recovered in similar circumstances, three innocent spouses failed to recover.<sup>134</sup> The decision of the Houston First District Court of Appeals in *Murphy v. Texas Farmers Insurance Company*<sup>135</sup> has evened the score. In this as in earlier cases of successful recovery, the interest of the plaintiff-spouse had become a separate property right either by way of partition by a divorce court or by act of the parties themselves. In *Murphy* the spouses had partitioned their community interest in their destroyed community mobile home and the wife had sued for divorce. Although the Texas Supreme Court had left open the question of whether the owner of an insured community interest could recover for the loss caused by a co-insured spouse, the issue on which claims had previously foundered was the conceptual concern that the wrongdoer's act had barred the entire recovery, not merely the half of it for which recovery was not sought. The issue, then, is whether partition removes that obstacle to allow the innocent claimant to succeed.<sup>136</sup> In California the death of the wrongdoing spouse or the divorce of the

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132. See *First State Bank of Three Rivers*, at \*13-15 (citing TEX. PROB. CODE ANN. § 161 (Vernon 1980)).

133. See *Kulubis v. Texas Farm Bureau Underwriters Insurance Co.*, 706 S.W.2d 953 (Tex. 1986).

134. See *Chubb Lloyds Ins. Co. v. Kizer*, 943 S.W.2d 946, 951 (Tex. App.—Fort Worth 1997, writ denied), and two federal cases, *Norman v. State Farm Fire & Casualty Co.*, 804 F.2d 1365 (5th Cir. 1986), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 41 Sw. L.J. 1, 19-20 (1987), and *Webster v. State Farm Fire & Casualty Co.*, 953 F.2d 222 (5th Cir. 1992), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 46 SMU L. REV. 1475, 1488 (1993).

135. 982 S.W.2d 79 (Tex. App.—Houston [1st Dist.] 1998, pet. granted Oct. 29, 1998). The other two recoveries were made in *Travelers Companies v. Wolfe*, 838 S.W.2d 708 (Tex. App.—Amarillo, 1992, no writ); and *Saunders v. Commonwealth Lloyd's Ins. Co.*, 928 S.W.2d 322, 324-25 (Tex. App.—San Antonio 1996, no writ), but in the latter case only as a consequence of the case that preceded it.

136. See *Murphy*, 982 S.W.2d at 80. It is striking that in every reported instance of an insurance claim of this sort the subject matter of destruction was a mobile home, but in only one instance was the homestead use of the property treated as a significant point in the argument against recovery. See *Western Fire Insurance Co. v. Sanchez*, 671 S.W.2d 666 (Tex. App.—Tyler 1984, writ ref'd n.r.e.) (concerning destruction of separate property).

spouses removes the bar of the innocent spouse.<sup>137</sup>

### C. NATURE AND EXTENT OF HOMESTEAD INTEREST

Homestead use of a mobile home was asserted as a significant factor in a dispute concerning express warranties in a contract of sale. In *Nationwide of Bryan, Inc. v. Dyer*<sup>138</sup> a husband and wife brought an action against the seller for breach of contract in relation to the purchase of an allegedly defective mobile home. The contract of purchase, signed by the husband only, contained a provision by which both the buyer and seller agreed to submit any dispute under the contract to arbitration. After experiencing difficulties with the operation of the mobile home and unsuccessful efforts on the part of the seller to perform repairs, the couple brought suit against the seller for breach of contract. Pursuant to the arbitration agreement in the contract, the seller requested that the plaintiffs submit the dispute to arbitration. The plaintiffs, however, refused to arbitrate on the ground that the wife had not signed the contract and therefore was not bound by that provision. The seller moved to compel arbitration. The appellate court held that the wife's failure to sign the contract had no significance due to her status as a third-party beneficiary of the contract from which she derived her standing to sue on the contract.<sup>139</sup> As a beneficiary of the contract, the court said, the wife was bound by its terms.<sup>140</sup> Further, the court said, the fact that the couple had made the mobile home a part of their homestead did not make the arbitration agreement invalid because of the wife's failure to sign it.<sup>141</sup> A contract for purchase of a homestead or for an improvement to a homestead does not require the joinder of both spouses for validity of the contract.<sup>142</sup> The husband-purchaser's agreement to arbitrate was therefore enforceable. Joinder of the spouse is, of course, necessary to put a lien on an existing homestead, but the agreement to arbitrate under the contract of purchase could not be construed either as a home improvement contract or as an encumbrance on the homestead. The metaphorical arguments of the plaintiffs did not change the fact that the agreement to arbitrate was merely a term of the contract of purchase.<sup>143</sup>

The Texas Constitution provides that a rural homestead may not consist of more than two hundred acres.<sup>144</sup> The legislature is therefore empowered to define the rural homestead as a smaller area and has done so by prescribing one hundred acres as the maximum extent of a rural

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137. See *Flores v. Brown*, 39 Cal.2d 622, 248 P.2d 922 (1952); *Washington v. Washington*, 47 Cal.2d 249, 302 P.2d 569 (1956).

138. 969 S.W.2d 518 (Tex. App.—Austin 1998, no pet.).

139. See *id.* at 520.

140. See *id.*

141. See *id.* at 520-21.

142. See *id.* at 521 (citing *Minnehoma Fin. Co. v. Ditto*, 566 S.W.2d 354 (Tex. App.—Fort Worth 1978, writ ref'd n.r.e.)).

143. See *id.* at 520.

144. See TEX. CONST. art. XVI, § 51 (as amended).

homestead of a single person,<sup>145</sup> whereas a family is entitled to a maximum of two hundred acres.<sup>146</sup> A family survivor, however, continues to be entitled to the family homestead exemption although that family member may then be *single*. This point was re-enunciated in *Riley v. Riley*.<sup>147</sup>

In *Riley* the court also applied the rule in *Clyde v. Hamilton*,<sup>148</sup> in which the Supreme Court of Texas held that a life-tenant is entitled to the benefits of the open-mine doctrine: if the prior holder from whom the life-tenant claims opened a mine on the property, his successors may enjoy the benefits of that wasting asset without accounting to the remainderman.<sup>149</sup> The difference between the situations in *Clyde* and *Riley* is that *Clyde* dealt with a testamentary life-estate in a non-marital context whereas the claimant to the benefit of the open-mine doctrine in *Riley* asserted a homestead right to the decedent's separate estate as a matter of law. The Texarkana court evidently regarded those differences as insignificant. But what is the basis for the application of the open-mine doctrine? If the life-tenant's enjoyment of the consequences of the open-mine doctrine rests significantly on the prior tenant's designation of the life-tenant as such, it is worth pointing out that Texas homestead law operates independently of the homestead owner's intent and even allows the surviving spouse to choose the extent and type of property to which the homestead designation applies, thus, particularly in a rural context, allowing the remainder interest in a separate estate to be encroached upon for no other reason than that the prior holder had opened access to minerals on that property. The court in *Riley* did not examine this question.<sup>150</sup>

In *Riley* the widow as surviving family constituent not only chose the dimensions of the family homestead to include surface areas to her particular liking but also claimed all royalties to minerals from particular acreage within her homestead designation because her description included bore-sites of producing oil and gas wells. In that respect her claim depended on whether the area in question was within a pooled unit. If it was, the rule of capture entitled her to share in all the royalties from the land in question though part of the minerals captured may have come from adjoining lands.<sup>151</sup> Because the record contained no finding of fact with respect to whether the area chosen by the widow as part of her rural homestead was subject to royalty payments or a pooling unit, she was allowed as a matter of justice to a remand for findings in those regards.<sup>152</sup>

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145. See TEX. PROP. CODE ANN. § 41.002(b)(2) (Vernon Supp. 1999).

146. See *id.* at § 41.002(b)(1).

147. 972 S.W.2d 149, 154 (Tex. App.—Texarkana 1998, no pet.).

148. 414 S.W.2d 434, 439 (Tex. 1967).

149. See *id.* at 437.

150. See *Youngman v. Shular*, 155 Tex. 437, 288 S.W.2d 495 (1956).

151. See *Riley*, 972 S.W.2d at 155.

152. See *id.* at 155-56. In the far less complicated determination of the extent of a homestead as a consequence of abandonment of occupancy, the question is merely one of fact. See *Scott v. Estate of Scott*, 973 S.W.2d 694, (Tex. App.—El Paso 1998, no pet.). The



The issue before the court in *Brooks v. Norris*<sup>153</sup> was the right of occupancy of a homestead by an adult unmarried child of a deceased homeowner. The adult child sought to stay in his late mother's home in order to preclude sale of the home to discharge a judgment debt against his mother. The claimant's right rested on his being a surviving dependent constituent of his mother's family. The son showed that prior to his mother's death he had lived in his mother's house and had shared expenses with her, but as an employed adult he was not dependent on her for support.<sup>154</sup> Nor was the decedent subject to any legal or moral obligation to support this adult child. Hence, the adult son was not a surviving family constituent entitled to protection under the Texas Constitution or Probate Code section 270.<sup>155</sup>

*Sanchez v. Telles*<sup>156</sup> was a land-title dispute between two claimants from the same source, and the court granted summary judgment to the claimant in the senior chain of title. The owner of the property had conveyed the property to the senior claimant as security for a loan with a recital, supported by the grantor's affidavit, that the property was not the grantor's homestead. The grantor's properly empowered agent then conveyed the same property to the junior claimant who was aware of the prior conveyance. After the senior claimant had foreclosed his lien against the grantor for non-payment of the loan, the junior grantee asserted his title. The basis for his claim was that the senior claimant's title was absolutely void because the property was the grantor's homestead at the time of the conveyance to the senior claimant. On behalf of the grantor, however, no claim was asserted that the property had been her homestead,<sup>157</sup> though the grantor had lived on the property with her daughter (who acted as her agent in conveying the property to the junior claimant) for at least two years prior to the first conveyance. The only summary judgment proof offered by either party relevant to the homestead claim was the grantor's sworn statement that the property was not her home-

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relevance of the inquiry in *Scott* was rather cloudy. A widow asserted that certain residential property had been erroneously characterized by the probate court as community property of her and her late husband, and she argued on appeal that the property was her separate property and that her husband had abandoned his homestead interest in it during marriage. The appellate court rejected her argument as to characterization as well as to homestead abandonment. But even if the property had been abandoned by the decedent as his homestead, his community interest would not have been affected. On the other hand, if the property had been the widow's separate property, his abandonment of his wife could have constituted abandonment of the homestead. See *Earle's Executors v. Earle*, 9 Tex. 630 (1853). His estate's interest in claiming the homestead as such presumably arose from an effort to rebut the widow's claim that the decedent had abandoned his homestead interest. The point of the widow's claim is nevertheless not apparent.

153. No. 05-95-01807-CV, 1997 WL 695588 (Tex. App.—Dallas Nov. 7, 1997).

154. See *id.* at \*1. Cf. *Reconstruction Fin. Corp. v. Burgess*, 155 S.W.2d 977 (Tex. Civ. App.—Waco, 1941, writ *ref'd.*).

155. See *id.* at \*3 (citing TEX. CONST. art. XVI, § 50 (as amended) and TEX. PROB. CODE ANN. § 270 (Vernon 1980)).

156. 960 S.W.2d 762 (Tex. App.—El Paso 1997, no *pet.*).

157. There does not seem to have been any counter-assertion that the junior claimant's title suffered from a similar flaw.

stead, and as an affidavit that statement was prima facie evidence of its truth. Moreover, the senior claimant had evidently shown at the trial that the grantor had never claimed that the property was her homestead for ad valorem tax purposes.<sup>158</sup> Though the senior claimant had not undertaken to show that the grantor claimed other property as her homestead, and the junior claimant had not shown that she had no other homestead, the appellate court found that the grantor's denial of her homestead claim under oath was sufficient to sustain the trial court's rendition of summary judgment in favor of the senior claimant.<sup>159</sup> The appellate court also relied on the provision in the Texas Constitution that the grantee is entitled to rely on the grantor's sworn assertion that the property is not her homestead, though that provision had not found a place in the Constitution until after the conveyance was made.<sup>160</sup>

By way of contrast to the El Paso court's conclusion in *Sanchez*, a bankruptcy court for the Western District of Texas held in *In re Eskew*<sup>161</sup> that sole possession by a remainderman as leasee of his own life-tenant-grantee can constitute a present homestead interest in the remainder as well as the leasehold. There does not seem to have been any dispute that the debtor's present *leasehold* interest in the property constituted part of his homestead.<sup>162</sup> The husband-bankrupt had been given the property by his parents in 1972, had lived on the property until 1984, and had farmed it continuously thereafter. In 1984 he had moved across the road but continued to use the property as part of his rural homestead. In 1989 the debtor and his wife granted a life-estate to the husband's parents to give them (as the husband testified) "some security that they would always have a say in the property."<sup>163</sup> The debtor, however, relinquished no control over this property and continued to farm it subject to an oral lease from the husband's parents.<sup>164</sup> In *Eskew* the debtor-claimants did not seek to protect the husband's leasehold interest alone but also sought to treat it as a means of tacking the leasehold interest to his reversionary interest so that the reversion was also protected as exempt. As in *In re*

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158. See TEX. PROP. CODE ANN. § 41.005 (Vernon 1997).

159. See *Sanchez*, 960 S.W.2d at 771.

160. See *id.* at 768-69 (citing TEX. CONST. art XVI, § 50 (as amended)).

161. 233 B.R. 708 (Bankr. W.D. Tex. 1998).

162. The court cited a *dictum* in *In re Moody*, 862 F.2d 1194 (5th Cir. 1989), *cert. denied*, 503 U.S. 960 (1992), to the effect that the debtor who conveyed his homestead property to a third person while retaining a life estate would not give up his present homestead interest. For a situation in which a seller in continued possession was held to have maintained his homestead in property subsequent to its sale, see *Sullivan v. Barnett*, 471 S.W.2d 39, 43 (Tex. 1971). See also *In re Nagel*, 216 B. R. 397 (Bankr. W.D. Tex. 1997); Joseph W. Mc Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 51 SMU L. REV. 1047, 1064-65 (1998).

163. *Eskew*, 233 B.R. at 710.

164. In *Eskew* the debtor had disposed of the life-estate on which his homestead interest in the remainder depended.

*Nagel*,<sup>165</sup> the court relied on *Capitol Aggregates, Inc. v. Walker*,<sup>166</sup> the well-known instance in which the court held that a mobile home might be claimed as an improvement to a homestead when moored to a mere month-to-month leasehold interest in land.<sup>167</sup> Other authorities also support the proposition that a leasehold interest may constitute a homestead interest.<sup>168</sup> For the further proposition that the present homestead interest of the debtors included their remainder interest, the court relied on *Evans v. Mills*,<sup>169</sup> which did not support their contention. What the claimants sought to show was a present merger of the prior fee to the reversionary fee interest by way of the present leasehold interest. They should have failed. The fee interest of the son prior to his conveyance of the life-estate cannot be *presently tacked* to his reversionary interest in fee by way of his present leasehold interest. Fee interests of steel (as they are, as a matter of law) cannot be welded together with duct-tape (as a mere leasehold interest is, as a matter of law). In *Evans* the grantors had conveyed a right to minerals underlying their homestead but retained a present royalty interest in the minerals, and their surface interest. Thus it was said that the grantors retained a homestead interest in the reversion to the minerals. The situation in *Eskew* was decidedly different in that there was no present fee interest retained to which the remainder interest could be united presently.

In *McKee v. Smith*<sup>170</sup> the court advanced another very dubious proposition: that real property owned by a debtor-wife, but leased to a corporation wholly owned by her debtor-husband, is exempt as her business-homestead property.<sup>171</sup> Despite the ill-based authority of the Fifth Circuit Court of Appeals in *In re John Taylor Co.*,<sup>172</sup> real property used to produce rents which may provide the entire sustenance of the family (as the rents from the wife's realty did in this instance) does not constitute homestead business property.<sup>173</sup> Contrary to the court's opinion, the Supreme Court of Texas does *not* direct us "to construe the business

165. 216 B.R. 397 (Bankr. W.D. Tex. 1997). For discussion of this case see Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 51 SMU L. REV. 1047, 1064-65 (1998).

166. 448 S.W. 2d 830 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

167. *See id.* at 832.

168. *See, e.g.*, *Johnston v. Martin*, 81 Tex. 18, 21, 16 S.W. 550, 551 (1891) (not cited by the court); *Davis v. Lund*, 41 S.W.2d 57, 59 (Tex. Comm'n App. 1931, holding approved); *Grimes v. McCrary*, 211 S.W.2d 1005 (Tex. Civ. App.—Texarkana 1948, no writ); *First Nat'l Bank of Kaufman v. Dismukes*, 241 S.W. 199, 200 (Tex. Civ. App.—Texarkana 1922, no writ); *Resolution Trust Corp. v. Olivarez*, 29 F.3d 201, 205 (5th Cir. 1994); *In re Nagel*, 216 B.R. 397 (Bankr. W.D. Tex. 1997).

169. 67 F.2d 840 (5th Cir. 1934).

170. 965 S.W.2d 52 (Tex. App.—Fort Worth 1998, no pet.).

171. *See id.* at 53.

172. 935 F.2d 75 (5th Cir. 1991). Full treatment of this case discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 1831, 1849-50 (1992).

173. *See, e.g.*, *Autry v. Reasor*, 102 Tex. 123, 128, 113 S.W. 748, 748 (1908); *Blum v. Rogers*, 78 Tex. 530, 535, 15 S.W. 115, 117 (1890); *Texas Commerce Bank-Irving v. McCrary*, 677 S.W.2d 643, 645 (Tex. App.—Dallas 1984, no writ); *Yates v. Home Bldg. & Loan Co.*, 103 S.W.2d 1081, 1085 (Tex. Civ. App.—Beaumont 1937, no writ).

homestead exemption liberally toward these ends."<sup>174</sup> Moreover, an individual cannot claim personalty as exempt (though its kind is defined by statute as exempt to an individual<sup>175</sup>) if it is sold to or leased by that individual's wholly-owned corporation.<sup>176</sup>

In another instance, rather than appealing from an unfavorable judgment of a Texas trial court, the judgment debtor invoked the protection of the bankruptcy court by filing under Chapter 7. Three decisions later, the results are related in *In re Reitnauer*.<sup>177</sup> The Texas Attorney General had brought suit on behalf of a charitable foundation established some years before by the debtor to provide a sanctuary for abandoned and neglected large felines such as lions, tigers, and leopards. On the petitioner's showing of a breach of trust on the part of the respondent, who had created the charitable foundation, the Texas court imposed a large award of damages and divested her of certain realty including her homestead right in the property that she had evidently shared with the foundation. In response to the foundation's motion in the bankruptcy proceeding, the court lifted the automatic stay against enforcement of the foundation's judgment. In ruling on an appeal from the bankruptcy court, the federal district court reversed the bankruptcy court on the ground that the Texas court lacked the power to deprive the judgment debtor of her homestead rights.<sup>178</sup> While recognizing that "Texas law does not recognize that homestead rights can be lost . . . for . . . reasons" given by the Texas court, the Fifth Circuit Court of Appeals nevertheless reinstated the judgment of the bankruptcy court.<sup>179</sup> The Fifth Circuit court relied on the *Rooker-Feldman* doctrine<sup>180</sup> in concluding that the bankruptcy court had overstepped its jurisdictional powers in purporting to review a state court's judgment.<sup>181</sup>

Since 1934 the Federal Housing Administration (FHA) has provided mortgage insurance to homeowners for the benefit of lenders to cover certain unpaid home mortgage loans in order to encourage home-building and buying of family homes. After World War II and the Korean War, the Veterans Administration provided a similar program for eligible veteran-buyers of homes. From 1957 private mortgage insurance has also

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174. *McKee*, 965 S.W.2d at 53, citing *Cocke v. Conquest*, 120 Tex. 43, 53, 35 S.W.2d 673, 678 (1931); *Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929). Neither authority supports that proposition.

175. See TEX. PROP. CODE ANN. § 42.002 (Vernon 1994).

176. See, e.g., *In re Cooper*, 128 B.R. 632, 636 (Bankr. E.D. Tex. 1991).

177. 152 F.3d 341 (5th Cir. 1998), *rev'g In re Reitnauer*, 223 B.R. 913 (N.D. Tex. 1998).

178. See *In re Reitnauer*, 223 B.R. 913, 916 (N.D. Tex. 1998).

179. *Reitnauer*, 152 F.3d at 344 (quoting *In re Reitnauer*, 223 B.R. at 916). A homestead claimant may, of course, lose his homestead as a consequence of losing the property in which the homestead is maintained. A common instance is that of foreclosure of a purchase-money mortgage placed on realty prior to its being designated as the owner's homestead.

180. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923) (federal district courts' jurisdiction is strictly original); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) (final state courts' judgments are not reversible by federal district courts).

181. See *Reitnauer*, 152 F.3d at 343-44.

been available to cover a specified part of the highest percentage of the balance of home mortgage loans. Such mortgage insurance commonly covers foreclosures of the upper twenty percent of the loan amount.<sup>182</sup> Once a home mortgage loan has been reduced to a balance of less than eighty percent of the property's value, there is little need for the insurance. Hence, in the case of FHA and private mortgage insurance, if the lender will allow borrowers to cancel the insurance at that time, the borrower's subsequent costs will be significantly reduced. Many lenders, however, have not been careful to bring this fact to the attention of borrowers. On July 29, 1998, the President signed the Homeowners Protection Act of 1998,<sup>183</sup> which requires automatic cancellation and notice of cancellation rights for private mortgage insurance.<sup>184</sup>

#### D. PERSONAL PROPERTY EXEMPTIONS

Probate Code section 278 provides that on settlement of a solvent estate of a decedent exempt property (as defined in Property Code section 42.002<sup>185</sup>), apart from the homestead or an allowance in lieu of homestead, is "subject to partition and distribution among the heirs and distributees" of the estate.<sup>186</sup> Following the decision of the San Antonio Court of Appeals in *Kelley v. Shields*,<sup>187</sup> the Tyler Court of Appeals rejected the widow's argument of entitlement to title to such property of a solvent decedent.<sup>188</sup> The court pointed out, however, that section 279 of the Probate Code<sup>189</sup> provides that with respect to insolvent estates the surviving spouse takes title to such property and allowances set apart to the surviving spouse.<sup>190</sup> Otherwise, the surviving spouse's use and benefit of exempt personalty lasts only during the period of administration.

With respect to the rights of creditors, exempt personalty as defined in the Property Code section 42.002 produces far more frequent disputes. In *In re Crockett*<sup>191</sup> spouses in a Chapter 7 bankruptcy asserted that a wave runner or jet ski (a small vehicle similar to a motorcycle designed for play in the surf) is exempt as "athletic and sporting equipment" within the Texas statute.<sup>192</sup> In weighing this argument against prior authorities<sup>193</sup> dealing with Texas aquatic sporting equipment and the decision of

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182. See GRANT S. NELSON & DALE A. WHITMAN, CASES AND MATERIALS ON REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 973-88 (1992).

183. Pub. L. 105-216, 112 Stat. 897 (1998).

184. See *id.* § 3.

185. TEX. PROP. CODE ANN. § 42.002 (Vernon Supp. 1999).

186. TEX. PROB. CODE ANN. § 278 (Vernon Supp. 1999).

187. 448 S.W.2d 135 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.).

188. See *Bolton v. Bolton*, 977 S.W.2d 157, 159 (Tex. App.—Tyler 1998, no pet.).

189. TEX. PROB. CODE ANN. § 279.

190. See *Bolton*, 977 S.W.2d at 159.

191. 158 F.3d 332 (5th Cir. 1998).

192. *Id.* at 334 (referring to TEX. PROP. CODE ANN. § 42.002(a)(8)).

193. See *In re Griffin*, 139 B.R. 415, 417 (Bankr. W.D. Tex. 1992) (a Hobie sailboat); *In re Peyton*, 73 B.R. 31 (Bankr. W.D. Tex. 1987) (dictum excluding a boat from the category of exempt property generally); *In re Gibson*, 69 B.R. 534, 535 (Bankr. N.D. Tex. 1987) (a 1968 Rivers boat); and *In re Cypert*, 68 B.R. 449 (Bankr. N.D. Tex. 1987) (a glass Par

the bankruptcy and district courts that this exemption should be limited to "small items for individual use," the Fifth Circuit court construed the language of section 42.002(a)(8)<sup>194</sup> on exempt sporting equipment by comparing it to that of section 42.002(a)(4)<sup>195</sup> dealing with exempt tools of trade. The mention only of "bicycles" in the former and of "boats and motor vehicles" in the latter indicated to the court that

[t]he Texas legislature was obviously aware of the potential ambiguities surrounding the word 'equipment' with regard to boats and motor vehicles . . . [and] acted to include those items as 'equipment' where it felt such inclusion was appropriate. The fact that [s]ection 42.002(a)(8) does not include boats and motor vehicles as examples of 'equipment' leads us to conclude that the Texas legislature made a conscious choice to omit such items from subsection (a)(8)'s athletic and sporting equipment exemption.<sup>196</sup>

Thus, the appellate court sustained the conclusion of the lower courts that the debtors' wave runner was not exempt sporting equipment under Texas law.<sup>197</sup> It does not seem to have occurred to the court that the legislature and its draftsman thought that all sporting equipment (a new category of Texas exempt property) should be treated as exempt and hence no clarifying language was necessary.<sup>198</sup>

In *In re Alexander*<sup>199</sup> the bankruptcy court allowed a debtor-couple to claim as exempt the long-term payment of damages for the wrongful death of their two minor children in the form of a structured settlement annuity in reliance on article 21.22 of the Insurance Code.<sup>200</sup> In light of the fact that the Texas statute exempts an "annuity"<sup>201</sup> without any restriction as to the source of funds used to purchase the annuity or the underlying purpose of the annuity, the court simply relied on the literal language of the act and Texas's liberal exemption policy.<sup>202</sup>

In *Leibman v. Grand*<sup>203</sup> the provisions of section 42.002(a)(4) were at issue in relation to enforcement of a turnover order against an ex-husband who had failed to satisfy a money judgment perhaps related to divi-

ishing boat). The last was excluded on the ground that the boat was not "reasonably necessary" as the statute then provided, as did the court in *Hickey v. Couchman*, 797 S.W.2d 103 (Tex. Civ. App.—Corpus Christi 1990, writ denied).

194. "[A]thletic or sporting equipment, including bicycles."

195. "[T]ools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession."

196. *Crockett*, 158 F.3d at 334-35.

197. *See id.* at 335.

198. The clarifying language with respect to boats and motor vehicles as tools of trade was included for two reasons: (1) as to boats, because ferry boats had previously been specifically exempted; and, (2) as to motor vehicles, because their treatment as tools of trade had sometimes raised problems of exempt characterization. *See* the summary of the draftsman's commentary on the 1991 amendments to the personal property exemption statute in STATE BAR [OF TEXAS] SECTION REPORT, FAMILY LAW 41 (Summer 1991).

199. 227 B.R. 658 (Bankr. N.D. Tex. 1998).

200. TEX. INS. CODE ANN. art. 21.22 (Vernon Supp. 1999).

201. *Id.*

202. *See Alexander*, 227 B.R. at 661.

203. 981 S.W.2d 426 (Tex. App.—El Paso 1998, no pet.).

sion of property and for delinquent alimony awarded another by a North Carolina divorce court. The ex-wife sought turnover of annuity funds in which the ex-husband had invested by liquidation of allegedly non-exempt separate assets of the ex-husband. The annuity funds were admittedly exempt from seizure under article 21.22 of the Texas Insurance Code,<sup>204</sup> unless those funds arose from non-exempt funds invested in the annuity with intent to defraud his ex-wife under Business and Commerce Code section 24.005.<sup>205</sup> The funds invested in the annuity were traced to proceeds of sale of a sailboat and an automobile. It was evidently not argued that the sailboat was exempt as sporting equipment under Property Code section 42.002(a)(8). Rather, the ex-husband attempted to bring it within section 42.002(a)(4). The appellate court held that he had failed to show that the sailboat "fairly belonged to or was usable in the debtor's trade and that it was used with sufficient regularity to indicate actual use by the debtor."<sup>206</sup> The debtor (a practicing electrical engineer) asserted that the boat was a tool of his trade as a sailing instructor, as he had given sailing lessons in the boat to a co-worker, who lived for a while on the boat (and paid rent) and had compensated the ex-husband for sailing lessons by helping the debtor set up a computer. The debtor later sold the boat but had apparently not given sailing lessons to others nor was he purporting to practice that calling at the time he sold the boat. In the meantime, however, the debtor asserted that he had used the boat in his employment by entertaining potential clients on the boat three or four times. The El Paso court, nevertheless, "fail[ed] to perceive in general how a sailboat could be legitimately used in the trade or profession of an electrical engineer."<sup>207</sup>

Other funds traced to purchase the annuity fund came from the sale of an automobile used by the debtor's wife within the terms of Property Code section 42.002(a)(9).<sup>208</sup> Before investing the proceeds of sale of the car in the annuity fund, however, the debtor held these proceeds for several months and purchased a replacement vehicle with other funds. Thus, the court said, to treat the proceeds as exempt funds would amount to allowing the debtor "an exemption not only for his two automobiles but also for the funds realized from the sale of a third vehicle."<sup>209</sup> Although there were some clearly exempt funds (borrowings from an exempt qualified retirement fund<sup>210</sup>) that might have found their way into the annuity investment, there were ample non-exempt funds that went into the fund

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204. TEX. INS. CODE ANN. art. 21.22.

205. TEX. BUS. & COMM. CODE § 24.005 (Vernon Supp. 1999).

206. *Leibman*, 981 S.W.2d at 434 (citing *In re Erwin*, 199 B.R. 628, 630 (Bankr. S.D. Tex. 1996)).

207. *Id.*

208. *See id.* at 434-35 (referring to TEX. PROP. CODE ANN. § 42.002(a)(9) (Vernon Supp. 1999)). An authority for the exempt quality of the proceeds for destruction of exempt personality is *Sorenson v. City National Bank*, 121 Tex. 478, 484-85, 49 S.W.2d 718, 721 (1932).

209. *Leibman*, 981 S.W.2d at 435.

210. *See id.* at 436 (citing TEX. PROP. CODE ANN. § 42.0021(a) (Vernon Supp. 1999)).

to purchase the annuity, which was therefore found to be non-exempt from the turnover order.<sup>211</sup>

In dealing with proof of the exempt character of an individual retirement annuity (IRA) under Property Code section 42.0021(a)<sup>212</sup> in *Lozano v. Lozano*,<sup>213</sup> the majority of the Houston Fourteenth Appellate District Court held that by the plain meaning of the statute “showing that an account is an individual retirement annuity is sufficient to establish that it is exempt unless evidence is presented that the IRA does not qualify for such treatment under the IRC.”<sup>214</sup> One judge dissented on the ground that the burden of proof in this regard should, nevertheless, fall on the debtor.<sup>215</sup>

#### IV. DIVISION OF MARITAL PROPERTY ON DIVORCE

##### A. DIVORCE PROCEEDINGS

###### 1. Jurisdiction

###### a. Durational Residence

Stating that his parents' residence in Tarrant County was his “permanent address,” the husband in *Roa v. Roa*<sup>216</sup> petitioned for divorce in Tarrant County. The evidence of his residence there for ninety days preceding the filing of his petition is not summarized but was characterized by the court as “extremely weak”<sup>217</sup> and appears to have been addressed more to domicile than to residence. After their marriage in Bexar County the couple had made their home in Hidalgo County and later in Mexico City for over six years, though they had kept their house in Hidalgo County. The husband admitted that he had not lived in Tarrant County since his marriage, and his wife had never lived there. He had, nevertheless, registered to vote (but had not voted) in Tarrant County and had received his driver's license there. Some bills incurred by his wife had also been sent to his parents' address in Tarrant County. The appellate court used the abuse of discretion standard in review of the trial court's finding of the husband's residence in Tarrant County.<sup>218</sup> Because there was said to be *some* evidence to support the trial court's finding, an abuse of its discretion was not found.

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211. *See id.*

212. TEX. PROP. CODE ANN. § 42.0021(a).

213. 975 S.W.2d 63 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

214. *Id.* at 67 (rejecting the authority of *Rucker v. Rucker*, 810 S.W.2d 793, 794-95 (Tex. App.—Houston [14th Dist.] 1991, writ denied)). *See* Katherine C. Hall, *Retirement Benefits: Texas Property Code Amendment*, 50 TEX. B.J. 993 (1987) (to the effect that putting the burden of proof in this instance on the judgment creditor is consistent with the inequities section 42.0021 as intended to address).

215. *See Lozano*, 975 S.W.2d at 70 (Yates, J., dissenting, in reliance on *Rucker v. Rucker*, 810 S.W.2d 703 (Tex. App.—Houston [14th] 1991, writ denied)).

216. 970 S.W.2d 163 (Tex. App.—Fort Worth 1998, no pet.).

217. *Id.* at 165.

218. *See id.* at 165 (citing *Schreiner v. Schreiner*, 502 S.W.2d 840, 843 (Tex. App.—San Antonio 1973, writ dism'd)).



b. Probate Court's Power to Grant a Divorce Concerning an Incompetent

In *In re Graham*<sup>219</sup> the Texas Supreme Court held that with its expanded jurisdiction a probate court might transfer a divorce case to itself for disposition.<sup>220</sup> Since 1987 exclusive jurisdiction in divorce cases has not vested in the district court.<sup>221</sup> Indeed, before that time the legislature had vested divorce jurisdiction in a number of county courts.<sup>222</sup> In this instance the wife had brought suit for divorce against her husband, an incompetent whose estate was subject to the jurisdiction of the probate court. The case involved the characterization of particular assets as separate or community property of the incompetent and claims for reimbursement owed by the incompetent's separate estate to the community estate and by the community estate to the wife's separate estate, as well as the right of the wife to sole control of community property, the duty of the husband's separate estate to pay certain attorney's fees, and the ultimate division of the community estate.

2. *Waiver of Citation*

*Defee v. Defee*<sup>223</sup> was a bill of review case in which it was asserted by the wife that a decree of divorce entered over seven years before was void because her waiver of citation had not been on file prior to the entry of the decree. The wife's attorney had discovered the executed waiver in the file after the wife's petition for a bill of review was filed. The trial judge, however, accepted as true the husband's testimony that, though the waiver had not been filed before the trial of the divorce case, at the trial the husband's attorney handed the waiver to the divorce judge who accepted it and placed it in the file.<sup>224</sup> Thus, the whereabouts of the waiver was accounted for, and the validity of the divorce was not affected by its not being stamped by the clerk.<sup>225</sup>

3. *Judge's Recusal*

In *Lueg v. Lueg*,<sup>226</sup> as one of her grounds for appeal from a decree of divorce, the wife complained of the judge's denial of her motion for recusal. She argued that the judge's long-term friendship with one of her husband's counsel, the judge's prior reliance on that lawyer as his campaign manager, and the lawyer's present representation of the judge in a civil dispute raised a question of the judge's impartiality. Applying the abuse of discretion standard, the appellate court concluded that though

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219. 971 S.W.2d 56 (Tex. 1998).

220. *See id.* at 59-60 (citing TEX. PROB. CODE ANN. §§ 607-608) (as amended 1985).

221. *See id.* at 58-59.

222. The Texas Government Code offers examples, e.g. various county courts with jurisdiction to grant divorces.

223. 966 S.W.2d 719 (Tex. App.—San Antonio 1998, no pet.).

224. *See id.* at 721.

225. *See id.*

226. 976 S.W.2d 308 (Tex. App.—Corpus Christi 1998, no pet.).

the attorney-client relationship between the judge and the attorney was a *prima facie* basis for recusal, there was no showing that recusal was required.<sup>227</sup> Nor was there anything in the verdict to indicate that the political association of the judge and attorney had made recusal necessary.<sup>228</sup>

#### 4. *Failure to Respond to Request for Admissions*

Though *In re Herring*<sup>229</sup> was not a divorce case, its subject matter is very closely related to the disposition of property elements of a divorce case. A widowed husband had sued the administratrix of his late wife's estate and his wife's son for community funds transferred to the son. In moving for summary judgment on the pleadings, the defendants relied on deemed admissions of facts as a result of the plaintiff's failure to respond to requests for admissions. Such deemed admissions are competent summary judgment evidence.<sup>230</sup> Requests for admissions had been properly submitted to the plaintiff, and he had responded to them within the proper time but had failed to sign them as required by Rule 169.<sup>231</sup> The defendants therefore argued that the unsigned responses amounted to a failure to respond.<sup>232</sup> Acknowledging a temptation to draw an analogy between unsigned pleadings generally and an unsigned response to a request for admissions, the appellate court followed the authorities on Rule 169 that treat the signature to the response as not a mere formality but as a substantive requirement of the response:<sup>233</sup> an "indication that the responding party has adopted and stands behind the answers he has provided in the same manner and with the same general consequences as the prior requirement for verification of the answers."<sup>234</sup> Although the court refused to consider broad requests that amounted to the plaintiff's admission of his lack of a cause of action, unsigned responses to specific requests concerning knowledge of transfers at particular times were treated as admitted. Thus, summary judgment, denying some of the plaintiff's case, was sustained.<sup>235</sup>

#### 5. *Proof of Grounds for Divorce*

In *Roa v. Roa*,<sup>236</sup> the court was careful to note that the parties' characterization of the judgment of divorce as a *default judgment* (because it was granted in the absence of a party) was inaccurate in that "the petitioner is required to prove the allegations at the final hearing on the

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227. *See id.* at 311.

228. *See id.*

229. 970 S.W.2d 583 (Tex. App.—Corpus Christi 1998, no pet.).

230. *See id.* at 587.

231. TEX. R. CIV. P. 169.

232. *See Herring*, 970 S.W.2d at 588.

233. *See id.* at 588-89.

234. *Id.* at 589.

235. *See id.* at 589-90.

236. 970 S.W.2d 163 (Tex. App.—Fort Worth 1998, no pet.).

case."<sup>237</sup> Therefore, the petitioner's burden of proof was not affected by the respondent's failure to appear.

#### 6. *Interim Attorney's Fees*

While her petition for divorce was pending a final hearing, the wife in *In re Bryce*<sup>238</sup> moved the court to award interim fees for her attorney. The court ordered that the husband pay a specific amount, and after the husband failed to pay, the court made an order to the husband in writing to pay half the specified amount on the following day. After the husband again failed to pay, the wife sought enforcement by contempt. When the wife called the husband as a witness at the contempt hearing, he asserted his right against self-incrimination and refused to testify. After the wife had put on her case, the husband's counsel sought to put on his defense, but the judge precluded him from doing so and explained that the husband's counsel had already kept his client from testifying as to his ability to pay. The judge thereupon cited the husband for contempt and ordered him to jail until he paid the amount due under the order. The husband petitioned for a writ of habeas corpus. In granting the writ the court held in *Bryce* that the contemnor was entitled to be heard in his own defense as a matter of due process if he had not knowingly waived that right.<sup>239</sup> In this instance, the court said, the tenor of the questions put by the husband's counsel to the wife's witness indicated that the husband would testify as to his inability to pay.<sup>240</sup>

#### 7. *Unappealable Interlocutory Orders*

Though section 51.014(a)(1) of the Civil Practice and Remedies Code provides for an interlocutory appeal of the appointment of a receiver, an order for the appointment of a successor receiver is not an appealable interlocutory order.<sup>241</sup>

#### 8. *Costs*

*Walston v. Walston*<sup>242</sup> dealt with an appeal from a trial on remand after a prior appeal of a divorce case. In the prior appeal, the ex-husband was ordered to pay the costs of that appeal and the ex-wife complained in her second appeal that on remand the trial court had failed to order payment

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237. *Id.* at 164 (citing *Mason v. Mason*, 282 S.W.2d 320, 322 (Tex. App.—San Antonio 1955, no writ (Thomas, C.J., concurring))). See Joseph W. McKnight, *Commentary to the Texas Family Code, Title I*, 21 TEX. TECH. L. REV. 911, 988 (1990).

238. 981 S.W.2d 887 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

239. See *id.* at 888.

240. See *id.*

241. See *Swate v. Johnston*, 981 S.W.2d 923, 925 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing, *inter alia*, *First Nat'l Bank of Gilmer v. First State Bank of Hawkins*, 456 S.W.2d 173, 174 (Tex. Civ. App.—Texarkana 1970, writ dism'd); *Benningfield v. Benningfield*, 155 S.W.2d 827, 828 (Tex. Civ. App.—Austin 1941, no writ); *McFarlane v. Greenmeyer*, 199 S.W. 304, 305 (Tex. Civ. App.—Galveston 1917, no writ)); and *Scalfani v. Scalfani*, 870 S.W.2d 608, 611 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

242. 971 S.W.2d 687 (Tex. App.—Waco 1998, no pet.).

of those costs. In responding to this point, the court in *Walston* stated that in civil cases the party against whom costs are assessed must pay the costs of appeal including the costs for preparation of the clerk's record and the reporter's record.<sup>243</sup> Thus, because on the first appeal the court had ordered the ex-husband to pay the costs of appeal, it is not necessary for the trial court to reorder payment though it is the trial court's duty to enforce the appellate court's order which can be achieved by a writ of execution.<sup>244</sup> If the claimant fails to present her claim for costs to the trial court, she has failed to preserve any claim for appellate review.<sup>245</sup> On second remand to the trial court, however, she may still obtain a writ of execution pursuant to the earlier order of the appellate court.<sup>246</sup>

### 9. Court's Retention of Plenary Power

In the course of considering a petition for a writ of mandamus to vacate an order granting a new trial, the Texas Supreme Court in *In re Dickason*<sup>247</sup> reviewed some aspects of the limits of the trial court's exertion of its plenary power. The husband-plaintiff had apparently sued his wife for divorce and also sued her alleged paramour for intentional infliction of emotional distress in having an affair with his wife. After the man's second effort to protect himself from the plaintiff's deposition subpoena, both parties moved for sanctions against each other. The husband's motion was overruled. As part of its sanction against the husband, the court dismissed his suit against the alleged paramour with prejudice on November 25. The plaintiff then filed a timely motion for a new trial on December 19 followed by an amended motion on December 26. The judge, who was leaving the bench at the end of the year, overruled the plaintiff's motion on December 27. After the successor judge was recused, an assigned judge then granted the plaintiff's amended motion on February 10. The defendant then filed his petition for mandamus to vacate that order.

In granting the writ, the Texas Supreme Court explained in its per curiam opinion that the plaintiff had filed his motion for new trial on December 19, within thirty days of the November 25 order, and the trial court therefore had plenary power to act on that motion for seventy-five days from November 25 under Rule 329b(c).<sup>248</sup> After the court overruled that motion on December 27, the court retained its plenary power to alter its order for another thirty days under Rule 329b(e).<sup>249</sup> Thus, the

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243. See *Walston*, 971 S.W.2d at 697 (citing TEX. R. APP. P. 43.4). Costs for a transcript on appeal are taxable costs. For what costs are taxable and those that are non-taxable, see Brad A. Allen & John D. Ellis, Jr., *What are Taxable Court Costs in Texas?* HOUSTON LAWYER, Sept.-Oct. 1998, at 14.

244. See *id.* (citing TEX. R. APP. P. 51.1(b)). See also *City of Garland v. Long*, 722 S.W.2d 49, 50 (Tex. App.—Dallas 1986, no writ); *Varner v. Koons*, 888 S.W.2d 511, 513 (Tex. App.—El Paso 1994, no writ).

245. See *Walston*, 971 S.W.2d at 698 (citing TEX. R. APP. P. 33.1).

246. See *id.* (citing *City of Garland*, 722 S.W.2d at 51).

247. No. 98-0140, 1998 WL 716936 (Tex. Oct. 15, 1998).

248. See *id.* at \*1 (citing TEX. R. CIV. P. 329b(c)).

249. See *id.* (citing TEX. R. CIV. P. 329b(e)).

court's plenary power was exhausted on January 26 and the order of February 10 was void.

#### 10. *Timely Appeal: Effect of Request for Findings*

A related dispute arose in the *Pursley v. Ussery*,<sup>250</sup> involving an ex-wife's bill of review proceeding to set aside a 1992 divorce. The judge indicated on May 5, 1997, that he would grant the bill. After the ex-husband filed a request for findings of fact and conclusions of law, the judge conducted a new hearing on May 17 and thereafter signed the interlocutory order granting the bill, setting aside the 1992 order, and reserving judgment on a re-division of property. Although there seems to have been some dispute as to if, or when, the judge recused himself, on July 31 another judge conducted a further trial and divided the property. His order was signed on September 4, and the ex-husband appealed on December 3. The ex-wife thereupon asserted that the appeal was not filed on time and should be dismissed. The dispute turned on the effect of the husband's motion for findings of law and fact. The San Antonio Court of Appeals held that, in light of the subsequent judgment of July 31, the husband's motion of May 14 was treated as premature and untimely and thus filed on July 31; therefore, the time for appeal had run on October 29.<sup>251</sup>

#### 11. *Appeal: Complete Record*

##### a. Findings of Fact and Conclusions of Law

A lack of clear findings with respect to the character and value of particular items of matrimonial property may make meaningful review of the trial court's division of that property impossible. When such findings are properly requested, the court must supply them.<sup>252</sup> Because this duty is mandatory, the failure of the trial court to respond to such a timely request is presumed harmful unless the appellate record affirmatively shows that the complaining party has suffered no injury.<sup>253</sup> When such findings are not requested, the appellate court presumes that the trial court made all necessary findings to support its judgment,<sup>254</sup> and in determining whether some evidence supports the judgment, the appellate court considers only that evidence most favorable to the judgment and disregards all contrary evidence.<sup>255</sup> In *Frommer v. Frommer*<sup>256</sup> the Hous-

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250. 982 S.W.2d 596 (Tex. App.—San Antonio 1998, no pet.).

251. *See id.* at 600.

252. *See In re Combs*, 958 S.W.2d 848, 851 (Tex. App.—Amarillo 1998, no pet.) (citing TEX. R. CIV. P. 297).

253. *See id.* (citing *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989)).

254. *See Frommer v. Frommer*, 981 S.W.2d 811 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Roberson v. Roberson*, 768 S.W.2d 280, 281 (Tex. 1989); *Magill v. Magill*, 816 S.W.2d 530, 532 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).

255. *See Worford*, 801 S.W.2d at 109.

256. 981 S.W.2d 811 (Tex. App.—Houston [1st Dist.] 1998, no pet.)

ton First Court of Appeals concluded that findings recited in a judgment cannot be relied upon because Rule 299a precludes such findings.<sup>257</sup> In *Frommer* no findings were requested, and in aid of his case on appeal the appellant sought to rely on recitals of characterization of property in the judgment. His argument was rejected along with his reliance on the recent decision of the Amarillo Court of Appeals in *Hill v. Hill*.<sup>258</sup>

In *Hill* conclusions of law were requested as to characterization of certain items of property and the court responded by referring the appellant to recitals in the judgment in that respect. The appellee asserted that the appellant was nonetheless precluded by Rule 299a from relying on those recitals and that the appellant should have pressed her request for "additional findings" in that regard.<sup>259</sup> The appellate court held, however, that at trial the appellee had not complained of error and that the language of the judgment did not conflict with the court's formal findings of fact.<sup>260</sup> The court added that to rule otherwise would render meaningless that part of Rule 299a, which dictates how conflicts between findings are to be resolved. In *Frommer* the court found the situation in *Hill* distinguishable from that in *Frommer* but did not comment on the Amarillo court's reasoning.<sup>261</sup>

Clearly some legislative or rule-making attention to this situation is required, but in making amends a balance must be struck between requiring *needed* particularized findings and a requirement of findings that will be unduly burdensome on the trial court.<sup>262</sup> In *Hill*, for example, the wife requested the net values of almost fifty items of personal property and also asked what percentage of the net community estate should be received by each party in order to achieve a "just and right" division. The court responded to the latter question only and indicated that each party should receive about fifty percent of the net community estate.<sup>263</sup> On appeal the wife asserted that the trial court was obligated to respond to the former request so that she could determine whether she received fifty percent of the community estate. The Amarillo court first pointed out that only findings and conclusions on ultimate or controlling issues need be made. "[I]n matters of property division, the ultimate or controlling issue is whether the division was just and right. The value of the property being divided, though related to the ultimate issue, is not a controlling issue."<sup>264</sup> Further, as to the wife's request for findings of the values of particular pieces of property, these were "findings upon evidentiary, as

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257. See *id.* at 814.

258. See *id.* at 813. See also *Hill v. Hill*, 971 S.W.2d 153 (Tex. App.—Amarillo 1998, no pet.).

259. See *Hill*, 971 S.W.2d at 157.

260. See *id.*

261. See *Frommer*, 981 S.W.2d at 813.

262. Proposals for legislation have been drafted for enactment at 1999 regular legislative sessions.

263. See *Hill*, 971 S.W.2d at 155.

264. *Id.* (citing *Rafferty v. Finstad*, 903 S.W.2d 374, 376 (Tex. App.—Houston [1st Dist.] 1995, writ denied)).

opposed to ultimate or controlling issues.”<sup>265</sup> Thus, the court had not erred in refusing to make such findings in that instance. But the difference of opinion as to how far a court *should* go in making findings of fact varies considerably, as Justice O’Connor’s dissenting opinion in *Rafferty v. Finstad*<sup>266</sup> indicates.

b. Bad Quality of Audio Transcription

In the course of the proceedings and at the trial of the divorce from which an appeal was taken in *Richardson v. Richardson*,<sup>267</sup> the wife’s inventory was not produced at trial and her attorney was therefore precluded from attempting to trace her separate assets. That fact did not constitute the basis for her appeal, however, but may have influenced the majority of the court in overruling the wife’s sole point of error with respect to the completeness of the record before the court. The basis for the wife’s appeal was the skeletal state of the record. At a point well into the trial, the court reporter’s stenographic machine began to function erratically, causing gaps in the testimony transcribed. The stenographer evidently did not know shorthand, and the machine was abandoned in favor of a tape-recording machine, which neither counsel apparently checked for operability. The result was a very poor quality of tape transcription that reproduced parts of the testimony without the questions of counsel. After four motions for extensions of time to prepare a statement of facts the wife moved for abatement of the appeal and sought a new trial.<sup>268</sup> Appellate Rule 50(e) states that a new trial shall be granted if “the court reporter’s notes and records have been lost or destroyed . . . unless the parties agree on a statement of facts.”<sup>269</sup> The majority of the court construed the rule to mean that the “testimony was actually memorialized by some method and that the existing memorialized testimony was either lost or destroyed.”<sup>270</sup> The majority concluded that the standard of the rule had not been met and that counsel had failed in exercising proper diligence to assure the preparation of a record of the trial.<sup>271</sup> Relying on *Gillen v. Williams Brothers Construction Co.*,<sup>272</sup> Justice Stover dissented on the ground that the wife, through her counsel, was sufficiently diligent in protecting the record and was therefore entitled to a new trial.<sup>273</sup>

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265. *Id.*

266. *See id.* at 378 (O’Connor, J., dissenting). For a discussion of this case see Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 49 SMU L. REV. 1015, 1049 (1996).

267. 969 S.W.2d 534 (Tex. App.—Beaumont 1998, no pet.).

268. *See id.* at 536.

269. TEX. R. APP. P. 50(e).

270. *Richardson*, 969 S.W.2d at 536.

271. *See id.*

272. 933 S.W.2d 162 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

273. *See Richardson*, 969 S.W.2d at 537 (Stover, J., dissenting).

### 12. Estoppel to Appeal

As a corollary to the principle of estoppel, a litigant cannot accept the benefits of a decree of divorce voluntarily and afterwards prosecute an appeal from the divorce.<sup>274</sup> But if the grounds for appeal are unrelated to the benefits accepted (for example, acceptance of benefits of property division and appealing matters of child custody and child support), the appellant is not estopped,<sup>275</sup> nor is the appellant estopped if the ground for appeal is based on fraud or misrepresentation of the other spouse affecting a property division.<sup>276</sup>

In *In re Richards*<sup>277</sup> the divorce court had granted the divorce and divided the community property according to the agreement of the parties; there was no property divided in favor of one party that was in possession of the other, nor was there any money judgment rendered by the court. The court ordered that each party was responsible for his or her own costs. The wife nevertheless filed notice of appeal. Asserting that the wife was acting in bad faith, the husband thereupon sought an appeal bond. The wife responded by asking for sanctions for a frivolous motion. The trial court set a "cost bond" of \$2000 and denied the motion for sanctions, and the wife appealed both rulings. The appellate court held that there was nothing under the circumstances that the wife might seek in execution or any other purpose for which an appeal bond might be sought.<sup>278</sup> As for the requested sanctions, the appellate court merely pointed out that the trial court had made the order, and in view of that fact, the imposition of sanctions would not be appropriate.<sup>279</sup>

### 13. Bill of Review

In *Defee v. Defee*<sup>280</sup> the ex-husband asserted the four years statute of limitation<sup>281</sup> against a bill of review to a judgment of divorce. That statutory period begins to run at the date of the judgment unless the petitioner can show extrinsic fraud.<sup>282</sup> The trial court, however, found ample evidence to rebut a showing of extrinsic fraud.<sup>283</sup>

## B. PROPERTY SETTLEMENT AGREEMENTS

Two recent cases turned on the interpretation of terms of property set-

274. See *Carle v. Carle*, 149 Tex. 469, 472, 234 S.W.2d 1002, 1004 (1950).

275. See *Roa v. Roa*, 970 S.W.2d 163, 166 (Tex. App.—Fort Worth 1998, no pet.) (citing *Lipshy v. Lipshy*, 525 S.W.2d 222, 224 (Tex. Civ. App.—Dallas 1975, writ dismissed)).

276. See *Wheeler v. Wheeler*, 713 S.W.2d 148, 151 (Tex. App.—Texarkana 1986, writ dismissed).

277. No. 07-98-0038-CV, 1998 WL 396424 (Tex. App.—Amarillo July 15, 1998).

278. See *id.* at \*2 (citing TEX. R. APP. P. 24).

279. See *id.* at \*3.

280. 966 S.W.2d 719 (Tex. App.—San Antonio 1998, no pet.).

281. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1997).

282. See *Defee*, 966 S.W.2d at 722 (citing *Law v. Law*, 792 S.W.2d 150, 153 (Tex. App.—Houston [1st Dist.] 1990, writ denied)).

283. See *id.*



tlement agreements in relation to their enforcement. In *Allen v. Allen*<sup>284</sup> the agreement provided that the husband's obligation to make monthly support payments to his ex-wife would terminate if she should cohabit with another man. The evidence showed that subsequent to the divorce the ex-wife had had sexual relations with two other men with whom she was successively romantically attached for a period of time. In both cases the men stayed intermittently at her house and kept some of their belongings there. The court supplied the ex-husband's definition of "cohabit" to the jury: ". . . the term 'cohabit' does not require living together, claiming to be married, in the relationship of husband wife. It can include an irregular, limited, or partial living together for the purpose of sexual relations."<sup>285</sup>

The jury denied recovery to the ex-wife in her suit for the ex-husband's failure to make the agreed payments. In reversing the trial court's judgment, the appellate court held that under the circumstances no definition was required to be submitted because the word "cohabitation" in its context was unambiguous and therefore did not require definition.<sup>286</sup> Thus, by supplying a definition the trial court bound the jury to a specific meaning of the word rather than "what the jury would ordinarily understand the parties to mean."<sup>287</sup>

In *Cardwell v. Sicola-Cardwell*<sup>288</sup> the dispute went beyond the actual terms of the agreement. The court considered whether the obligation survived the death of the obligor. The Austin Court of Appeals applied the ordinary rule that a contractual obligation of a decedent is enforceable against his estate if the contract is capable of being performed by the estate.<sup>289</sup> The agreement provided that the former husband would make three hundred monthly payments to his former wife. The contract was not for personal service of the obligor nor did its non-assignable provisions so suggest. The contract specifically provided that it terminated on the former wife's death or the completion of the required number of payments. The appellate court construed the contract as unambiguous and required the ex-husband's estate to pay the present value of the remaining payments.<sup>290</sup>

The third settlement agreement case is much more unusual: Rule 11 agreement entered into before judgment, filed with the court thereafter, but before the judgment became final. In *In re Raffaelli*<sup>291</sup> the wife had filed suit for divorce and before judgment moved to Alabama. Though the sequence of these events is not clear from the decision, following the

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284. 966 S.W.2d 658 (Tex. App.—San Antonio 1998, no pet.).

285. *Id.* at 660.

286. *See id.* at 661.

287. *Id.*

288. 978 S.W.2d 722 (Tex. App.—Austin 1998, no pet.).

289. *See id.* at 725-26. *See also* Republic Nat'l Bank v. Beard, 475 S.W.2d 344 (Tex. Civ. App.—Beaumont 1971, writ ref'd).

290. *See Cardwell*, 978 S.W.2d at 728.

291. 975 S.W.2d 660 (Tex. App.—Texarkana 1998, pet. denied) (per curiam).

divorce hearing the court sent a letter to counsel indicating the court's division of property as well as custody and support of their minor children. Evidently mutually dissatisfied with the court's disposition of their affairs, the couple entered into a written settlement agreement. The husband then moved the court to render judgment according to the agreement, but the court entered a judgment different from the terms set out in the court's letter and the parties' agreement. With the settlement agreement attached to his pleading, and thus for the first time filed with the court, the husband then brought a separate suit just before the divorce became final to enforce the agreement as a contract. With that action pending, the husband then appealed from denial of his motion in the suit for divorce; he sought enforcement of the Rule 11 agreement or abatement of the appeal pending resolution of his proceeding on the contract. The Texarkana Court of Appeals concluded that the parties' agreement had by its filing (though in another proceeding) complied with all the requirements of an enforceable agreement under Rule 11: ". . . no agreement between . . . parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record . . . ."292

The court did not inquire whether the agreement had been filed "with the papers as part of the record" but gave effect to the agreement simply as "*filed* while the trial court still had plenary power over its judgment and before the judgment became final."<sup>293</sup> The fact that the wife had withdrawn her consent to the agreement prior to its filing was of no aid to her because she was already bound by her contract.<sup>294</sup> Nor could she rely on the husband's alleged failure to make an agreed payment under the contract within thirty days of signing (a fact that was in dispute) because the agreement did not provide that time was of the essence, and the agreement presupposed (as an agreement under Rule 11) that it would become enforceable only on approval by the court.<sup>295</sup>

### C. MAKING THE DIVISION ON DISSOLUTION OF MARRIAGE<sup>296</sup>

#### I. *Process of Division*

Although during the year past the appellate courts do not seem to have been presented with many questions dealing with division of property on divorce, some anxiety has nonetheless been expressed concerning the ability of the Texas property system to handle the problems of divorce

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292. *Id.* at 661 (quoting TEX. R. CIV. P. 11).

293. *Id.* (emphasis supplied).

294. *See id.* at 662 (citing *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995)).

295. *See id.* at 661.

296. In its 1997 revision, Subtitle C of Title 1 of the Family Code received a new title, "Dissolution of Marriage" and Chapter 6 is called "Suit for Dissolution of Marriage." Suits to declare a marriage void, suits for annulment, and suits for divorce are all covered in Chapter 6. Subtitle C deals with inter vivos dissolution of marriage only. The other kind (death) is covered in the Probate Code.

adequately.<sup>297</sup> Some have suggested solutions available in the principle of post-divorce maintenance of ex-spouses and other alternatives.<sup>298</sup> Some courts were too quick in awarding ex-spousal maintenance in cases brought prior to the effective date of the statute authorizing that remedy.<sup>299</sup> In remanding the case for further proceedings in *In re Combs*, the court noted the inextricable relationship between the process of property division and award of maintenance.<sup>300</sup> Before Texas courts turn casually to the alternative award of ex-spousal maintenance, they should carefully consider the difficulties of enforcing maintenance awards in other states whose experience with the remedy is far more extensive than ours.

While injury to business interests may be considered in making divisions of property on divorce,<sup>301</sup> it has also been suggested that careful examination should be made in those instances of the seller's implied covenant not to derogate goodwill in relation to valuation of business interests.<sup>302</sup> Although abuses of discretion in making the division of property are occasionally found, one senses that many appellate complaints in that regard are made somewhat casually and without good cause.<sup>303</sup> In some instances, however, even though the trial court may have made an error constituting mischaracterization of property, disposition of a small amount of property, properly characterized as community rather than separate property, awarded to the separate owner of the related property may not affect the just and right division of the community estate.<sup>304</sup> In *Butler v. Butler*,<sup>305</sup> however, the trial court had decided to award sixty percent of the community estate to the wife and forty percent to the husband. In making its proportionate computation, however, the court failed to consider a larger sum awarded to the community as reimbursement from the husband's estate, the wife's attorney's fees, and what were called equalizing monthly payments, all of which were also ordered paid by the husband to the wife with the result that the wife was awarded about seventy-five percent of the community property and the husband, twenty-five percent.<sup>306</sup> On the husband's appeal, the Corpus Christi Court of Appeals termed the result "manifestly unfair" and remanded the case for

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297. See Bea Ann Smith, *Why the Community Property System Fails Divorced Women and Children*, 7 TEX. J. OF WOMEN AND THE LAW 135 (1998).

298. See James W. Paulsen, *The History of Alimony in Texas and the New "Spousal Maintenance" Statute*, 7 TEX. J. OF WOMEN AND THE LAW 151 (1998); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 33-37 (1998).

299. See *In re Combs*, 958 S.W.2d 848 (Tex. App.—Amarillo 1997, no pet.). See also Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 51 SMU L. REV. 1047, 1082-83 (1998).

300. See *Combs*, 958 S.W.2d at 849.

301. See *Walston*, 971 S.W.2d at 693.

302. See George P. Roach, *The Seller's Implied Covenant Not to Derogate Goodwill*, 1998 STATE BAR [OF TEXAS] SECTION REPORT (No. 3, Summer 1998).

303. See, e.g., *Frommer*, 981 S.W.2d at 814.

304. See *Hunt v. Hunt*, 952 S.W.2d 564, 568 (Tex. App.—Eastland 1998, no pet.).

305. 975 S.W.2d 765 (Tex. App.—Corpus Christi 1998, no pet.).

306. See *id.* at 770.

re-division.<sup>307</sup>

In *Kimsey v. Kimsey*<sup>308</sup> it was also asserted that the divorce court had erred in making the division. Although the court did not disturb the trial court's award of over sixty percent of the community estate (including business interests) to the husband, he had also been ordered to pay very substantial debts (apparently incurred for business purposes)<sup>309</sup> as well discharging a separate debt for reimbursement at the rate of \$1000 a month over almost ten years. Speaking through Justice M<sup>c</sup>Clure, a leading judicial authority on Texas family law, the court also provided a set of guidelines for trial courts in winding up the proprietary aspects of divorce. The court not only directed closer attention to spelling out the mode of preparing both parties' federal income tax returns in instances when their returns were in arrears<sup>310</sup> but also specified inclusion of disposition of tax refunds and preservation of financial records and the parties' access to them.<sup>311</sup> The court there found that the trial court had abused its discretion in not giving the wife a full choice of remedies by failing to require the husband to execute a promissory note and deed of trust on certain separate realty on which the court had perpetuated an equitable lien<sup>312</sup> in favor of the community estate for the receipt of reimbursable benefits rendered during marriage.<sup>313</sup> For the further benefit of both obligors and obligees the court also counseled that "[w]henever a party is to make some payment after the date of divorce, the decree should specify the dates, time, and location of the payment."<sup>314</sup> In like manner, an award of corporate stock should specify the number of shares or a particular stock certificate.<sup>315</sup> As security for reimbursement and an encouragement of its prompt payment, the court further specified that in order to avoid ambiguity as to compound interest on a money judgment for reimbursement, the divorce decree should specify "interest at the legal rate, compounded annually."<sup>316</sup>

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307. *Id.*

308. 965 S.W.2d 690 (Tex. App.—El Paso 1998, no pet.).

309. It is not indicated, however, whether the wife was personally obligated for any of these debts. Whatever Justice Johnson may have meant beyond liability of jointly managed community property in using the phrase "joint community obligation" in *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975), allusion to the observation (as in *Kimsey*, 965 S.W.2d at 702) can only create confusion after the amendment of TEX. FAM. CODE ANN. §§ 3.201 (formerly § 4,031) and 3.202 (formerly § 5.61) (Vernon Supp. 1999).

310. *See id.* at 696.

311. *See id.*

312. Though it reflects casual professional usage, the court's comment on the perpetuation of an equitable lien for reimbursement is not as precise as it might be. *See id.* at 698. Surely such a lien (judicially recognized) is a species of judgment lien and notice of its existence is provided by abstracting the divorce judgment. *See* Joseph W. M<sup>c</sup>Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 1831, 1866-67 (1992).

313. *See Kimsey*, 965 S.W.2d at 698.

314. *Id.* at 697.

315. *See id.* at 698.

316. *Id.* (citing TEX. FIN. CODE ANN. §§ 304.003, 304.006 (Vernon Supp. 1999)).

## 2. Terminology of Decree

*Stanley v. Riney*<sup>317</sup> dealt with the meaning of a decree of annulment. The petitioner alleged that the only community property accumulated during the marriage was personal effects and the court found that her allegation was true and provided in the decree that each party take "all such property as is presently in his or her possession."<sup>318</sup> At the time of the decree the wife had in her possession an uncashed lottery ticket acquired during the marriage and worth approximately \$4,300,000. The ex-husband then sought and was granted a declaratory judgment that the lottery ticket and its proceeds had not been divided. In rejecting the ex-wife's appeal the court pointed out that "[a] litigant cannot complain about an action of the trial court that was done at the invitation of the complaining party."<sup>319</sup> The court went on to say that the petitioner might have requested that the court divide *personal property* but had chosen to ask for division of *personal effects* only.<sup>320</sup> "Personal effects commonly refer to items of personal property used or usable primarily by the person to whom they are related, such as clothes, toilet articles, glasses, and dentures, and not to significant items of intangible personal property."<sup>321</sup> Further, the prior decree could not be res judicata to the ex-husband's post-annulment proceeding because the division of assets other than personal effects was not put in issue in the prior proceeding.<sup>322</sup> In rejecting the ex-wife's objection that the ex-husband had improperly brought his suit in a court other than that which had granted the annulment, the appellate court pointed out that a suit for undivided community property is properly brought under section 9.203 in a court other than that entering the original decree.<sup>323</sup> The court noted that a suit for enforcement of a decree is properly brought in the court making the original decree and retaining jurisdiction to enforce it under section 9.002.<sup>324</sup>

## 3. Attorney's Fees

As a general rule the award of attorney's fees to either party in a suit for divorce is an element of property division<sup>325</sup> but other factors may also affect such awards.<sup>326</sup> Also as a general rule in marital or post-mari-

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317. 970 S.W.2d 636 (Tex. App.—Tyler 1998, no pet.) (opinion withdrawn from publication on motion by party).

318. *Id.* at 638.

319. *Id.* (citing *Litton Indus. Prod., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984)).

320. *See id.* at 639.

321. *Id.* (citing *Teaff v. Ritchey*, 622 S.W.2d 589, 592 (Tex. Civ. App.—Amarillo 1981, no writ); *Dearman v. Deutschmann*, 739 S.W.2d 454, 455 (Tex. App.—Corpus Christi 1987, writ denied)).

322. *See Stanley*, 970 S.W.2d at 640.

323. *See id.* at 639; TEX. FAM. CODE ANN. § 9.203 (Vernon Supp. 1999).

324. *See id.* at 639; TEX. FAM. CODE ANN. § 9.002.

325. *See Carle v. Carle*, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950); *Butler v. Butler*, 975 S.W.2d 765, 770 (Tex. App.—Corpus Christi 1998, no writ).

326. As a necessary contract, a contract for attorney's fees would also seem enforceable against the other party, especially when that party is the petitioner for divorce. It has

tal disputes, attorney's fees are awarded to the prevailing party only<sup>327</sup> but that rule has its exception. One such exception is found in the situation when one party is successful on some points of appeal and is awarded attorney's fees in that regard.<sup>328</sup> The Ethics Committee of the State Bar of Texas has also concluded that it is improper in a divorce case for an attorney to sue his own client for his fees.<sup>329</sup> In *Kimsey v. Kimsey*,<sup>330</sup> there were pleadings for fees by each party against the other for attorney's fees but no pleadings by either attorney for fees against his own client. The jury nevertheless rendered a verdict that each party should pay his or her attorney's fees, and the court in turn awarded a money judgment to each attorney for his client's fees. On appeal, the husband asserted that the court might order each party to pay his or her attorney's fees but acknowledged that a money judgment should not be awarded against the wife in favor of her attorney. The wife's attorney evidently made no response in this regard, and the appellate court held that the award of the money judgment to the attorneys of both parties against their clients was improper.<sup>331</sup>

As to the quantum of attorney's fees, the Texas Supreme Court held in *Stuart v. Bayless*<sup>332</sup> that in an action by a lawyer against his former client for fees, lost contingent fees are not recoverable unless the parties contemplated at the time the contract was made that such damages would be the probable result of breach. As a matter of law, the court went on to say that such injury (lost fees as a result of having to bring suit for an unpaid bill) is not ordinarily foreseeable in a divorce case.<sup>333</sup> Thus, if such a loss is sought to be covered, it ought to be included in the attorney's fee contract.

#### D. EX-SPOUSAL MAINTENANCE

In *In re Combs*<sup>334</sup> an impetuous trial court had awarded ex-spousal maintenance in a suit for divorce filed before the statute authorizing an award for such maintenance came into effect and proceeded to make a

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also been said that a party should not be ordered to pay attorney's fees for the other when the cost must fall on the payee's separate estate. See *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ denied), *overruled on other grounds by* *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993). *But see* *Johnson v. Johnson*, 948 S.W.2d 835, 838 (Tex. App.—San Antonio 1997, no writ) (holding that such an argument is inappropriate in a dispute concerning the parent-child relationship).

327. See, e.g., *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998) (holding that because the husband was successful in his appeal against a judgment in favor of his wife, the award of attorney's fees in her favor was reversed).

328. See *Carlson v. Carlson*, 983 S.W.2d 304 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

329. See Texas Ethics Committee Opinion No. 374, 37 TEX. B.J. 1085 (1974).

330. 965 S.W.2d at 690.

331. See *id.* at 694 (citing TEX. R. APP. P. 43.2(b) and *Beavers v. Beavers*, 675 S.W.2d 296, 300 (Tex. App.—Dallas 1984, no writ). *But see* Texas Ethics Committee Opinion, *supra* note 329.

332. 964 S.W.2d 920, 921 (Tex. 1998) (per curiam).

333. See *id.* at 922.

334. 958 S.W.2d 848 (Tex. App.—Amarillo 1997, no pet.).

division of the community estate. In putting aside the maintenance award the court said that it was also obliged to set aside the property division: A great many of the factors controlling the award of maintenance and the division of property are not only the same but the two processes are "inextricably intertwined."<sup>335</sup> In *Alexander v. Alexander*,<sup>336</sup> on the other hand, the Houston First Court of Appeals<sup>337</sup> defined some of the standards for division in an award of spousal maintenance in limited circumstances<sup>338</sup> when there is very little property to divide on divorce.

#### E. POST DIVORCE DIVISION

In divorce cases from the forties through the mid-seventies, retirement benefits were often overlooked in the division of property either because those benefits were assumed to belong to the prospective pensioner as separate property or because the pension interest was not yet vested. In *Busby v. Busby*<sup>339</sup> the Texas Supreme Court held in 1970 that community property undivided on divorce became a tenancy in common between the former spouses subject to partition.<sup>340</sup> In 1976, in *Cearley v. Cearley*,<sup>341</sup> the Texas Supreme Court held that unvested pension interests were nonetheless divisible.<sup>342</sup> With respect to military pensions, however, the United States Supreme Court held, in *M<sup>c</sup>Carty v. M<sup>c</sup>Carty*,<sup>343</sup> on June 26, 1981, that those interests were not divisible under the Congressional Act. Acting with considerable speed for such an unwieldy legislative body, Congress thereupon enacted the Uniformed Services Former Spouses Protection Act,<sup>344</sup> signed by the President on September 9, 1982 (to be effective on February 1, 1983) to make such pension interests (payable after June 25, 1981) divisible under state law. It seemed apparent to some in light of the decision in *M<sup>c</sup>Carty* and its treatment by Congress that pension rights arising before June 26, 1981, were therefore not subject to division. The Supreme Court of Texas so held in 1982 in *Cameron v. Cameron*,<sup>345</sup> but uncertainty on the point lingered on until Congress provided that with respect to divorces rendered prior to June 26, 1981 partitions of benefits should not be allowed, but with respect to decrees entered between June 25, 1981 and November 5, 1990 such divisions

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335. *See id.* at 851.

336. 982 S.W.2d 116 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

337. In its marquee, the cast of judges in the advance sheets not only includes Justices O'Connor and Taft but also Justice Bea Ann Smith of the Austin court sitting by designation. In the footnote, however, Justice Smith is identified as Jackson B. Smith, Jr., a retired judge of the First Court of Appeals.

338. *See* TEX. FAM. CODE ANN. § 8.002 (Vernon Supp. 1999).

339. 457 S.W.2d 551, 554 (Tex. 1970).

340. *See id.* at 554.

341. 544 S.W.2d 661 (Tex. 1976).

342. *See id.* at 662.

343. 453 U.S. 210 (1981).

344. *See* 10 U.S.C. § 1408 (1998).

345. 641 S.W.2d 210, 212 (Tex. 1982).

would end on November 5, 1990, the date of the amendment.<sup>346</sup> Application of that statute was before the San Antonio Court of Appeals in *M<sup>c</sup>Dougall v. Havlen*.<sup>347</sup> The couple had married in 1953 while the husband was a member of the Air Force and they were divorced in 1976 after his retirement, but no division in the retirement benefits was made. In 1996 the ex-wife filed a petition for division of the ex-husband's military retirement pay as an undivided community asset. In reliance on the federal act of 1990 the trial court granted the ex-husband's motion for summary judgment and the ex-wife appealed. Relying on *Buys v. Buys*,<sup>348</sup> which turned on an interpretation of a residuary clause in a property settlement agreement deemed to include a pre-June 26, 1981 retirement interest, and *Walton v. Lee*,<sup>349</sup> in which the court put reliance on the effect of Texas law in converting undivided community property into a tenancy in common, the court concluded that the ex-wife's interest was not covered by the federal statute of 1990.<sup>350</sup> The court relied heavily on an article by Professor William Reppy<sup>351</sup> and distinguished the decision in *Knowles v. Knowles*.<sup>352</sup> The applicability of the 1990 federal statute to such cases as *Buys*, *Walton*, and *M<sup>c</sup>Dougall* is nonetheless hard to refute.<sup>353</sup>

In *M<sup>c</sup>Dougall*, the court also dealt with the ex-husband's assertion that the two-years statute of limitation in section 9.003 bars such claims as that asserted.<sup>354</sup> Section 9.004,<sup>355</sup> however, provides that the prior section does not apply to suits for partition of tenancies in common.<sup>356</sup> The court also pointed out that the applicability of section 9.003 depends on a showing of unambiguous repudiation of the asserted claim which had not been made,<sup>357</sup> and the ex-husband had not properly pled section 9.003 as a defense to the ex-wife's entire cause of action but merely as a defense regarding payments received by him prior to June 26, 1994. Finally, the

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346. See 10 U.S.C. § 1408(c)(1) (West Supp. 1998).

347. 980 S.W.2d 767 (Tex. App.—San Antonio 1998, no pet.).

348. 924 S.W.2d 369, 372-73 (Tex. 1996).

349. 888 S.W.2d 604 (Tex. App.—Beaumont 1994, writ denied).

350. See *M<sup>c</sup>Dougall*, 980 S.W.2d at 770-71.

351. See William Reppy, Jr., *The 1990 U.S.F.S.P.A. Amendments: No Bar to Recognition of Tenancy in Common Interests Created by Pre-M<sup>c</sup>Carty Divorces that Failed to Divide Military Retirement Benefits*, 29 IDAHO L. REV. 941, 961 (1992).

352. 811 S.W.2d 709, 710-11 (Tex. App.—Tyler 1991, no writ), which interpreted an agreed settlement as granting the entire pension interest to the military spouse. The court in *Knowles* had also relied on the doctrine of *res judicata* and the 1990 federal act. See Joseph W. M<sup>c</sup>Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 1831, 1864 (1992). On other applications of the doctrine of *res judicata* in this context see Joseph W. M<sup>c</sup>Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 49 SMU L. REV. 1015, 1024-25 (1996).

353. As to *Buys* see Joseph W. M<sup>c</sup>Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 50 SMU L. REV. 1189, 1229-30 (1997). As to *Walton* see Joseph W. M<sup>c</sup>Knight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 48 SMU L. REV. 1225, 1235-36 (1995).

354. See *M<sup>c</sup>Dougall*, 980 S.W.2d at 771; TEX. FAM. CODE ANN. § 9.003 (Vernon Supp. 1998).

355. TEX. FAM. CODE ANN. § 9.004 (Vernon Supp. 1998).

356. See *M<sup>c</sup>Dougall*, 980 S.W.2d at 771.

357. See *id.*



court rejected the ex-husband's defenses of laches and estoppel as not supported by evidence to show his proper reliance on those defenses.<sup>358</sup>

*M<sup>c</sup>Laurin v. M<sup>c</sup>Laurin*<sup>359</sup> also dealt with an ex-husband's appeal from a judgment in favor of his ex-wife to enforce an agreed settlement of a 1988 suit to divide the ex-husband's military retirement benefits. This couple had married in 1957 while the husband was a member of the Air Force. They were divorced in 1982 after the decision in *M<sup>c</sup>Carty*, but it was agreed that the husband would pay the wife \$450 a month from his retirement benefits until her remarriage. The ex-husband complied with the contract until the wife remarried in 1988. After the ex-wife's new marriage was annulled in 1988, she brought suit to reinstate payments under the contract. After judgment in favor of the ex-wife, an appeal, and a remand to the trial court, the dispute was settled and an agreed judgment was entered in 1992 that the ex-husband pay the ex-wife \$385 a month from his military retirement benefits. Thereafter the ex-husband was employed by another federal agency. When he retired from *that* employment in 1994 his military retirement entitlement was used to implement his civil service retirement at a higher rate. Having ceased to receive military retirement payments, the ex-husband ceased making payments under the 1992 agreed judgment, which the ex-wife then sued to enforce. On the ex-husband's appeal from a judgment in favor of the ex-wife, the Texarkana Court of Appeals noted that although the ex-wife could have brought suit for breach of contract under *Brannon v. Brannon*,<sup>360</sup> such a cause of action was no longer her exclusive remedy after enactment of section 9.008 in 1987.<sup>361</sup> Thus, the court was empowered to implement the agreed order entered in 1992 to ensure that the ex-husband's unilateral acts did not dispossess the ex-wife of her prior interest.<sup>362</sup>

In *Sagester v. Waltrip*<sup>363</sup> the court considered whether an unequivocal or merely ambiguous repudiation had occurred in relation to military retirement benefits. The couple had been divorced in 1975, but the benefits were not divided by the court. Two years later, the ex-wife sued for partition of the benefits. The ex-husband, who was then living in another state, made a special appearance and, subject thereto, responded with a general denial. In 1981 the ex-wife's suit was dismissed for want of prosecution. In 1997 the ex-wife filed a further suit for partition of the benefits, and the ex-husband again responded with a general denial and moved for summary judgment on the basis of the statute of limitation as a bar to the suit. The trial court accepted the ex-husband's argument that his general denial in the 1977 suit had constituted an unequivocal repudiation of the ex-wife's interest and granted his motion for summary judgment based on both the general four years and the Family Code's two

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358. *See id.* at 772.

359. 968 S.W.2d 947 (Tex. App.—Texarkana 1998, no pet.).

360. 692 S.W.2d 528, 530 (Tex. App.—Dallas 1985, no writ).

361. *See M<sup>c</sup>Laurin*, 968 S.W.2d at 948 (citing TEX. FAM. CODE ANN. § 9.008).

362. *See id.* at 950.

363. 970 S.W.2d 767 (Tex. App.—Austin 1998, no pet.).

years statute of limitation.<sup>364</sup> The ex-wife appealed. The appellate court rejected the ex-husband's argument as to the effect of the 1977 general denial even coupled, as it was, with his failure to share his retirement benefits over a period of twenty years. The court stressed the general denial's principal effect of putting all matters at issue before the court and thus, avoiding any judgment by default.<sup>365</sup> The court acknowledged that both facts constituted some evidence of repudiation but did not establish unequivocal repudiation.<sup>366</sup>

The effects of the statute of limitation in response to a claim for partition of retirement benefits was again discussed in *Phillips v. Phillips*.<sup>367</sup> The parties' 1990 decree of divorce had failed to divide the proceeds of community agricultural produce in existence at the time of divorce. The ex-wife, however, failed to bring suit for equitable division or partition of the property until almost four years later. The ex-husband asserted that he had unequivocally repudiated her claim to the proceeds over two years prior to the assertion of it. The summary judgment proof indicated that the ex-husband had refused in late 1990 to pay the ex-wife "until his lawyer said he had to."<sup>368</sup> Sometime fairly soon thereafter he wrote her a check for \$2500. The ex-wife related how she had learned he had received more money than previously admitted for the sale of the crops, and on five different occasions in late 1992 the ex-husband indicated that he would "get back to her" about the matter.<sup>369</sup> On one of these occasions he had offered her \$2000 in final settlement but she refused to accept it. It was not until January, 1993 that he told her he would pay her nothing, and she could do nothing about it. The ex-wife's suit was filed in April, 1994. The trial court granted the ex-husband's motion for summary judgment on the ground that the cause of action was barred by the two-years statute of limitation in Family Code section 9.202(a).<sup>370</sup> The appellate court held that, in light of the facts of the continued dispute between the parties, there was a genuine issue of fact as to the time of the ex-husband's unequivocal repudiation that precluded summary judgment of the ex-wife's claim to have an equitable division of the undivided property under section 9.202(a).<sup>371</sup> The court also concluded that even if her remedy was barred under section 9.202(a), she could still assert a right to partition within four years under Property Code section 23.001.<sup>372</sup> One judge dissented on the latter point to express the myopic view that the

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364. See TEX. FAM. CODE ANN. § 9.202(a) (Vernon Supp. 1998).

365. See *Sagester*, 970 S.W.2d at 769.

366. See *id.*

367. 951 S.W.2d 955 (Tex. App.—Waco 1997, no writ).

368. See *id.* at 955.

369. See *id.* at 957.

370. See TEX. FAM. CODE ANN. § 9.202(a) (Vernon Supp. 1998).

371. See *Phillips*, 951 S.W.2d at 957.

372. See *id.* (citing *Carter v. Charles*, 853 S.W.2d 667, 671 (Tex. App.—Houston [14th Dist.] 1993, no writ)); TEX. PROP. CODE ANN. § 23.001 (West 1998). See also Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 42 Sw. L.J. 1, 47-48 (1988).

Family Code provides an exclusive remedy for property undivided on divorce.<sup>373</sup>

The Texarkana court found *Burchfield v. Finch*<sup>374</sup> a less difficult case to resolve, but the resolution of the dispute turned on the burden of proof which the ex-husband failed to meet. In 1976 the divorce court had awarded one-half of the husband's community retirement benefits to the wife, but when the ex-husband retired in 1995, he paid her nothing. She then brought suit for enforcement of the decree and for an accounting and partition of the benefits including any increases thereof to which she was entitled. In making its calculation of the amount awarded to the ex-wife the trial court evidently computed the benefits due by reference to their *value on retirement*, which included some increases since divorce. Relying on *Berry v. Berry*,<sup>375</sup> the ex-husband asserted on appeal that the ex-wife was entitled to her share of the value of the benefits *at divorce* and nothing more. The appellate court agreed with the appellant's argument based on the authority of *Berry* but nevertheless sustained the full award of the trial court. Under the circumstances, the appellate court said, the only difference between the value of retirement benefits at divorce and the value of those benefits at the date of the ex-husband's retirement was the value of divisible post-divorce increases in value.<sup>376</sup> The ex-husband's failure to show that the later valuation included any non-divisible benefits therefore required that the trial court's judgment be affirmed. The ex-husband bore the burden of showing the extent of post-divorce increases in the value of the retirement benefits and the value of non-divisible benefits, if any, because the facts supporting the value and identity of such benefits were more accessible to him. As the appellate court pointed out, the same burden of proof had been relied on in *Boniface v. Boniface*<sup>377</sup> and *Dessommes v. Dessommes*.<sup>378</sup> The court might have added the authority of *Berry v. Berry* itself.<sup>379</sup>

#### F. ENFORCEMENT

In *Carter v. Jimerson*<sup>380</sup> a New Mexican divorce decree filed under the Uniform Reciprocal Enforcement of Support Act (URESA) in 1983 was relied on in 1995 to enforce unpaid alimony under that decree under the Uniform Enforcement of Foreign Judgments Act.<sup>381</sup> Although the ex-

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373. See *id.* at 958, Vance, J. dissenting in part. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 47 SMU L. REV. 1161, 1193 (1994).

374. 968 S.W.2d 422 (Tex. App.—Texarkana 1998, no pet.).

375. 647 S.W.2d 945 (Tex. 1983).

376. See *Burchfield*, 968 S.W.2d at 425.

377. 656 S.W.2d 131, 135 (Tex. App.—Austin 1983, no writ).

378. 505 S.W.2d 673, 678 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

379. See *Berry*, 647 S.W.2d at 947. See also *Moreno v. Alejandro*, 775 S.W.2d 735 (Tex. App.—San Antonio 1989, writ denied) (As to the award for personal injury suffered during marriage but left undivided on divorce, the court put the burden of showing the community element on the injured spouse.).

380. 974 S.W.2d 415 (Tex. App.—Dallas 1998, no pet.).

381. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.06(b) (Vernon 1998).

wife who had filed under URESA had complied with its statutory formalities, the Act did not apply to the enforcement of alimony payments in 1983. Hence, for the purpose of the enforcement of the 1995 alimony payments, the 1983 filing had not been shown to be effective, even as *notice* of the alimony claim.<sup>382</sup> Thus, the 1983 filing could not be relied on for the enforcement of the foreign alimony decree within the ten-years statute of limitation.<sup>383</sup>

In *M<sup>c</sup>Pherren v. M<sup>c</sup>Pherren*<sup>384</sup> the El Paso Court of Appeals was at pains to point out that a divorce decree specific enough to be enforced by contempt does not require clarification. The trial court had found that the decree was specific enough to be enforced by contempt and that finding was supported by sufficient evidence; hence the remedy sought was without foundation.<sup>385</sup>

The extent of a trial court's jurisdiction to punish for violation of an order of the court of appeals was before the Texas Supreme Court in *In re Gabbai*.<sup>386</sup> An ex-husband had been ordered by the trial court to execute certain deeds and assignments pursuant to a divorce decree, and he appealed from that order. The appellate court thereupon ordered the ex-husband to file a supersedeas bond or to execute the documents as ordered. The court further provided that if he failed to comply with the order his appeal would be dismissed. The ex-husband complied with neither order of the appellate court, and his appeal was thereupon dismissed. The ex-wife then moved the trial court to find the ex-husband in contempt of its order and that of the court of appeals. The trial court so found and imposed criminal sanctions for his failure to comply. In releasing the contemnor, the Texas Supreme Court held that the ground for the order was too extensively stated.<sup>387</sup> Though the trial court might have punished the relator for violation of its own order, it lacked the power to punish for violation of the appellate court's order.<sup>388</sup>

The nature of the contemnor's punishment was in issue in *In re Ragland*.<sup>389</sup> The trial court's response to the relator's failure to produce certain bank records as ordered was to cite her for contempt and assess imprisonment in the county jail for thirty days. The sentence was suspended, however, and the relator was placed on probation for one year during which time she was to perform two hundred hours of community service at the rate of four hours a week. The Tyler Court of Appeals ordered her release from the ordered requirement of probation. The trial court had not only failed to specify the proper portion of Rule 215 on

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382. See *Carter*, 974 S.W.2d at 418.

383. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.06(b) (Vernon 1998).

384. 967 S.W.2d 485 (Tex. App.—El Paso, 1998, no pet.).

385. See *id.* at 490-91.

386. 968 S.W.2d 929 (Tex. 1998) (per curiam).

387. See *id.* at 931.

388. See *id.*

389. 973 S.W.2d 769 (Tex. App.—Tyler 1998). Although this problem arose from a suit affecting the parent-child relationship, it seems equally applicable to a dispute involving other matters at issue between ex-spouses.

which the order was based, but the contempt order was not founded on a written order regarding discovery of the documents sought.<sup>390</sup>

#### G. EFFECTS OF AN EX-SPOUSE'S POST DIVORCE BANKRUPTCY

In *In re Gamble*<sup>391</sup> the Fifth Circuit Court of Appeals ruled against an ex-husband who sought to use section 523(a)(15)<sup>392</sup> of the Bankruptcy Code to discharge a debt to his ex-wife. During marriage the husband (an executive of a bank) and his wife contracted to purchase bank stock using borrowed money (\$116,000) and a \$100,000 inheritance of the wife. In their divorce four years later the court awarded the stock to the husband, ordered him to pay the debt of \$116,000 and further ordered him to sign a note to the wife for \$100,000 without interest, payable in three years. Five years later, the note was still unpaid. The ex-wife then reduced the note to judgment, and the ex-husband promptly filed for bankruptcy under Chapter 7. To prevent discharge of the note, the ex-wife asserted that the note fell within the exception of a property settlement debt under section 523(a)(15).<sup>393</sup> Both the bankruptcy court and the district court found that the debtor had not shown his inability to pay the note from his disposable income or that the benefit to him of not paying would outweigh the detriment to his ex-wife under all the circumstances. The debtor had, in fact, paid another \$100,000 unsecured note and discharged a note to his father during the period since their divorce. In its de novo review of the findings of fact for clear error and its conclusions of law, and after reviewing the record and applying the plain language of the statute, the appellate court concluded that the bankruptcy court was not in error in reaching its conclusion.<sup>394</sup>

In *Nikoloutsos v. Nikoloutsos*<sup>395</sup> an ex-wife fared less well in her appeal to the federal district court after her ex-husband's Chapter 7 plan had been converted to a Chapter 13 plan and confirmed by the bankruptcy court. The ex-husband had filed his initial petition three days after entry of a Texas court's judgment against him for malicious assault on his ex-wife, and a conversion to a Chapter 13 proceeding was filed two months

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390. See *Ragland*, 973 S.W.2d at 771-72.

391. 143 F.3d 223 (5th Cir. 1998).

392. 11 U.S.C. § 523(a)(15).

393. A discharge . . . does not discharge an individual debtor from any debt . . . [not in the nature of alimony or child support as otherwise exempted under § 523(a)(15)] that is incurred by the debtor in the course of a divorce or separation . . . unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent . . . ; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to . . . a former spouse . . . of the debtor.

*Id.*

394. See *Gamble*, 143 F.3d at 225-26 (citing *In re Hamilton*, 125 F.3d 292, 295 (5th Cir. 1997), and authorities from other circuits).

395. 222 B.R. 297 (E.D. Tex. 1998).

later.<sup>396</sup> The district court held that Chapter 13 eligibility requirements are not jurisdictional and that the ex-wife had waived her objections to conversion.<sup>397</sup> Further, the ex-wife had failed to carry her burden of persuasion that confirmation of the Chapter 13 plan for partial payment should have been revoked for the ex-husband's fraud in listing the debt owed to her as valueless in that he was acting without knowledge of any misrepresentation and on advice of counsel.<sup>398</sup>

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396. The full facts are set out by the court below. See *In re Nikoloutsos*, 199 B.R. 624, 625-26 (Bankr. E.D. Tex. 1996).

397. See *Nikoloutsos*, 222 B.R. at 301.

398. See *id.* at 303-05.

