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FAMILY LAW: HUSBAND AND WIFE

*Joseph W. McKnight**

TABLE OF CONTENTS

| | |
|--|------|
| I. STATUS | 996 |
| A. TRANSSEXUAL'S CAPACITY TO MARRY | 996 |
| B. INFORMAL MARRIAGE | 997 |
| C. PRIVILEGED TESTIMONY | 998 |
| D. STATE EMPLOYMENT | 999 |
| E. FEDERAL PREEMPTION UNDER ERISA | 1000 |
| F. SPOUSAL CLAIMS AGAINST THIRD PERSONS | 1001 |
| G. SPOUSAL CLAIMS AGAINST EACH OTHER | 1003 |
| II. CHARACTERIZATION OF MARITAL PROPERTY ... | 1006 |
| A. PRE-MARITAL ACQUISITIONS | 1006 |
| B. ACQUISITIONS MADE DURING MARRIAGE | 1008 |
| 1. <i>Gifts</i> | 1008 |
| 2. <i>Tracing</i> | 1009 |
| 3. <i>Borrowed Money</i> | 1009 |
| 4. <i>Personal Injury Recovery</i> | 1010 |
| 5. <i>Stock Options</i> | 1011 |
| 6. <i>Spouses' Retirement Pension Trust of Separate Property (but not productive of Income Which Settlor-Spouse Can Reach) Converted to an ERISA-governed plan</i> | 1012 |
| 7. <i>Defined Contribution Retirement Plan</i> | 1012 |
| C. RECOVERY FOR SPOUSAL DESTRUCTION OF INSURED INTEREST IN COMMUNITY PROPERTY | 1013 |
| III. CONTROL OF MARITAL PROPERTY | 1014 |
| A. REIMBURSEMENT CLAIMS | 1014 |
| 1. <i>Support Obligations Arising Prior to Marriage</i> | 1014 |
| 2. <i>Claims for enhancement in Value</i> | 1016 |
| 3. <i>Gratuitous Dispositions</i> | 1021 |
| B. LIABILITY OF MARITAL PROPERTY | 1023 |
| C. MANAGEMENT OF A DECEASED SPOUSE'S PERSONAL REPRESENTATIVE | 1025 |
| D. INTERSPOUSAL TRANSFERS AFFECTING LIABILITY | 1025 |
| E. HOMESTEAD: DESIGNATION AND EXTENT | 1025 |
| F. SECURING LIABILITY ON A HOMESTEAD | 1031 |
| G. PERSONAL PROPERTY EXEMPTIONS | 1033 |

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|---|------|
| IV. DIVISION OF MARITAL PROPERTY ON DIVORCE | 1034 |
| A. DIVORCE PROCEEDINGS | 1034 |
| 1. <i>Jurisdiction</i> | 1034 |
| 2. <i>Judge's Disqualification or Recusal</i> | 1035 |
| 3. <i>Attorney's Disqualification</i> | 1036 |
| 4. <i>Right to Counsel</i> | 1036 |
| 5. <i>Right to Trial by Jury</i> | 1036 |
| 6. <i>Appointment of Receiver</i> | 1037 |
| 7. <i>Statutory Pleading and Conduct of Trial</i> | 1037 |
| 8. <i>Notice of Final Hearing</i> | 1038 |
| 9. <i>Prisoner's Rights To Be Heard</i> | 1039 |
| B. MAKING THE DIVISION | 1040 |
| 1. <i>Property Settlement Agreements</i> | 1040 |
| 2. <i>Abuse of Discretion</i> | 1041 |
| 3. <i>Findings of Fact and Conclusions of Law</i> | 1041 |
| 4. <i>Consequences of Mischaracterization</i> | 1042 |
| 5. <i>Temporary Alimony on Remand</i> | 1044 |
| C. AWARD OF ATTORNEY'S FEES | 1045 |
| D. BILL OF REVIEW | 1046 |
| E. OTHER POST-DIVORCE CLAIMS | 1048 |
| 1. <i>Jurisdiction</i> | 1048 |
| 2. <i>Claim Barred By Limitation</i> | 1048 |
| 3. <i>Pre-M^cCarty Military Retirement Benefits</i> | 1049 |
| 4. <i>Interpretation of Divorce Decrees</i> | 1049 |
| 5. <i>Clarification and Enforcement</i> | 1050 |

I. STATUS

A. TRANSEXUAL'S CAPACITY TO MARRY

CONSTITUTIONAL analysis of the right to marry¹ continued to be implemented with further comment on the standing of unisexual unions² and the inclination of a few sister-states to give the practice statutory status.³ A related dispute was before the San Antonio

1. See Margaret F. Brinig, *The Supreme Court's Impact on Marriage, 1967-1990*, 41 *How. L.J.* 271 (1998); Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990*, 41 *How. L.J.* 289 (1998).

2. See Jill R. Green, Comment, *Will the Marriage of Dick and Jane Evolve into the Marriage of Jane and Jane? Same-Sex Marriage: A Viable Union in the 21st Century*, 45 *LOY. L. REV.* 313 (1999); Bryan H. Wildenthal, *To Say "I Do": Shahar v. Bowers, Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 *GA. ST. U. L. REV.* 381 (1998).

3. See *HAW. REV. STAT. ANN.* ch. 572(c) (Reciprocal Beneficiaries) (Michie 1999). This statute allows persons not allowed to marry to qualify for the benefits of marriage by registration, but the statute seems to presuppose sexual relations between them because a brother and sister, and presumably a grandparent and a grandchild, are excluded from its benefits, though as interdependants they might be reasonably included. See also *VT. STAT. ANN.* tit. 23 § 1201 (2000) (Civil Union) (unisexual monogamous relationship statute); tit. 25 § 1301 (2000) (Reciprocal Beneficiaries Relationship) (blood or adoptive relations with presupposition of sexual relations). See also proposed legislation in Colorado concerning reciprocal beneficiaries and civil unions.

Court of Appeals in *Littleton v. Prange*.⁴ The plaintiff in this wrongful death action was born a male in 1952 (apparently in Texas) and at the age of twenty-three underwent gender-dysphoria surgery and psychological treatment (also referred to as sexual reassignment) by which he became a female transsexual. In 1989 the plaintiff and a biological male were ceremonially married in Kentucky, where persons of the same sex may not marry.⁵ The two lived together thereafter as husband and wife until the man's death, though their domicile is not commented on in the report. As the man's surviving spouse the transsexual then brought suit in Texas for the man's wrongful death. The defendant moved for summary judgment on the ground that the plaintiff, as a male, was not the decedent's surviving spouse under the Texas statute.⁶ During the pendency of this suit, in a ministerial proceeding in another Texas court, the plaintiff's birth certificate had been amended at the plaintiff's request to show change of sex and name under the Texas statute allowing such change if the original record was "incomplete or proved by satisfactory evidence to be inaccurate."⁷ The defendant's motion for summary judgment was nonetheless granted, and the plaintiff appealed. By a majority of two to one the appellate court affirmed the judgment of the trial court. In the absence of statutory guidance the court relied on biological factors to determine that the plaintiff was, and is, a male as a matter of law⁸ and hence was unable to have been married to the decedent under Texas law.⁹ Justice Alma López dissented on the ground of the significant evidence of the plaintiff as female that had raised an issue of material fact in that regard.¹⁰ Speaking for the court, Chief Justice Hardberger said that the amendment of the birth certificate was of no effect¹¹ because the certificate was not "inaccurate" within the meaning of the statute at the date of the plaintiff's birth. The dissenting judge thought that the amended certificate had replaced the original certificate as a matter of law.¹²

B. INFORMAL MARRIAGE

Although informal marriage is now recognized in only eleven American jurisdictions,¹³ many states nonetheless continue to recognize significant elements of the doctrine as exceptions to their prevailing

4. 9 S.W.3d 223 (Tex. App.—San Antonio 1999, no pet.).

5. See KY. REV. STAT. ANN. § 402.020(1)(d) (Banks-Baldwin 1999).

6. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.004, 71.021 (Vernon 1977).

7. TEX. HEALTH & SAFETY CODE ANN. § 191.028 (Vernon 1992).

8. See *Littleton*, 9 S.W.3d at 226-31, 231-32 (relying on *In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (Ohio Probate Ct. 1987), and *Corbett v. Corbett*, 2 All E. R. 33, 1970 WL 29661 (P. 1970)).

9. See TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998).

10. See *Littleton*, 9 S.W.3d at 232.

11. See *id.* at 231. Angelini, J., concurring, did not mention this point.

12. See *id.* at 233. Cf. *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 31 Sw. L.J. 105 (1977).

13. See John B. Crowley, *Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 CUMB. L. REV. 399, 400 note 4 (1999). An institution that prevailed throughout Christendom before

requirements of ceremonial marriage.¹⁴ After an ill-considered effort to eradicate the doctrine in Texas in 1989, the principle of informal marriage has been largely restored to its prior form by legislation and judicial decisions. The shifting rules of law were commented on in *Nava v. Reddy Partnership/Quail Chase*.¹⁵ The wrongful death of the alleged husband occurred on February 1, 1994, and the alleged widow filed her application for consequential Social Security benefits in March, 1994. It was not until April, 1995, however, that she filed her suit to determine her status as his widow, and it was not until August, 1995 that she filed suit for her alleged husband's wrongful death. From 1989 until amended in 1995 the Family Code provided in section 1.91(b) that a proceeding in which an informal marriage is to be proved "must be commenced not later than one year after the date on which the relationship ended. . . ."¹⁶ The Houston First District Court of Appeals held that the alleged widow's marital status under the statute had been timely asserted by her claim for Social Security benefits.¹⁷

First amended as section 1.91(b) in 1995 and then recodified as section 2.401(b) in 1997,¹⁸ the statute now requires that the survivor of an alleged informal marriage must assert the claim within two years of the date the parties ceased living together or it is "rebuttably presumed" that the parties did not agree to be married informally. As the law stood prior to the 1987 amendment, there was no statutory presumption as to the parties' agreement. While an agreement could be inferred from the facts of holding out and spousal cohabitation, the burden of proof, nevertheless, was on the proponent of the informal marriage to prove all of its elements. Thus, though the standard of proof for an informal marriage has been somewhat raised, the law virtually returned to its former condition after a decade.¹⁹

C. PRIVILEGED TESTIMONY

To encourage harmony in marital relations the spousal-communication privilege allows exclusion of evidence of a spouse or former spouse of a person accused of a criminal offense. In *Huddleston v. State*²⁰ the husband-father, who was prosecuted for aggravated kidnapping and aggra-

the mid-sixteenth century can scarcely be said to have been "on honeymoon" either before or after that time.

14. See *id.* at 412-15, 418-24.

15. 988 S.W.2d 346 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

16. TEX. FAM. CODE ANN. § 1.91(b) (Vernon Supp. 1984).

17. See *Nava*, 988 S.W.2d at 349-50.

18. TEX. FAM. CODE ANN. § 2.401 (Vernon 1998). For a brief review of the fluctuating statutory time limitations see Joseph W. McKnight, *Family Law: Husband and Wife*, 52 SMU L. REV. 1143, 1146 (1999).

19. See *Russell v. Russell*, 865 S.W.2d 929, 933-34 (Tex. 1993). See also Joseph W. McKnight, *Family Law: Husband and Wife*, 47 SMU L. REV. 1161 (1994).

20. 997 S.W.2d 319 (Tex. App.—Houston [1st Dist.] 1999, no pet.). In *McCuller v. State*, 999 S.W.2d 801 (Tex. App.—Tyler 1999, no pet.), a prosecution of the husband for endangering the health of his wife and thus an interspousal offense, did not implicate the spousal privilege.

vated sexual assault on a minor, sought to exclude the testimony of his wife. Though neither the accused nor his wife was the parent of the minor victim, the privilege is nonetheless inapplicable to such testimony under the Texas Code of Criminal Procedure because it, like the privilege in the federal context, applies to utterances rather than acts.²¹

In *United States v. Martinez*,²² a mother was accused of abusing her own minor children. Allowing her ex-husband (the father of the children) to be called as a witness for the prosecution, the court said that “[s]ociety has a stronger interest in protecting such children than in preserving marital autonomy and privacy.”²³ In this case, moreover, there was very little harmony or trust in the former marital relationship to preserve. The federal district court therefore followed precedent from other federal circuits and Texas law in enunciating a further exception to the spousal privilege rule when minors are involved.²⁴

D. STATE EMPLOYMENT

Entering an affidavit (allegedly pursuant to Water Code section 54.118) to memorialize her intent to abstain from further participation in the hiring of her husband to the paid position of utility superintendent did not insulate a member of a county municipal utility board from the board's action. The member signed the affidavit on an evening in early 1995 when (but possibly after) the board of a county municipal utility district had appointed her husband to the paid position.²⁵ The provision was of the Water Code repealed in 1995.²⁶ In September, 1999, after the resignation of that board member, the board sought the Attorney General's opinion with respect to any such appointment that might arise in the future. Stating the general rule²⁷ that a public officer is prohibited from hiring a near relative²⁸ for a paid public position, the Attorney General²⁹ added that the offence is punishable by a fine³⁰ as well as removal from office.³¹ Nor did the board member's affidavit under former section 54.118 make the particular appointment exempt from the provisions of

21. See *Huddleston*, 997 S.W.2d at 321; TEX. CRIM. PROC. CODE ANN. § 38.10 (Vernon Supp. 2000).

22. 44 F. Supp.2d 835 (W.D. Tex. 1999).

23. *Id.* at 837.

24. See *id.* at 836-37.

25. TEX. WATER CODE ANN. § 54.118 (Vernon 1994), repealed by Act of May 25, 1995, ch. 715, 843, 1995 Tex. Gen. Laws 3803, allowed a board member to make an affidavit showing the intention of the board member not to participate in any vote dealing specifically with an *existing* employee who was the board member's relative, and the board member's relative was allowed to maintain existing employment.

26. See *id.*

27. See TEX. GOV'T CODE ANN. § 573.041 (Vernon 1994).

28. See TEX. GOV'T CODE ANN. § 573.002 (Vernon 1994); within the third degree of consanguinity, TEX. GOV'T CODE ANN. § 573.023 (Vernon 1994); or within the second degree of affinity, TEX. GOV'T CODE ANN. § 573.025 (Vernon 1994). With respect to the former, see Op. Tex. Att'y Gen. No. JC-0185 (2000).

29. See Op. Tex. Att'y Gen. No. JC-0184 (2000).

30. See TEX. GOV'T CODE ANN. § 573.084 (Vernon 1994).

31. See TEX. GOV'T CODE ANN. § 573.081 (Vernon 1994).

the Government Code, which under certain circumstances allowed an appointee to retain an *existing* position³² though the board-member-relative may not participate in a decision affecting specifics of his employment. Strengthening this position, the Attorney General pointed out further that "a director of a municipal utility district may not participate in a vote on a matter involving a business entity or real property if he or she has a substantial interest in the matter and it is reasonably foreseeable that action on the matter would confer an economic benefit on the business entity or real property."³³

E. FEDERAL PREEMPTION UNDER ERISA

In a Louisiana case³⁴ the federal Fifth Circuit Court of Appeals held that a non-pensioner's claim to a community portion of an ERISA-controlled pension interest³⁵ left undivided on divorce must be claimed before the ex-spouse-pensioner retires. This result, however, was not based on *Boggs v. Boggs*,³⁶ which dealt with the terminable interest rule, but merely on terms of the federal statute.³⁷ In the Louisiana case, the former spouses divorced in 1972, before much judicial experience in division of pension interests existed and nearly twelve years before the Retirement Equity Act of 1984³⁸ instituted the qualified domestic relations order (QDRO) as the orderly means of dealing with the entitlement of a non-pensioners to a pensioner's benefits.³⁹ After his 1972 divorce the pensioner remarried, retired in 1983, and died in 1993. It was not until 1997 that the ex-wife sought a QDRO in a Louisiana court to establish her interest. Her suit was removed to federal district court. Following the approach of the Fourth Circuit,⁴⁰ the Fifth Circuit concluded that at the pensioner's retirement his benefits irrevocably vested in his second wife under the federal statute.⁴¹ His former wife was therefore barred from any interest in the plan.⁴² Thus a sort of terminable interest rule

32. See TEX. GOV'T CODE ANN. § 573.062(a)(2)(A) (Vernon 1994). See Op. Tex. Att'y Gen. No. LO 95-015 (1995), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, 49 SMU L. REV. 1015, 1019 (1996).

33. Op. Tex. Att'y Gen. No. JC-0184 (2000) at 3.

34. See *Rivers v. Central and South West Corp.*, 186 F.3d 681 (5th Cir. 1999).

35. Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829 (codified as amended at 29 U.S.C. § 1001 (1999)).

36. 520 U.S. 833 (1997).

37. For a Texas case dealing with claims of spouses as employees of their own closely held corporation against insurers under an ERISA-regulated health benefits plan, see *Vega v. National Life Ins. Servs., Inc.*, 188 F.3d 287 (5th Cir. 1999) (en banc). In *Matassarini v. Lynch*, 174 F.3d 549, 564 (5th Cir. 1999), the court rejected an ex-wife's alleged ERISA entitlement to the appreciated value of shares held in an ESOP at the date of delivery of the interest segregated to her on divorce, rather than the value of the shares plus simple interest as provided in the QDRO made pursuant to a 1991 divorce.

38. 26 U.S.C. § 417 (1984).

39. See Carla M. Oliveira, *The Many Applications of Qualified Domestic Relations Orders*, 32 FAM. L.Q. 641 (1998).

40. See *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997).

41. See 29 U.S.C. § 1056(d)(3)(A).

42. See *Rivers*, 186 F.3d at 683-84.

against the non-pensioner arose on the date of the pensioner's retirement.

In *Barnett v. Barnett*,⁴³ however, the Houston First District Court of Appeals declined to find any application of the federal statute to a case in which a prospective pensioner's widow sought her community interest in proceeds of life insurance when the premiums were paid with payroll deductions from her husband's ERISA-regulated retirement plan. Prior to the husband's death, his wife had sued him for divorce; he then evidently made his estate the beneficiary of the insurance proceeds and executed a will naming his mother as executrix. By his will the husband made the insurance proceeds payable to named beneficiaries of his estate in specified amounts with the largest sum payable to his mother. Applying Texas law of estate administration, the court concluded that ERISA does not purport to affect the pensioner's estate.⁴⁴ On this point Justice Mirabal dissented, arguing that "the ERISA plan documents direct[ed] that proceeds of plan life insurance policies [be] payable to the beneficiary designated by the employee."⁴⁵ The only such designation was the decedent's direction of payment of the insurance proceeds to his estate with actual beneficial designation spelled out in his will. The dissenting interpretation of such designations as by "ERISA plan documents" (and thus as necessarily controlled by federal statute) is therefore strained.

F. SPOUSAL CLAIMS AGAINST THIRD PERSONS

1. *Loss of Consortium*

In *Brewerton v. Dalrymple*⁴⁶ the Supreme Court of Texas reiterated the well established principle that a spouse's action for loss of consortium is derivative.⁴⁷ Thus, when the husband failed to sustain his claim for wrongful dismissal from employment, his wife's derivative claim also failed.⁴⁸ In *Verinakis v. Medical Profiles, Inc.*⁴⁹ went further in stressing that for a spouse's action for loss of consortium derived from a primary claim for infliction of emotional distress, the primary claim must be supported by the other spouse's recovery for *serious* physical injury.⁵⁰

43. 985 S.W.2d 520 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

44. For a further discussion on the reimbursement issue raised in *Barnett*, see *infra* at text accompanying notes 169-70.

45. *Id.* at 535.

46. 997 S.W.2d 212 (Tex. 1999).

47. See also *Wal-Mart Stores, Inc. v. Ard*, 991 S.W.2d 518, 526-27 (Tex. App.—Beaumont 1999, no pet.) (a premises liability case largely concerned with weight of evidence); *North Am. Refractory Co. v. Easter*, 988 S.W.2d 904, 914 (Tex. App.—Corpus Christi 1999, no pet.) (a products liability case applying Alabama law); *Ross v. Boodry*, 54 F. Supp.2d 1199 (S.D. Tex. 1999) (spouse of non-seafarer can recover for loss of consortium for non-seafarer spouse's injuries in boating accident in territorial waters).

48. See *Brewerton*, 997 S.W.2d at 217.

49. 987 S.W.2d 90 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (O'Neil, J. dissenting) (agreeing with the trial court that the infliction of emotional distress was *intentional*).

50. See *id.* at 99.

2. Malpractice Claim

In *Arlitt v. Paterson*⁵¹ the widow of a deceased testator brought suit for professional malpractice against the attorneys representing both of them in preparing a joint estate plan⁵² and representing the testator in preparing his will. The widow sued in her representative capacity as executrix of the will, in her individual capacity as a beneficiary, and in her individual capacity as a party to the contract of professional employment. The trial court granted the defendant's motion for summary judgment. The appellate court sustained the trial court's ruling as to the widow's claim on behalf of the decedent's estate because the attorneys did not represent her in her representative capacity,⁵³ quite apart from the lack of an assertion that the decedent had suffered any damage during his lifetime.⁵⁴ In reliance on *Barcelo v. Elliott*,⁵⁵ the court stated that as a mere beneficiary of her husband's will, the plaintiff could not recover on a professional malpractice claim because such a claim depends on privity of contract. If she could show privity of contract with the defendants, however, individual standing to sue existed.⁵⁶ The appellate court also sustained the widow's standing to sue for negligent misrepresentation, which does not require privity of contract for its assertion.⁵⁷ Likewise, privity requirements do not exist in causes for damages for expenditure of attorney's fees and for costs in her will contest and will-construction proceedings.⁵⁸

In *Douglas v. Delp*⁵⁹ spouses sued their former attorneys for malpractice resulting in various sorts of economic loss: the husband's loss of interest in property, earning capacity, credit reputation, and for mental anguish and the wife's pain and suffering (mental anguish, stress, and depression) and community interest in her husband's losses. The Supreme Court of Texas held that the husband (whose cause of action had passed to his trustee in bankruptcy⁶⁰) lacked standing to sue for mental anguish because his losses were purely economic, and that the wife's separate cause of action for mental distress could not be maintained in the absence of heightened culpability on the part of the attorneys (*i.e.* "egregious or extraordinary circumstances"⁶¹) which had not been proved. The wife's "claim for mental anguish damages [was merely] a consequence of her

51. 995 S.W.2d 713 (Tex. App.—San Antonio 1999, no pet.).

52. There was no intimation that the wills were mutual, and they do not appear to have been joint. But neither fact would have made a significant difference in the result.

53. *See id.* at 720.

54. *See id.*

55. 923 S.W.2d 575, 579 (Tex. 1996).

56. *See Arlitt*, 995 S.W.2d at 720-21.

57. *See id.* at 718.

58. *See id.* at 721.

59. 987 S.W.2d 879 (Tex. 1999). In another suit by a husband and wife against their attorneys for malpractice, the court in *Brents v. Haynes & Boone, L.L.P.*, 10 S.W.3d 772, 775-78 (Tex. App.—Dallas 2000, no pet.), concluded that the plaintiff's cause of action had been barred by the statute of limitation which had begun to run and was not tolled thereafter.

60. *See Douglas*, 987 S.W.2d at 882.

61. *Id.* at 884.

economic loss [and as such] she may not maintain that claim. . . ."⁶² Evidently it was the lack of physical loss in regard to the husband as well as the wife that barred recovery for emotional distress under the facts of the case. By "egregious circumstances" the court apparently meant more than merely "conscience-shocking facts," no matter how disreputable. Presumably the court referred to a kind of behavior definable in terms of norms of recovery, such as representations affecting change of status concerning the nature or condition of property, or including enticement to commit a fraud or crime.

G. SPOUSAL CLAIMS AGAINST EACH OTHER

1. *Emotional Distress*

The Texas Supreme Court had decided *Schlueter v. Schlueter*⁶³ two months before hearing argument in *Douglas v. Delp*⁶⁴ (an action by spouses against their lawyers) and while a petition for a writ of error in *Vickery and Richards v. Vickery*⁶⁵ was awaiting consideration by the court, as noted in Justice Hecht's dissenting opinion in *Schlueter*.⁶⁶ In *Schlueter*, the majority of the court, speaking through Justice Raul Gonzalez, held that in a suit for divorce one spouse could not recover damages against the other for fraudulently secreting community funds in anticipation of divorce.⁶⁷ The court noted, however, that in the division of the community estate a divorce court may award a money judgment to one spouse against the other for various causes that may include the wrongful removal of community property before trial. The court added: "Because the amount of the judgment is directly referable to a specific value of lost community property, it will never exceed the total value of the community estate."⁶⁸ Justice Hecht (joined by Chief Justice Phillips) dissented on the ground that "the [Court's] only rationale for treating fraud on a spouse differently from other intentional torts is that fraud does not involve personal injuries."⁶⁹ Though the course of legal development since the late 1970s has hitherto moved toward recognition of general tortious recovery between spouses, it would be more consistent

62. *Id.* at 885. Further, the court held that "[a]ssuming that a representation, as that term is used in the [Deceptive Trade Practices Act,] could be inferred from [the attorney's] advice to sign the [settlement] agreement, a general misrepresentation that the agreement would protect the [clients'] interest is too vague under the facts of this case to support DTPA liability." *Id.* at 886.

63. 975 S.W.2d 584 (Tex. 1998).

64. 987 S.W.2d 879 (Tex. 1999).

65. 42 TEX. SUP. CT. J. 670 (Tex. App.—Houston [1st Dist.] 1997 pet. denied).

66. 975 S.W.2d at 591 n.6.

67. *Id.* at 586-88.

68. *Id.* at 588. The court cited *Mazique v. Mazique*, 742 S.W.2d 805, 808 (Tex. App.—Houston [1st. Dist.] 1987, no writ), and might have added *Reaney v. Reaney*, 505 S.W.2d 338 (Tex. Civ. App.—Dallas 1974, no writ).

69. *Schlueter*, 975 S.W.2d at 590. Justice Spector dissented on grounds that had been disposed of in *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984). See Joseph W. McKnight, *Family Law: Husband and Wife*, 39 Sw. L.J. 1, 8-11 (1985).

with traditional tenets of Texas marital law to treat all claims between spouses as in the nature of reimbursement claims.

In anticipation of divorce, the husband in *Schlueter* had hidden \$12,500 in his father's care. During the course of the proceeding the funds were recovered. In *Vickery*, on the other hand, the lawyer-husband had contrived to rid himself of his wife by convincing her to sue him for a divorce as a means of saving their community estate threatened by a ruinous malpractice suit about to be brought by one of his clients.⁷⁰ The client had indeed threatened suit, but by the time that the lawyer finally convinced his wife to sue for divorce, the matter was secretly settled. The husband then arranged for an old friend to act as his wife's lawyer while also acting on his behalf. After having rid himself of his wife, the lawyer promptly married his ex-wife's former best friend and then sought to enforce his property rights under the divorce decree against his ex-wife. It was then that the ex-wife procured counsel of her own choosing to bring a successful bill of review against her husband and her lawyer. Her efforts prevailed before the trial court and the First District Court of Appeals, and the ex-husband sought review before the Supreme Court.

When the other members of the Texas Supreme Court denied the husband's petition for review of the lower court's decision in *Vickery and Richards v. Vickery*,⁷¹ Justice Hecht alone dissented to the court's failure to grant review and attached the lower court's opinion to his dissent as an appendix.⁷² Although the court's refusal to grant review was not accompanied with an opinion, some of the justices may have regarded their position as having been adequately expressed in *Douglas v. Delp*. Thus, for them, the egregious circumstances of fraud in *Vickery* supported the award of damages for the ex-wife's emotional distress against her lawyer-husband. In his dissent Justice Hecht explained that "[a]pplying *Schlueter* could require that the actual and punitive damages awarded to Mrs. Vickery against her former husband be reversed . . ." and that on remand the trial court could then "consider Mr. Vickery's 'dishonesty of purpose or intent to deceive' and 'the heightened culpability of actual fraud' . . ."⁷³ Justice Hecht recognized that under *Schlueter* "the court may not simply divide the community estate to award Mrs. Vickery damages she cannot otherwise recover, but it also need not to measure her share by the damages she ha[d] suffered."⁷⁴ In light of Justice Hankinson's carefully crafted opinion in *Douglas*, in which Justice Hecht joined, the majority of the court evidently concluded in denying review in *Vickery* that the divorce court's award to the wife amounted to a division of the community

70. Whether the wife realized that the husband's proposal that his wife sue him for a divorce to be followed by later reunion smacked loudly of a plan to defraud anticipated judgment creditors does not appear from the report. See *Steed v. Bost*, 602 S.W.2d 385 (Tex. Civ. App.—Austin 1980, no writ).

71. 42 TEX. SUP. CT. J. 652, 999 S.W.2d 342 (Tex. 1999).

72. 999 S.W.2d at 345.

73. *Id.* at 344.

74. *Id.* at 344-45.

estate in her favor along with a money judgment against her husband that was within the dimensions of their community estate. Review of the record presumably supported the conclusion that the heightened culpability of the husband and the wife's attorney allowed damages to be awarded against both of them under *Douglas*. It should also be noted that the conduct of both the lawyer-husband⁷⁵ and the wife's counsel⁷⁶ were the subject of professional discipline.

*Mayes v. Stewart*⁷⁷ rests on facts similar to those of *Schlueter* (where the husband had secreted funds with his father to be returned after the divorce), except that the plan to defraud the wife was not detected in *Mayes* until several years after the divorce. In 1993 the husband and wife were separated. The wife was living in New York and the husband was living with his mistress in Texas. The husband bought a lottery ticket which entitled him to 3.5 million dollars to be paid in annual installments over twenty years. Disinclined to share his winnings with his wife, the husband agreed with his mistress that she would claim the winnings, but the husband could spend them as he pleased. The husband then brought suit for divorce, and he and the woman (who was not a party to the suit) testified that the lottery ticket and the winnings belonged to her, and the court so found. In dividing the community estate, the court merely allowed each spouse to take the property in his or her possession or control. In 1993 and 1994 the installments of the lottery winnings were received and used by the ex-husband, but in 1995 the former mistress (since married to the ex-husband) sold three years of installments at a discount. In 1996, she attempted to sell another three years of installments, but her husband intervened to abort the sale. Evidently by then more inclined to share his winnings with his former wife, the ex-husband told her of the plot, and she sued him and his present wife in another court for fraud, conspiracy and partition of the lottery winnings. The husband then asserted a claim against his mistress, who also asserted a claim against him.⁷⁸ In the ex-wife's suit a jury rendered a verdict in her favor against both her ex-husband and his present wife and awarded the ex-wife the value of one half of the lottery winnings. The jury made no findings in favor of the ex-husband or his wife and awarded \$20 in damages against the latter and \$50,000 against the ex-husband. The wife alone appealed.

The appellant asserted that the ex-wife's proper remedy was a bill of review *in the divorce court* to set aside the divorce and argued that without setting aside the prior judgment, *res judicata* barred the ex-wife's claim. She thus argued that the ex-wife was bound by the divorce court's division of the community property.⁷⁹ The appellate court might have

75. See *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

76. See *Disciplinary Actions*, 62 TEX. B. J. 295, 297 (No. 3, 1999).

77. 11 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

78. The husband had since pled guilty to a charge of aggravated perjury as to the ownership of the lottery ticket in the divorce proceeding.

79. See *id.* at 448.

analogized the divorce court's award of community property "in possession or in control" to decrees under which retirement benefits are not covered by such language.⁸⁰ Instead, the court merely accepted the *res judicata* argument and demonstrated its inapplicability. There was no provision *in the divorce decree* in favor of the appellant and thus her ownership of the winnings was not *res judicata*.⁸¹ Hence, the ex-wife's failure to follow the jurisdictional rule for an equitable bill of review was not controlling.

II. CHARACTERIZATION OF MARITAL PROPERTY

A. PRE-MARITAL ACQUISITIONS

In *In re Murray*⁸² the court concluded that non-marital standards of acquisition (that is "general property law") governs title on pre-marital acquisition of property by a man and woman who subsequently marry rather than the rules applicable to acquisitions by spouses.⁸³ In that case, application of general law to the facts indicated acquisition in equal shares and was therefore shared equally as separate property.⁸⁴ A recital in the couple's pre-marital agreement may recognize the constitutional quality of separate property but a provision to protect the continuing separate character of property already owned or claimed by a spouse-to-be constitutes a statutory rather than a *constitutional* element of the agreement.⁸⁵ Thus, no partition or exchange need support the recital. Separate character of the property is already in place by operation of law. Such a recital, however, often supported by schedules of existing property, is a useful means of identifying such property in case of future dispute. Such pre-marital understandings have been used in Texas since the mid-nineteenth century without any need for constitutional authorization.

In *Smith v. Smith*⁸⁶ the appellate court concluded that the trial court erred in mischaracterizing the husband's separate property as community property and remanded the case to the trial court for division of the community estate. Prior to marriage, the husband had brought suit for damages suffered in connection with a purchase of real property. The dispute went to trial after the couple married. The judgment totaled \$256,000, of which \$95,000 covered attorney's fees. This sum was therefore held by the separate and community estates, as a tenancy in common from which the attorney's fees were properly shared *pro-rata*.⁸⁷ The net recovery after the payment of these fees was thus \$161,000. Of this sum \$110,000 was attributable to the husband's direct and consequential damages (sep-

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

81. *See Mayes*, 11 S.W.3d at 449-50.

82. 15 S.W.3d 202 (Tex. App.—Texarkana 2000, no pet.).

83. *See id.* at 205.

84. *See id.* at 205-06.

85. *See TEX. FAM. CODE ANN.* § 4.003(a)(1) (Vernon 1998).

86. 22 S.W.3d 140 (Tex. App.—Houston [14th Dist.] Dec. 2, 1999, no pet.).

87. *See id.* at 46.

arate property) and \$52,000 for pre-judgment and post-judgment interest (community property).

All the recovery for the husband's claim had been deposited in an account subject to his sole management and after a number of withdrawals contained about \$100,000 at the time of divorce.⁸⁸ The court treated all of these withdrawals as from the community portion of the funds on deposit before depleting any of their separate property. This application of the well-known "community-out-first" principle,⁸⁹ identified inaccurately as stemming from the decision in *Sibley v. Sibley*,⁹⁰ all the community property deposited in the account prior to the divorce having been depleted.⁹¹ Thus, the trial court's award of the residue of the account to the wife was erroneous.⁹²

In the 1999 amendments to the Family Code the legislature added a provision that codifies the rule in *Love v. Robertson*⁹³ that a tenancy-in-common may exist between separate and community property.⁹⁴ That situation is illustrated by the judgment for pre-marital personal injury with interest in *Smith v. Smith*.⁹⁵ Prior to a marriage a person is not then a husband or a wife. Thus, any acquisition then made retains its character as non-marital and any replacement of a pre-marital asset by judgment takes the same character, but interest earned on such assets during marriage is community property.

An award by a divorce court to persons who later remarry is separate property of the recipient as a pre-marital acquisition. That point was at issue in *In re Taylor*.⁹⁶ Similarly a transfer made by one spouse-to-be to the other future spouse is also a pre-marital acquisition to which marital presumptions are inapplicable. But if the transfer was a fraudulent one in that its object was to defraud the transferor's creditor (in order to protect the property from a lien that might be fixed on it by the transferor's creditor), any promise by the transferee to reconvey the property at some later time is unenforceable.⁹⁷ The marital status of the parties at the time of the transfer is irrelevant as to the application of that rule.⁹⁸

88. *Id.*

89. *See id.* at 147.

90. 286 S.W.2d 657 (Tex. Civ. App.—Dallas 1955, writ dismissed w.o.j.), commented on in *Smith*, 22 S.W.3d at 147 n.5. *See* Joseph W. McKnight, *Family Law: Husband and Wife*, 52 SMU L. REV. 1143, 1154-56 (1999).

91. *Smith*, 22 S.W.3d at 147.

92. *Id.*

93. 7 Tex. 6, 8 (1851). §3.006(a) describes this condition in its caption as a "proportional ownership of property."

94. *See* TEX. FAM. CODE ANN. § 3.006(a) (Vernon Supp. 2000).

95. No. 14-96-01080-CV, 1999 WL at *2.

96. 992 S.W.2d 616, 618-20 (Tex. App.—Texarkana 1999, no pet.).

97. *See In re Parker*, 997 S.W.2d 833, 838 (Tex. App.—Texarkana 1999, no pet.).

98. For examples of fraudulent interspousal transfers and the application of the rule, *see* JOSEPH W. MCKNIGHT & WILLIAM A. REPPY, JR., *TEXAS MATRIMONIAL PROPERTY LAW* ch. 5 at 12 (2d ed. 1998).

B. ACQUISITIONS MADE DURING MARRIAGE

1. Gifts

Although property was received by a spouse during marriage with a recital of value for which the property was transferred in the formal instrument of transfer, evidence of gift can refute the recital and will rebut the community presumption so that the property is proved to be the receiving spouse's separate property. Thus, it was shown in *Rusk v. Rusk*⁹⁹ that stock of an operating corporation was received by the husband-son from his father as the husband's separate property¹⁰⁰ despite a finding of the trial court that the stock was community property.

In *In re Morris*¹⁰¹ the court dealt with several instances of presumed interspousal gifts. During marriage, and using his separate funds, the husband had bought a lot on which to build a house. The lot was conveyed to both spouses thus raising a presumption of a gift of one-half of the property to the wife.¹⁰² The presumption of gift as to one-half therefore prevailed in the absence of any refutation by the husband though the trial court had erroneously awarded the entire property to the wife. During the marriage another piece of land was purchased by the husband and also paid for with his separate property. At purchase this property was also put in the names of both spouses, but in this instance the husband testified that he had put his wife's name on the deed in the interest of marital harmony and that he did not intend to give her an interest in the property.¹⁰³ The trial court did not find his testimony convincing but nevertheless erroneously awarded all of that property to the husband.¹⁰⁴

During marriage the wife in *Roberts v. Roberts*¹⁰⁵ conveyed to her husband a one-half interest in a home she had acquired prior to marriage but without any recital in the deed characterizing his interest in the property. The divorce court ordered the home sold and the proceeds divided. In remanding the division of the property the appellate court properly applied the presumption of gift¹⁰⁶ but went on to rely on *Bohn v. Bohn*¹⁰⁷ to fix heavy burdens of proof on a recipient husband to show that the gift was "fair and reasonable and voluntarily and understandingly made." One would have thought that at this late date such a double standard is

99. 5 S.W.3d 299 (Tex. App.—Houston [14th Dist.] 1999, no pet.)

100. *See id.* at 303-05. Fowler, J. dissenting. *See id.* at 310-12.

101. 12 S.W.3d 877 (Tex. App.—Texarkana 2000, no pet.).

102. *See id.* at 881 (citing *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975); *Graham v. Graham*, 836 S.W.2d 308, 310 (Tex. App.—Texarkana 1992, no writ)).

103. *Morris*, 12 S.W.3d at 883.

104. *See id.* at 883-84.

105. 999 S.W.2d 424 (Tex. App.—El Paso 1999, no pet.).

106. *See id.* at 432 (citing *Story v. Marshall*, 24 Tex. 305 (1859) (conveyance of community property by husband to wife)). *See also* *Goldberg v. Zellner*, 235 S.W. 870 (Tex. Comm. App. 1921, judgment adopted) (conveyance of separate property by husband to wife).

107. 455 S.W.2d 401 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ dismissed), discussed in Joseph W. McKnight & Louise Ballerstedt Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L. J. 34, 39-40 (1971).

passé as Justice Reavley characterized disparate treatment of interspousal gifts in his dissent in *Cockerham v. Cockerham*.¹⁰⁸

2. *Tracing*

In *McCann v. McCann*¹⁰⁹ the issue before the court was not the application of the reimbursement principle but the characterization of the reimbursement claim. The land on which improvements were made during marriage was acquired by the husband prior to marriage. The case was tried to a jury and over 100 questions were submitted to the jury on the character and values of the properties in issue. The jury found that the particular property was partly separate and partly community. The court granted the husband's motion to disregard that finding and awarded the property to him as his separate estate, as it obviously was.¹¹⁰ The court went on to find that substantial improvements were made to the property at community expense and awarded the wife one-half that amount. The husband appealed on the characterization of the reimbursement claim. The court first concluded that the burden of rebutting the community presumption that improvements put on the property during marriage were supplied by the community estate was on the separate property claimant. But the court was satisfied that the husband had proved that all but \$37,261 of expenditures for improvements came from his separate funds. Thus, to that extent he had rebutted the community presumption.¹¹¹ Thus, the community estate's right of reimbursement was limited by the degree of community expenditure and the case was remanded for new division.

In *Evans v. Evans*¹¹² the spouses' home was purchased during their marriage, destroyed by fire, and rebuilt with the proceeds of an insurance policy purchased during the marriage. Though the husband merely claimed a right to some separate property reimbursement against the house, the divorce court characterized all of the house as his separate property and awarded it to him. The trial court's conclusion (however explained) clearly went beyond any proper application of judicial discretion, and it was necessary that the appellate court remand the case for a new division of the community estate.¹¹³

3. *Borrowed Money*

Money borrowed during marriage is presumed to be community property unless the lender looks only to the separate estate of the borrower

108. 527 S.W.2d 162, 175 (Tex. 1975).

109. No. 14-97-01339-CV, 2000 WL 280301 (Tex. App.—Houston [14th Dist.] Mar. 16, 2000) (not designated for publication).

110. *Id.* at *1.

111. *Id.* at *2.

112. 14 S.W.3d 343 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

113. *Id.* at 347-48.

for repayment.¹¹⁴ In *Sprick v. Sprick*¹¹⁵ the wife in a suit for divorce sought to show that money ostensibly borrowed by the husband was not really borrowed, or, if a loan was made, it was negotiated fraudulently by the husband in an effort to diminish the net community estate. The trial court found that the loan transaction had occurred and was not fraudulent, and the record did not provide grounds for the appellate court to disturb the trial court's finding. The burden was on the wife to prove her allegation of fraud or to establish her assertion that the lender looked only to her husband's separate income for repayment, and on both points she had failed in making her proof.¹¹⁶

4. *Personal Injury Recovery*

Section 3.003 of the Family Code,¹¹⁷ as interpreted by the Texas Supreme Court in *Graham v. Franco*,¹¹⁸ defines as separate property the recovery for a personal injury claim except compensation for lost earning power and medical expenses incurred by the community estate. In *Staton v. Staton*¹¹⁹ the divorcing couple had sued during marriage for damages resulting from a medical malpractice claim for injury to the wife and loss of consortium by the husband. A lump sum settlement for the claim was reached without any specific attribution of damages. But the trial court had rejected the husband's separate property claim for loss of consortium as unsupported by his evidence, and there was no evidence that he had suffered physical injury or monetary loss. The trial court therefore held that the wife had satisfied her burden of proof by clear and convincing evidence that a specific amount of the recovery (after deducting stipulated medical expenses and lost wages) was her separate property consisting of her claims for disfigurement, pain and suffering, and mental anguish.¹²⁰ Without discussion the court rejected the husband's argument that the income from the settlement agreement was merely contractual and hence community property. It was *presumptively* community property, but by using the husband's stipulation, the wife had successfully traced her separate property losses to their source.

In *Licata v. Licata*¹²¹ the court again concluded in a suit for divorce that the wife had sufficiently identified her recovery from a personal injury action to prove its separate character. It is not indicated in the opinion, however, when the wife's injury occurred or when the settlement for her recovery was reached, but both events presumably occurred shortly before the suit for divorce was filed. The wife (perhaps joined by her

114. *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881 (1937).

115. No. 08-98-00035-CV, 1999 WL 420987 (Tex. App.—El Paso June 24, 1999, no pet.) (not designated for publication).

116. *Id.* at *4, *5.

117. TEX. FAM. CODE § 3.003 (Vernon 1998).

118. 488 S.W.2d 390, 396 (Tex. 1972).

119. 987 S.W.2d 180 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

120. *Id.* at 183, 184, citing *Lewis v. Lewis*, 944 S.W.2d 630, 631 (Tex. 1997), where a similar statement is made in the court's preliminary analysis.

121. 11 S.W.3d 269 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

husband)¹²² had sued for the wife's pain and suffering and physical disfigurement. In the settlement only the wife released the defendant from liability for her injuries and both spouses executed an individual agreement to hold the defendant harmless for any further medical expenses incurred. The wife was then paid a lump sum excluding fees and expenses.¹²³ The wife then deposited the funds in a brokerage account in her name. On these facts the court held that the wife had discharged her burden of proof to rebut the community presumption and to show that the entire recovery was her separate property. This showing might not satisfy everyone's conception of clear and convincing proof, but it was enough for the Fourteenth District Court of Appeals. The court added somewhat imprecisely and casually that the "clear statements in the settlement documents displaced the presumption of community property and created a new presumption that the settlement proceeds [were the wife's] separate property"¹²⁴ and had thus shifted the burden of proof to the husband. The husband countered with evidence of his joinder in the indemnity agreement, by which he presumably meant to show that they had jointly *procured* the settlement. This suggestion, the court said in reliance on *Staton*,¹²⁵ was insufficient to overcome the prima facie case already established by the wife.¹²⁶ The indemnity agreement in which the husband had joined was certainly consistent with the wife's position, and the husband's further argument as to bargain was worthy of his professional standing as a lawyer. The court rejected his argument with the curious comment that the settlement funds were received by the wife as her separate property before any right of indemnity could arise.¹²⁷

5. *Stock Options*

The wife in *Charriere v. Charriere*¹²⁸ had acquired options to purchase shares in her employer's corporation when it was purchased by another corporation. The options were exercisable at any time but with the corporation's consent (though these restrictions expired over time). During the marriage the wife had both exercised and sold some of these stock options. At the time of divorce the wife had a large number of stock options and the court divided them equally between the spouses as community property. The wife argued that the options were somehow her

122. Whether both spouses had sued was not clear from the record. *Id.* at 274.

123. No document introduced by the wife in the divorce proceeding indicated that medical expenses were included in her personal injury recovery. *Id.* at 275.

124. *Id.*

125. *Staton*, 987 S.W.2d at 182-84.

126. *Licata*, 11 S.W.3d at 274-75.

127. *Id.* at 276. The ingenuity of the husband's argument in this instance must have been somewhat dimmed by the court's having to deal with his assertion that an unsigned worksheet indicating that his wife might have received community worker's compensation benefits for various fees and expenses from an insurance company as part of the proceeds of the settlement. At the trial of the divorce case the wife testified that she had received no compensation for loss of wages. The husband's point was apparently to suggest ambiguity in the settlement agreement which on its face was clear.

128. 7 S.W.3d 217 (Tex. App.—Dallas 1999, no pet.).

separate property and that the fact that their value depended on her post-divorce employment by the corporation affected their characterization. The appellate court rejected her first argument on the ground that all the options were received (and in fact exercisable) during marriage.¹²⁹ The appellate court also rejected the wife's argument that the value of the options affected their characterization. Though the court acknowledged that in maintaining the value of the shares the transfer restrictions on the shares might be onerous to her, value of the shares does not affect their character in this respect.¹³⁰ The court also rejected the wife's analogies of stock options to professional goodwill and professional degrees¹³¹ as well as to retirement benefits.¹³²

6. *Spouse's Retirement Pension Trust of Separate Property (but Not Productive of Income which Settlor-Spouse Can Reach) Converted to an ERISA-Governed Plan*

In *Lipsey v. Lipsey*¹³³ the husband was a settlor of a trust prior to marriage. The income from the trust corpus was payable to him at the sole discretion of the trustee and no income was ever distributed. During marriage the husband exercised his right to convert the trust into an ERISA-governed pension plan. His wife brought suit for divorce and asserted that she was therefore a beneficiary of the plan because the conversion constituted a constructive distribution of trust income which was therefore community property by virtue of ERISA's QDRO provisions. But ERISA's QDRO provisions do not *create* community property interests. They merely make it possible for division of personal earnings from an ERISA-regulated trust. The court concluded that growth of the trust corpus does not constitute personal earnings, and the fact that a trust may allow the spouse-settlor to convert it into an ERISA plan does not make any trust fund distributable and thus community property.

7. *Defined Contribution Retirement Plan*

In *Smith v. Smith*¹³⁴ the court reiterated the proposition that in calcu-

129. *Id.* at 219-221 (citing *Bodin v. Bodin*, 955 S.W.2d 380 (Tex. App.—San Antonio 1997, no pet.) (invested stock options), and *Demler v. Demler*, 836 S.W.2d 696 (Tex. App.—Dallas 1992, no writ) (presumptively community stock options)).

130. *Id.* at 221. Of course if some stock options were attributable to the pre-marital employment and were therefore separate property, their value (as expressed in terms of a right to purchase shares at a cost below market value) would be a relevant factor in determining this character. For handling valuation in other jurisdictions, see Lynn Curtis, Comment, *Valuation of Stock Options in Dividing Marital Property Upon Dissolution*, 15 J. of AAML 411 (1998).

131. *Id.* at n.7.

132. *Id.* at 221-22. For treatment of valuation of stock options in other jurisdictions see Lawrence D. Dodds & Robert D. Feder, *Stock Options in Divorce—A National Trend*, 13 AM. J. FAM. L. 105 (1999).

133. 983 S.W.2d 345 (Tex. App.—Fort Worth 1998, no pet.). This case is discussed in a different context in Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 52 SMU L. REV. 1143, 1159 (1999).

134. 22 S.W.3d 140, 149-50 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

lating the value of separate and community components of a defined contribution retirement fund the court may merely subtract the value of the fund at the beginning of the marriage from that at the end.¹³⁵

C. RECOVERY FOR SPOUSAL DESTRUCTION OF INSURED INTEREST IN COMMUNITY PROPERTY

In 1977 the Texas Supreme Court concluded that the condition of Texas family law had so changed that the concept of interspousal immunity claims arising from willful injury of one spouse by the other spouse was no longer a bar to recovery for the loss.¹³⁶ Thus, unauthorized disposition or destruction of one spouse's separate interest in property by the other spouse might be actionable but not necessarily subject to the same rules as applicable between non-spouses. An innocent wife has since been allowed to recover on a contract of insurance for the destruction of her separate property interest co-owned with a separate property interest of her husband and destroyed by him.¹³⁷ The court, however, reserved consideration of the consequences of a claim for destruction of a spousal half-interest in community property.¹³⁸ After the federal appellate court had abstained from dealing with that question,¹³⁹ the issue was finally resolved by the Texas Supreme Court in *Texas Farmers Insurance Co. v. Murphy*.¹⁴⁰ In that case prior to their divorce the spouses had made an equal partition of whatever interest they had under a contract insuring their community property that had been destroyed by the willful act of the husband. After their divorce the ex-wife asserted a right against the insurer to recover for her destroyed one-half interest. Although the insurance policy contained a clause barring recovery for fraud and misrepresentation in asserting facts of a claim, and the claim had been filed without revealing the husband's part in the destruction of the property, the insurer waived that contractual defense and chose to rely on the husband's wrongful act as a bar to recovery. The ex-wife, in turn, relied on the spousal partition as the basis for her recovery for one-half the loss. Though at least seven members of the court evidently agreed that the ex-

135. See *Baw v. Baw*, 949 S.W.2d 764, 767-68 (Tex. App.—Dallas 1997, no pet.), discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 51 SMU L. REV. 1047, 1057 (1998).

136. *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977).

137. *Kulubis v. Texas Farm Bureau Underwriters Ins. Co.*, 706 S.W.2d 953 (Tex. 1986). Some of the developments over the first decade of appellate consideration of these matters are briefly reviewed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 41 Sw. L.J. 1, 19-21 (1987).

138. *Kulubis*, 706 S.W.2d at 955.

139. *Norman v. State Farm Fire & Casualty Co.*, 804 F.2d 1365, 1366 (5th Cir. 1986) (per curiam), commented on in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 41 SMU L. REV. 1, 20 (1987). The court reiterated that conclusion in *Webster v. State Farm Fire & Casualty Co.*, 953 F.2d 222 (5th Cir. 1992), discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 46 SMU L. REV. 1475, 1488 (1993).

140. 996 S.W.2d 873 (Tex. 1999).

wife could assert her claim based on the partition,¹⁴¹ only six members of the court allowed the ex-wife to recover against the insurance company apparently on the principle of common half-ownership, evidently rejecting any argument (that might have been made) based on her right of reimbursement from her ex-husband.¹⁴² Two judges dissented¹⁴³ on the ground that when the right of recovery arose it was a community right and to allow any recovery would thus recognize the arsonist husband's right to benefit by his own wrong.¹⁴⁴ Though the six members of the majority of the court speaking through Justice Alberto Gonzales limited the ex-wife's right of recovery to one-half of the value of the community property destroyed, her interest in the property depended not on the voluntary spousal partition but apparently on her vested half-ownership right. Alternatively it might have been said that the husband had lost his half-interest by his own willful act of destruction, as was his apparent intent, leaving only the wife's interest surviving under the contract. But however the interspousal equities may be weighed, the insured ex-husband lost his one half of the value of the property destroyed due to his wrongful act. It remains to be seen whether insurers will seek to change this result by tightening the terms of their policies to exclude any recovery in such cases. Such uncertainty aside, the court's reliance on the simple principle of community half-ownership as the basis for the wife's recovery invites a similar approach to a claim for a spouse's own lost earnings due to personal injury that have been barred by the wrongful participation of the other spouse in the cause of injury.

III. CONTROL OF MARITAL PROPERTY

A. REIMBURSEMENT CLAIMS

1. *Support Obligations Arising Prior to Marriage*

Does a continuing pre-marital personal obligation to support one's minor child give rise to a right of reimbursement (against the separate estate of the parent) if community funds of a later marriage are expended for that purpose? In *Farish v. Farish*¹⁴⁵ the court concluded that the husband's obligation to support his minor children of his first marriage indeed arose prior to his second marriage. But the court went on to say that the responsibility to discharge that obligation continued during the subsequent marriage and thus it became a community obligation. But such an analysis can be made of any undischarged premarital obligation and is supported by the language of Family Code section 3.202(c),¹⁴⁶

141. See *id.* at 882 (Hecht, J., dissenting).

142. That argument, advanced in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 46 SMU L. Rev. 1475, 1488 (1993), can fall afoul of the contractual terms of the policy, but such terms were not relied on by the insurer in *Murphy*.

143. *Murphy*, 996 S.W.2d at 883 (Enoch and Owen, JJ. dissenting).

144. *Id.*

145. 982 S.W.2d 623, 628 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

146. TEX. FAM. CODE ANN. § 3.202(c) (Vernon 1998).

which provides that a creditor may enforce a pre-marital obligation against the separate property of the obligor or community property subject to a debtor spouse's sole or joint management at the option of the creditor. Thus, because liability for child-support is a community obligation as well as a separate obligation, the concept of spousal liability (obligation) is easily confounded with that of property interest (characterization). Just as in *Norris v. Vaughan*¹⁴⁷ the court confused principles of liability with characterization of property interests. The right of reimbursement asserted may merely require attention to primary over secondary responsibility as between the spouses.¹⁴⁸

Fixing liability from a creditor's point of view need not resolve the issue of competing spousal interests. In *Norris v. Vaughan* in 1953 the court denied reimbursement to a husband-father's separate estate for providing familial support, which is ordinarily thought of as a community property responsibility. The result was explained on the basis of liability. If the separate property of the father-obligor and the community estate are both liable, as they are for family necessities, no right of reimbursement was said to be due to the husband's separate estate that discharged the obligation. A further factor in the court's thinking may have been that the husband had voluntarily paid for familial support, but voluntary payment has never been a defense to a reimbursement claim in Texas.

If a duty to support a child of a prior marriage is equated to the duty to provide familial support (as that obligation was treated in *Norris v. Vaughan*) and the community estate discharges that obligation (as occurred in *Farish*), why would liability not fall primarily on the father's separate estate as the debt had its origin in the pre-marital past? The principle of correlative liability which seemingly protected the community estate from supplying reimbursement in *Norris v. Vaughan* would not be operative. But, particular circumstances of the dispute in issue might overcome an argument based on primary responsibility.

In *Lewis v. Lewis*,¹⁴⁹ also before the First District appellate court in Houston, the wife alleged that the husband had used community funds to pay contractual alimony to his prior wife, certainly a legitimate ground for a reimbursement claim by the community estate. But the husband showed certain offsetting income tax benefits that the community estate enjoyed from his separate business transactions. Thus, the trial court's failure to award reimbursement to the wife was within the proper exer-

147. 152 Tex. 491, 502-03, 260 S.W.2d 676, 683 (1953). For other comments on the conclusion see Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 39 Sw. L. J. 1, 10 (1985), and Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 43 Sw. L. J. 1, 15 (1989).

148. For other discussions of a right of reimbursement of the community estate for support of a child of a prior marriage or a child born out of wedlock see Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 51 SMU L. REV. 1047, 1059-1060 (1998); Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 52 SMU L. REV. 1143, 1161 (1999).

149. No. 01-98-00354-CV, 1999 WL 442176 (Tex. App.—Houston [1st Dist.] July 1, 1999, no pet.) (not designated for publication).

cise of the trial court's good judgment and application of equitable principles.

2. *Claims for Enhancement in Value*

In *In re Morris*¹⁵⁰ the couple had built a house on a lot held by them in equal shares as separate property. Separate funds of both spouses as well as community funds were used to make improvements. In such a situation the separate estates and the community estate may assert claims for reimbursement, but the appellate court's observations in this regard may be somewhat misleading. The court said that "a trial court's discretion in evaluating a claim for reimbursement is as broad as that discretion exercised by a trial court in making a just and proper division of the community estate."¹⁵¹ That statement is apt to be misunderstood. A divorce court may indeed *divide* a community reimbursement *right* as it deems just and the process of determining the extent of that right also involves an element of equitable judgment in considering the circumstances under which the claim for reimbursement arose, but the standards of judgment in each instance depend on different sorts of factors. Further, the court did not mention a possible right of separate reimbursement which may be asserted by one separate estate against another. In making findings concerning rights of reimbursements a court should first determine the existence of the right (either as a separate right or a community right) and then the court will consider the just division of the community right. The court went on to say that "a court's finding can support reimbursement to the community estate, as long as the spouse who is claiming the right to reimbursement establishes the fact and the amount of community funds expended to improve or benefit the other spouse's separate estate."¹⁵² This analysis does not reflect the full adjudicative process. In a situation such as that in *Morris* the community claim may be asserted by one or both spouses or by neither, but such a claim as may be proved will be an equal obligation of both separate estates when they own the benefited property in equal separate shares. Separate claims for reimbursement will also be equally apportioned as offsets in value.

Because there were four parcels of real estate in *Morris* with which the trial court had to deal (as well as the terms of pre-marital agreement of which the court had to be mindful), the task of resolving the claims and then dealing with division of the community rights of reimbursement was particularly onerous and required remand to the trial court for resolution.

*Rusk v. Rusk*¹⁵³ also presented a reimbursement claim based on the use of community funds to make mortgage payments on the husband's separate realty in which the couple lived during a part of the marriage and

150. 12 S.W.3d 877 (Tex. App.—Texarkana 2000, no pet.)

151. *Id.* at 882.

152. *Id.*

153. 5 S.W.3d 299, 309-10 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Fowler, J. dissenting, considered the point at *id.* at 315-16.

rented to tenants thereafter. The court approached the claim for reimbursement of funds paid to discharge the mortgage in the same manner as the Texas Supreme Court applied the rule for funds used in making improvements in *Anderson v. Gilliland*.¹⁵⁴ But the husband complained that the trial court had nonetheless failed to give consideration to the family use and community rental income from the property. The majority of the court apparently concluded that those factors should be considered on remand.

Though the procedural posture of *Fazakerly v. Fazakerly*¹⁵⁵ is difficult to comprehend and the holding is not altogether clear, insofar as the decision enunciates any principle of law with respect to pre-marital partitions, nothing significant is said there with respect to that subject.¹⁵⁶ The pre-marital partition is merely part of the background for the reimbursement claims later asserted. At the insistence of the husband-to-be an agreement was entered into prior to the couple's marriage. Whether the husband (whose legal training long preceded the 1980 amendment to article XVI, section 15 of the Texas Constitution) actually drafted the agreement is not disclosed. The agreement first recited that each spouse would continue to hold all property owned prior to marriage as separate property—a truism by operation of law that requires no agreement to make it so.¹⁵⁷ The agreement went on to state that the business income of the wife-to-be would be her separate property¹⁵⁸—a unilateral term that on the basis of the facts given by the appellate court seems void on its face as neither a partition nor an exchange under article XVI, section 15 of the Texas Constitution.¹⁵⁹ But this point was not noted by the court. Although the appellate court appears to have treated the recital in the pre-marital agreement that the husband was fully aware of the wife's financial condition as evidence of the truth of that statement, the relevance of that conclusion was not explained in that the issue of its unconscionability was not reached by the trial court.

During the marriage, the wife's business interests were apparently wholly regenerated with the husband's assistance, and at the time of his death in 1992, the value of her business interests had greatly increased. The really significant fact, however, was that after the husband's death his daughter entered into a settlement agreement with the widow concerning the husband's estate. Although the occasion for the settlement and the full terms of that agreement are not related in the opinion, the daughter

154. 684 S.W.2d 673, 675 (Tex. 1985).

155. 996 S.W.2d 260 (Tex. App.—Eastland 1999, no pet.).

156. For some useful general comments on drafting premarital agreements see Peggy L. Podell, *Before Your Client Says "I Do" - Premarital Agreements Will Hold Up Better With Full Financial Disclosure*, A.B.A. J. 80 (Aug. 1999).

157. See TEX. CONST. art. XVI, § 15 and TEX. FAM. CODE § 3.001(1). See also text accompanying notes 80-82.

158. *Fazakerly*, 996 S.W.2d at 262.

159. TEX. CONST. art. XVI, § 15. See *Hibbler v. Knight*, 735 S.W.2d 924, 926-27 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, *Annual Survey of Texas Law*, 42 Sw. L. J. 1, 8-11 (1988).

agreed that the settlement might be used as a defense to any claim she might later assert against the widow. Her claim was not asserted until over five years later, when the daughter filed suit to establish that the pre-marital agreement was void and that her father's estate was entitled to substantial reimbursement for his labor in making the wife's business interests more valuable. The wife asserted that the four years statute of limitation¹⁶⁰ had run after the lapse of one year after the husband's death, as provided by statute.¹⁶¹ The trial court thereupon struck the daughter's pleading and entered judgment in favor of the widow. The appellate court sustained the trial court's judgment on appeal—first by application of the statute of limitation to the claim and secondly on the ground of laches, though the court did not relate how the wife had relied on the settlement to her detriment. The daughter's claim for reimbursement was precluded by the running of the statute of limitation but even if it were not, it should have been barred by her settlement agreement.

In 1999 the Legislature undertook to improve the rules of marital reimbursement. The new provisions of section 3.401 (Enhancement in Value Due to Financial Contribution of Community Property) deal with community reimbursement claims for enhancement of community property.¹⁶²

(a) The enhancement in value during a marriage of separate property owned by a spouse due to financial contributions made with community property creates an equitable interest of community property in the separate property.

(b) The equitable interest created under this section is measured by the net amount of the enhancement in value of the separate property during the marriage due to the financial contribution made with community property.

Applying the provisions of section 3.401 to the facts of *Morris* and *Rusk* present no particular difficulties. The community contributions were clearly of a "financial" nature. "Net amount" merely means "amount". A similar formula in section 3.404¹⁶³ describes a similar means of reckoning a separate reimbursement right for enhancement of community property and enhancement of one separate estate by another separate estate in comparable situations. But in a situation similar to that in *Fazakerly* (and in the absence of the defenses applicable there) if it had been proved that the husband's efforts and acumen had resulted in an enhancement of the wife's separate estate, would those "contributions" have been described as "financial?" In the history of this legislation there is some indication that the draftsmen meant to exclude this ground for

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

161. TEX. CIV. PRAC. & REM. CODE ANN. § 16.062 (Vernon 1997). See *Burton v. Bell*, 380 S.W.2d 561, 565 (Tex. 1964).

162. TEX. FAM. CODE ANN. § 3.401 (Vernon 1998).

163. TEX. FAM. CODE ANN. § 3.404 (Vernon Supp. 2000). The denial of any claim or setoff against one marital estate for use on occupancy of facilities of the other under § 3.405 simplifies the calculation of reimbursement owed but whether such denial is just in many situations is highly questionable.

reimbursement by use of the term "financial." But even if that was the draftsmen's object, was that object achieved? If the contribution is in any way measured by its effect, the result would certainly be described as "financial."

A fundamental tenet in the application of the principle of reimbursement between marital estates is that advancements between estates do not bear interest. But though one spouse may borrow from the community estate interest free for the benefit of a separate venture, that spouse is required to pay for contingent enhancement of the separate estate in the amount of the appreciation realized (equities considered) as a result of the community investment. The same principle operates in favor of separate property appropriated for community use and in favor of separate property of one spouse used for the benefit of the other separate estate.

When it comes to labor, however, only the community has toil and effort to expend *personally*, but labor can be *bought* with separate funds. Literally, the 1999 statute seems to allow reimbursement of paid separate labor but not community personal labor. Should there be such a disparity so that community personal labor goes uncompensated by a separate estate for enhancement of separate property? Should the separate owner be able to expend as much of his time and energy as he wishes on his separate estate without community compensation? Prior to the decision of the Texas Supreme Court in *Jensen v. Jensen*¹⁶⁴ that was the rule in Texas. But in *Jensen* the court laid down the rule that a spouse is allowed to expend unreimbursable community energy and effort only *to maintain* his separate property but not to make it productive. A real problem in applying that rule of reimbursement is evaluation of a claim such as that advanced in *Fazakerly*. In *Jensen* on remand to the trial court that task was ultimately put in the hands of a master to hear evidence and evaluate the claim. In this respect it seems appropriate that such separate and community reimbursement claims be subject to the same rules, though the formula for calculating reimbursement as provided by the court in *Jensen* has produced some puzzlement. Why, for example, did the court direct that cash dividends paid by the husband's separate corporate interest in *Jensen* should be set off against a community contribution for enhancement of the value of the husband's separate corporate shares? Those cash dividends belong to the community estate as a matter of law.¹⁶⁵ (But the amount of the dividends regularly paid is certainly an element in valuing the separate corporate enterprise and the separate shares in that corporation.) Similarly, the value of profits retained for expansion of the corporation and not paid as dividends is also a factor to

164. 665 S.W.2d 107 (Tex. 1984).

165. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 38 Sw. L. J. 131, 138-39 (1984).

be evaluated.¹⁶⁶ In section 3.405,¹⁶⁷ enacted in 1999, it is provided that use or enjoyment by a claimant for benefits rendered is not to be considered in calculating a right of reimbursement against a benefited estate. Although this sort of setoff is always difficult to evaluate, one wonders whether its total exclusion as an equitable factor in reimbursement-evaluation can produce a fair result.

A fundamental criticism that can be made of the *Jensen* decision is the court's preoccupation with what was termed inadequate compensation by the separate corporation as a measure of the amount of reimbursement owed to the community estate in that instance. That approach was a consequence of the pleadings and arguments in that particular case when the question turned on whether (and to what extent) the husband had enhanced the value of the large block of separate shares of a corporation, which he personally controlled at community expense. That was a very difficult question that had not been fully explored at the trial. But though the court discussed the point in terms of adequacy of the husband's compensation by the corporation, the real issue was how much benefit the husband had contributed to the value of his separate shares as his debt to the community was the only issue before the court not whether the corporation owed him unpaid compensation. Nor was there any issue before the court as to whether the owners of the rest of the shares of the corporation (who had benefited by share increases as much as the husband had) owed compensation to the community estate. Though the focus of the 1999 legislation on "financial" as opposed to "non-financial" benefits as the primary test for producing marital reimbursement rights may not be the most appropriate way to formulate the reimbursement issue, the 1999 reimbursement legislation has furnished a basis for discussion of the resolution of this and related issues.

The 1999 legislation also distinguishes between enhancements in value of separate property by financial contributions of community property (section 3.401) and the use of community property to discharge a debt "on" separate property (section 3.402¹⁶⁸). The most common application of this rule is found in the discharge of mortgage indebtedness on separate property with community funds. But reference to any other use of community funds for the discharge of separate obligations is pointedly omitted. Is section 3.402 (or section 3.401) applicable to the use of community funds to pay premiums on separate life insurance policies or to pay any other sort of unsecured premarital obligation?

166. See Joseph W. McKnight, *Reimbursement for Uncompensated Labor Rendered for a Closely-Held Corporation and Some Other Comments on Jensen v. Jensen*, 3 THE ADVOCATE, STATE BAR [OF TEXAS] LITIGATION SECTION REPORT 8 (no. 4 1984).

167. TEX. FAM. CODE ANN. § 3.405 (Vernon Supp. 2000).

168. TEX. FAM. CODE ANN. § 3.402 (Vernon Supp. 2000).

3. *Gratuitous Dispositions*

In *Barnett v. Barnett*¹⁶⁹ the deceased husband had two policies of life insurance; one was his separate property and the other was community property. The proceeds of the separate property policy passed as directed under his will with appropriate reimbursement to the community estate for premiums paid with community funds. In dealing with the proceeds of a community policy of life insurance in the past, courts have applied the standards of constructive fraud in appraising the propriety of making the directed payments to the beneficiary, in this instance the mother of the insured decedent.¹⁷⁰ Those standards include (1) the disproportionately large value of the proceeds as compared to the entire community estate and (2) the responsibility of the deceased spouse for the care of the beneficiary as compared to the needs of the surviving spouse. Although his mother was a natural object of the husband's bounty in *Barnett*, it was shown that she was not dependent on him for her support. On the other hand, there was no showing of particular need on the part of his widow. Nor was there any showing by the widow that the total disposition in favor of the decedent's mother was unduly large in comparison with the size of the community estate. In the absence of any further evidence in favor of the husband's disposition of his wife's community share of the proceeds in favor of his mother, the trial court would have been expected to find in favor of the decedent's mother, and the trial court so ruled. The appellate court nevertheless awarded one-half of the insurance proceeds of approximately three-quarters of a million dollars to the widow who had sued her husband for divorce. The appellate court seemed to approach the matter as one of presumptive community entitlement¹⁷¹ to one-half of the community estate whereas following the trial court's exercise of its judgmental discretion is consistent with the great weight of authority.

Evidently offended by the husband's spending of \$510 on his visits to massage parlors, the jury in *Lewis v. Lewis*¹⁷² (whose advice on the issue of reimbursement was sought by the trial judge) self-righteously awarded the wife \$100,000 in reimbursement. The trial court reduced that amount to \$50,000. In that the evidence did not support the award to more than \$510, the Houston First appellate court reformed the award to provide

169. 985 S.W.2d 520 (Tex. App.—Houston [1st Dist.] 1999, no pet.). See text at notes 43-44 *supra*.

170. See *Murphy v. Metropolitan Life Ins. Co.*, 498 S.W.2d 278 (Tex. Civ. App.—Houston [14th Dist.] 1973, ins ref'd n.r.e.); *Givens v. Girard Life Ins. Co.*, 490 S.W.2d 421 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.); *Hartman v. Crain*, 398 S.W.2d 387 (Tex. Civ. App.—Houston [14th Dist.] 1966, no writ).

171. The Texas Supreme Court's apparent employment of the notion that each spouse has a vested right to a half share of the community estate was used in a radically different non-reimbursement context in *Texas Farmers Ins. Co. v. Murphy*, *supra*, note 140 at note 142.

172. No. 01-98-00354-CV, 1999 WL 442176 (Tex. App.—Houston [1st Dist.] July 1, 1999) (not designated for publication).

for reimbursement of only that amount.¹⁷³ The jury had also found that the husband had dissipated community funds by their use in paying federal income taxes of \$48,000 on separate capital gains. Though the appellate court found no authority to support that award, it is hard to see why. If the evidence had sustained the finding, reimbursement of the community estate would not have been appropriate with proper attention paid to the equities of the situation. In affirming the trial court's handling of a reimbursement claim for the husband's use of community funds in discharging his contractual alimony obligations to his former wife, the appellate court noted that the trial court had given weight to the community benefit received as a result of the income tax payments.¹⁷⁴

Better handled instances of constructive fraud were presented in *Osuna v. Quintana*.¹⁷⁵ There the husband had maintained an affair with a woman other than his wife for twenty-four years of his marriage, he ceremonially married the woman in 1983, and she later bore him three children, though she had known from at least 1984 that he was already married to someone else. During their long relationship the husband had provided community funds to purchase a home for the woman and her children. The wife brought suit for divorce in late 1994 and joined the husband's mistress as a party. The trial judge, sitting without a jury, granted the divorce and made substantial monetary awards to the wife against both the husband and the mistress.¹⁷⁶ As a consequence, the mistress was primarily and not merely secondarily liable to the ex-wife, at first glance this appears contrary to the holding of the Dallas Court of Civil Appeals in *Carnes v. Meador*¹⁷⁷ that liability in such cases must be sought first against the donor-spouse and then against the donee if it is shown that the donor is unable to make reimbursement. In affirming the judgment against the mistress, the appellate court deduced that in the absence of any request for findings of fact and conclusions of law, the trial court had made all necessary findings to support its judgment. Thus, because the mistress had presented no evidence to challenge the husband's apparent inability to discharge his primary liability, the appellate court concluded that the trial court had impliedly found that the husband was insolvent.¹⁷⁸ This ingenious explanation therefore leaves the principle laid down in *Carnes* undisturbed. The mortgage on the house had been long since foreclosed, and all but a small fraction of the purchase money had been lost.¹⁷⁹ Despite the mistress's argument that the hus-

173. *Id.* at *2.

174. *Id.* at *3-*5. The opinion (not prepared for publication) is sometimes wanting in precision on these points.

175. 993 S.W.2d 201 (Tex. App.—Corpus Christi 1999, no pet.).

176. Both the husband and the mistress appealed, but the husband's appeal was dismissed for lack of prosecution.

177. 533 S.W.2d 365, 371 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

178. See *Osuna*, 993 S.W.2d at 208.

179. Although the appellate court had affirmed the wife's right to a resulting trust against the home purchased for the mistress, *id.* at 210, later in its opinion the appellate court merely alludes to a debt awarded against the husband and the mistress.

band had promised the house as a place for their children to live, the appellate court found therein no refutation of the principle that a resulting trust was fixed on the house in the absence of a family purpose,¹⁸⁰ after the mistress had failed to cite contrary authority.¹⁸¹ The mistress had also argued that she should be answerable to the community estate for only one half of the funds received. The appellate court rightly pointed out that in a suit for divorce (unlike a death case) full, not half, reimbursement is imposed in favor of the community estate in such instances.¹⁸² The reason for the difference in a death case is that on the spouse-donor's death, a partition of the community has been achieved and the decedent's share is therefore treated as a completed gift, as in *Barnett v. Barnett*.¹⁸³ There the court characterized a testamentary disposition of community insurance proceeds as a constructive fraud. The widow was entitled to no more than one-half of the community proceeds as the other one-half had passed as the husband's separate share at death.¹⁸⁴

B. LIABILITY OF MARITAL PROPERTY

Because all of the jointly managed community property is liable for either spouse's debts *in full*, such property passes to a debtor-spouse's trustee in bankruptcy.¹⁸⁵ But claims to a debtor-spouse's assets can, by application of federal preemption principles, go well beyond Texas rules of marital liability. The rights of the Internal Revenue Service are illustrated in *In re Whitus*.¹⁸⁶ In a wife's Chapter 13 bankruptcy proceeding in which her husband was not joined, the Revenue Service filed a proof of claim for a tax penalty against the husband for failure to pay social security withholding taxes in connection with several business ventures. These were community liabilities for which jointly managed community property is liable, and there was jointly managed community property within the bankruptcy estate to which a tax lien could attach under federal law.¹⁸⁷ The Fifth Circuit appeals court paraphrased section 101(7) of the Bankruptcy Code: a " 'community claim' . . . provides creditors holding claims against the debtor or a nondebtor the opportunity to participate in distribution out of the bankruptcy estate, if state law would have allowed

180. See *Osuna*, 993 S.W.2d at 211.

181. See *id.* at 211.

182. See *id.* at 208.

183. *Barnett*, 985 S.W.2d at 530-31, *supra* note 169.

184. See *id.* Cf. *Redfearn v. Ford*, 579 S.W.2d 295 (Tex. Civ. App.—Dallas 1979, writ *ref'd. n.r.e.*), where the wife's behavior had deprived her of an equitable share in the husband's disposition of well over one-half of community insurance proceeds to his son. Thus, though the disposition of the donor's share was allowed to stand as the consequence of his *inter vivos* directions under the insurance contract, equitable considerations also justified reduction of the contestant's community share. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 34 Sw. L.J. 115, 132-33 (1980).

185. See 11 U.S.C.A. § 541(a)(2) (West 1993). See *Douglas v. Delp*, 987 S.W.2d 879, 883 (Tex. 1999).

186. 240 B.R. 705 (Bankr. W.D. Tex. 1999).

187. See 11 U.S.C.A. §§ 101(7), 541(a)(2) (West 1993).

recovery from community property assets.”¹⁸⁸ The Revenue Service sought to share not only in the debtor’s bankruptcy estate as it stood at the beginning of the proceeding, but also in the debtor’s post-petition income under a Chapter 13 plan. Bankruptcy Code section 1325(a),¹⁸⁹ however, limits recovery under a Chapter 13 plan to what could be received under a Chapter 7 proceeding whereby several substates are recognized under section 726(c)(2) for the satisfaction of claims against a non-debtor.¹⁹⁰ In this instance, because the bankrupt debtor’s post-petition earnings are not available for distribution in a Chapter 7 case, they are not available for distribution in a Chapter 13 proceeding. Further, because the property of the *debtor’s estate* that the Revenue Service sought to reach was the debtor’s solely managed community homestead, which could not be liquidated in a Chapter 7 proceeding, that property also could not be used to calculate a distribution under section 1328(a)(4).¹⁹¹ The court added that all “community claims” can be treated together in a Chapter 13 plan, and thus by application of the best-interest-of-creditors test a particular creditor may take nothing, as may also be the result if no claimant for a community claim is favored under that test.¹⁹²

The Fifth Circuit Court of Appeals dealt with another instance of the interaction of state and federal law in *In re Cook*.¹⁹³ The bankrupt husband and wife had incurred debts to a creditor whose security agreement covered the proceeds of all crops planted in particular land for five years. For their cotton crop the debtors had purchased crop insurance under the Federal Crop Insurance Act¹⁹⁴ which allowed assignment, but the creditor had not been given an assignment as such. When the crop insurance was paid for loss of the cotton crop, the debtor-husband used the proceeds to discharge other debts. In the couple’s bankruptcy, the creditor asserted a secured interest in the insurance proceeds under Texas law and further claimed that the debtor-husband should be denied a discharge because of his fraudulent disposition of the insurance proceeds.¹⁹⁵ The court held that neither the federal act nor the federal regulations made pursuant to it effectively preempted Texas law in requiring an assignment except when a creditor seeks to obtain the proceeds of an insurance policy directly from the insurer. In this instance, however, as the proceeds were paid to the debtors directly, a specific assignment of the insurance proceeds was not necessary to protect the creditor under Texas law because the creditor had a lien on the insurance proceeds under its contract

188. *Whitus*, 240 B.R. at 707.

189. 11 U.S.C. § 1325(a) (West 1993).

190. *See* 11 U.S.C.A. § 726(a)(2)(A) (West 1993). The first substate favors the Revenue Service, whereas the fourth and fifth substates are residual and may well be empty. *See Whitus*, 240 B.R. at 709.

191. *See Whitus*, 240 B.R. at 710.

192. *See id.*

193. 169 F.3d 271 (5th Cir. 1999).

194. 7 U.S.C.A. § 1509 (West 1999); 7 C.F.R. § 401.8 (2000).

195. *See* 11 U.S.C.A. § 727(a)(2)(A) (West 1993 & Supp. 2000).

with the debtors.¹⁹⁶ On remand, however, the trial court must consider whether the husband's act in paying other creditors with the insurance proceeds established grounds for denial of a discharge.¹⁹⁷

C. MANAGEMENT POWERS OF A DECEASED SPOUSE'S PERSONAL REPRESENTATIVE

The deceased spouse's personal representative succeeds to the decedent's powers of management for both the descendents solely controlled community property and all of the jointly controlled community property and responsibility for discharging liabilities on such properties.¹⁹⁸ Thus, the Corpus Christi appellate court held in *In re Estate of Herring*¹⁹⁹ that statutory authority exists for the decedent's personal representative to act alone without the joinder of the surviving spouse as to community property that was jointly managed by the spouses during the life of the decedent.

D. INTERSPOUSAL TRANSFERS AFFECTING LIABILITY

In *In re Wang*²⁰⁰ a creditor of the ex-husband asserted that a denial of discharge was proper because the ex-husband made a fraudulent transfer of a community truck to his estranged wife within one year of filing for bankruptcy.²⁰¹ Though the transfer actually occurred well outside the one-year period prior to bankruptcy, the evidence also showed that the transfer was made to resolve a marital dispute. The court's conclusion implies that even if the transfer had occurred within one year of the husband's bankruptcy filing, the facts failed to show any intent to defraud the husband's creditors.²⁰²

E. HOMESTEAD: DESIGNATION AND EXTENT

Long ago in *Lauchheimer & Sons v. Saunders*²⁰³ the Texas Supreme Court held that nine of 109 acres in issue had been enveloped by urban sprawl and had thus become urban. In a series of recent cases, however, the Fifth Circuit Court of Appeals has wrestled with this question with

196. See *Cook*, 169 F.3d at 277. See also *In re Rees*, 216 B.R. 551, 554-56 (Bankr. N.D. Tex. 1998).

197. See *Cook*, 169 F.3d at 277-78. Because the wife had no involvement in these matters, the creditor had not contested her discharge. See *id.* at 278.

198. See TEX. PROB. CODE ANN. §§ 160, 177(b) (seemingly without authority of the probate court), 355-357 (by authority of the probate court) (Vernon 1980 & Supp. 2000).

199. 983 S.W.2d 61, 63 (Tex. App.—Corpus Christi 1998, no pet.).

200. 247 B.R. 211, 213 (Bankr. E.D. Tex. 2000).

201. See 11 U.S.C.A. 727(a)(2)(A) (West 1993 & Supp. 2000).

202. The creditor evidently did not plead that the transfer was voidable under 11 U.S.C. § 548 (within one year of bankruptcy) or that the debtor had made a fraudulent transfer under Texas law, 11 U.S.C. § 544(b), in which case the transfer would have been within the Texas statute of limitation. For a brief discussion of an alleged pre-marital fraudulent transfer, see *In re Parker*, *supra* notes 97-98.

203. 97 Tex. 137, 76 S.W. 750 (1903).

continuing concern. In *In re Moody*²⁰⁴ the terrain of Galveston Island, including the sparse habitation of the region in question, apparently caused both the bankruptcy court and the appellate court to conclude that urban envelopment had not occurred. The Fifth Circuit court subsequently held in both *In re Bradley*²⁰⁵ and *In re Blakeman*²⁰⁶ that land north of Dallas and Fort Worth, respectively (though in both instances actually within urban corporate boundaries), were rural homesteads. Most recently in *In re Crowell*²⁰⁷ that Court reexamined the problem. On former farmland in the fast-growing area north of Dallas, a residential subdivision of forty-two acres surrounded by other residential subdivisions was in course of development within municipal boundaries. The debtor maintained his home in this area as the subdivision was developed. The court found that the envelopment of the area by such development decisively transformed it from a rural to an urban setting. It interpreted this transformation in the same way the Texas Supreme Court saw the situation in *Lauchheimer & Sons v. Saunders*²⁰⁸ in late nineteenth century Gatesville, but unlike that in some other recent instances.²⁰⁹ The fact of urban encirclement tends to be decisive for the process of rural-to-urban transformation in a debtor-creditor context. As enacted in 1989, the statute which defined the consequences of lack of municipal utilities and fire and police protection warded off both municipal tax-assessors and rapacious creditors by preserving the rural character of homesteads when urban corporate boundaries encroached,²¹⁰ but enjoyment of those advantages did not necessarily make the land urban for homestead purposes. Under the statutory amendments (contingent upon adoption of the 1999 Texas constitutional amendment providing for the more extensive urban homestead), availability of those services within a municipality makes the homestead urban, but lack of amenities allows the rural character of the homestead to be maintained.²¹¹

In *In re Grisham*,²¹² when a married couple bought the 80 acres in dispute, about 12 acres were within the municipal limits of the small town of Mabank. The house, but not all the other buildings constructed on the property, was within the boundaries of the town, and access to the house

204. 77 B.R. 580, 590 (Bankr. S.D. Tex. 1987), *aff'd*, 862 F.2d 1194 (5th Cir. 1989), *cert. denied*, 503 U.S. 960 (1992).

205. 960 F.2d 502, 508 (5th Cir. 1992), *cert. denied*, 507 U.S. 971 (1993). Though in *Bradley* the bankruptcy court found that the rich former farmland northeast of Dallas was very prone to rapid urbanization, the Fifth Circuit court found that the failure of the municipality (in which the land was located) to provide municipal utilities and fire and police protection under section 41.002(c) of the Property Code (as amended in 1989 and effective through most of 1999) rebutted the assertion that the 129 acres in question had lost its rural character.

206. 997 F.2d 1084, 1091 (5th Cir. 1992), *cert. denied*, 510 U.S. 1042 (1994).

207. 138 F.3d 1031 (5th Cir. 1998).

208. 76 S.W. at 752.

209. *See, e.g.*, instances cited in notes 204-06 *supra*.

210. *See* TEX. PROP. CODE ANN. § 41.002(c)-(d) (Vernon Supp. 2000).

211. *See id.*

212. 230 B.R. 529 (Bankr. N.D. Tex. 1998), *aff'd*, No. 3:99-CV-0346-P, 1999 WL 261849 (N.D. Tex. Apr. 26, 1999).

was by way of a town street. The town provided water and sewage, as well as fire and police protection. Local private facilities also provided other services. Though the couple used the property to raise livestock and to grow hay, they were assessed and paid municipal taxes. The family derived most of its support, however, from the husband's business activities. The residential area of the town was to the south of the couple's property and a high school to the west, but the area to the east remained undeveloped, with another school and an old residential area to the east of that. To the north of the property, a state highway existed, with further rural area to the north of that. The eighty acres thus abutted urban use on the south and west, but such use was more removed on the east and non-existent in the north's open country. The property was thus not wholly surrounded by urban use when the couple filed for bankruptcy relief. In concluding that the couple was merely entitled to an urban homestead of one acre, the court seemingly put inordinate weight on the fact that the municipal boundary encompassed the area including the house and other buildings. This misplaced emphasis is even more apparent in light of the court's observation that the provision of the Property Code that "[a] homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection" is irrelevant if the amenities were available when the property was so designated.²¹³ Notably, the legislative history of this provision shows that its initial enactment related to municipal property taxes rather than to a concern for creditor's claims to homestead property.

In *In re Kang*²¹⁴ a bankruptcy court considered the extent of a business homestead. The bankruptcy debtor in a Chapter 13 case owned a small strip-shopping-center in the middle of which he operated a grocery-convenience store. Asserting that he had purchased the entire shopping-center to protect the location of his business, he claimed the entire center as his business homestead.²¹⁵ The total area allowed as an urban homestead was one acre when the bankruptcy was filed in 1998. Though a tourist camp with twenty cabins alongside a gasoline station has qualified as a business homestead for exemption purposes,²¹⁶ a grocery-convenience store, the court said, requires no more for its operation than the

213. *Grisham*, 230 B.R. at 531 (citing TEX. PROP. CODE ANN. § 41.002(c) (Vernon Supp. 2000)).

214. 243 B.R. 666, 668 (Bankr. N.D. Tex. 1999).

215. The dimensions of the center, however, were not mentioned. The debtor presumably claimed a residential homestead in the same urban area in which the business homestead was located. A business homestead can be claimed in an urban area where the claimant lives, and in order to claim the business homestead the residential homestead property need not be held in fee. See *Ayres v. Patton*, 111 S.W. 1079, 1082 (Tex. Civ. App.—Galveston 1908, no writ); *Exall v. Security Mortgage & Trust Co.*, 39 S.W. 959, 960 (Tex. Civ. App.—Dallas 1897, writ ref'd).

216. See *C.D. Shamburger Lumber Co. v. Delavan*, 106 S.W.2d 351, 357 (Tex. Civ. App.—Amarillo 1937, writ ref'd); *Maroney Hardware Co. v. Connellee*, 25 S.W. 448, 449 (Tex. Civ. App.—Ft. Worth 1894, no writ) (lumber mill with a mill yard, camp houses, and outhouses necessary for customers' lodging). As the dates of these decisions indicate, the

“store with necessary space for ingress and egress and customer parking.”²¹⁷ The court cast some doubt on the viability of such authorities as *Cooper Grocery Co. v. Peter*²¹⁸ and *Brennan v. Fuller*.²¹⁹ Both of those decisions, however, dealt with treating an entire building as a business homestead when only a part of it is actually used for business purposes and the rest is rented to others. There are analogous situations in which an entire duplex or quadriplex has been treated as a residential homestead when only one unit of the building is actually occupied as a home and the rest is occupied by others.²²⁰ The court suggested that in such instances the extent of the homestead exemption must depend on the space “reasonably necessary for the operation of [the] business.”²²¹ With the extension of the urban homestead to a possible ten acres,²²² grander and more extensive business homestead claims may be anticipated.

Altogether consistent rules have not yet been developed for classifying homes as urban or rural when they lie at the edge of an urban area surrounded by an acre or so of non-urban land. In *In re Spencer*²²³ a bankruptcy court concluded that one of a number of “ranchettes” should be classified as urban because of its essentially urban use and location. Although the 1999 redefinition of urban homesteads to include up to ten acres will preclude contests when under ten acres are claimed as exempt, there is still some uncertainty about the proper formulation of a rule to cover the extent of a rural homestead when the entire area is of up to two hundred acres for a family (or one hundred acres for a single claimant) and is of a rural character but is not used for the economic support of the claimant but merely for the psychic gratification that a rural residence may provide, as in *In re Mitchell*.²²⁴

urban homestead of the time was defined by land value at the time the homestead was established.

217. *Kang*, 243 B.R. at 670.

218. 80 S.W. 108 (Tex. Civ. App.—Austin 1904, writ ref'd).

219. 37 S.W. 641 (Tex. Civ. App.—Dallas 1896, no writ).

220. See *Tyler v. Thomas*, 297 S.W. 609 (Tex. Civ. App.—Galveston 1927), *rev'd on other grounds* 6 S.W.2d 350 (Tex. Comm'n App. 1928, judgment not adopted).

221. *Kang*, 243 B.R. at 670.

222. See TEX. CONST. art. XVI, § 51 (amended 1999).

223. 109 B.R. 715, 718 (Bankr. W.D. Tex. 1989).

224. 132 B.R. 553, 566 (Bankr. W.D. Tex. 1991). See Leif M. Clark, *Bankruptcy, Annual Survey of Fifth Circuit Law*, 30 TEX. TECH L. REV. 441, 457 (1999); Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 45 Sw. L.J. 1831, 1847-48 (1992); Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 47 SMU L. REV. 1161, 1174-75 (1994). In *Mitchell* the debtor-attorney maintained his office in his family home on 104 acres in a rural setting outside Bastrop. Although he had previously engaged in some farming and ranching there, he had abandoned these activities. The court nevertheless allowed the claimant to maintain a homestead exemption for the entire area without proof that the property supported the claimant or his family economically as prescribed in *Autry v. Reasor*, 102 Tex. 123, 108 S.W. 1162 (1908), *rev'd on reh'g*, 113 S.W. 748 (1908). The Fifth Circuit Court's decision in *Bradley* seems built on a point of view similar to that which prevailed in *Mitchell*. See *Bradley*, 960 F.2d at 507. See also *In re McCain*, 160 B.R. 933 (Bankr. E.D. Tex. 1993), discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 47 SMU L. REV. 1161, 1174-75 (1994).

In *In re Brooks*,²²⁵ the homestead claimant owned and operated a ranch on 137 acres of rural land that had once been a part of a family ranch comprising over 10,000 acres in Irion County. The rural property was the only realty owned by the claimant, but he lived with his mother on an adjacent property, which had been part of the former family ranch. The claimant was a joint managing conservator of his two minor children whom he had with him from time to time on the property claimed as a homestead. He neither lived on the property claimed, however, nor had made any preparation for building a house on the property beyond merely giving the prospect of building some thought. Because he did not occupy the property as his home, the bankruptcy court denied its exemption from his creditors' claims.²²⁶ If the bankrupt's living arrangements with his mother on her adjacent ranch could have been characterized as a leasehold interest (even possibly a tenancy-at-will), the bankrupt's interest in his 137 acres of ranching property might have retained its exemption.²²⁷

In *In re Anderson*²²⁸ a bankrupt soldier-debtor claimed a federal homestead exemption in South Carolina. Under military orders, the claimant filed her bankruptcy petition in Texas after being transferred from her home in South Carolina to a base in Texas.²²⁹ Though the debtor lived in Texas in a rented house, she continued to own her South Carolina home (temporarily rented to a tenant) to which she intended to return. A creditor nevertheless argued that the South Carolina property had been abandoned as a homestead. With very little authority for guidance in interpreting the federal provision,²³⁰ the court concluded that South Carolina law allows a citizen to maintain a homestead interest when involuntarily compelled to be out of occupancy.²³¹ Texas authorities reach the same conclusion.²³²

Once a homestead right is established, a heavy burden rests on a contestant who asserts its abandonment.²³³ In *In re Estate of Casida*²³⁴ the executrix of the deceased surviving spouse of an apparently long marriage was unable to show that the spouse abandoned his homestead though he spent many of his last years away, visiting his home only a few times a year. The object of showing abandonment by the decedent in this

225. 233 B.R. 696, 698 (Bankr. N.D. Tex. 1999).

226. *See id.* at 701.

227. *Cf. In re Eskew*, 233 B.R. 708 (Bankr. W.D. Tex. 1998), *discussed in* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 52 SMU L. REV. 1143, 1167 (1999) (leasehold interest in farm and residence across the road, presumably on property held in fee or as part of the leasehold).

228. 240 B.R. 254, 256 (Bankr. W.D. Tex. 1999).

229. *See* 11 U.S.C.A. §522(d)(1) (West 1993 & Supp. 2000).

230. The court gave several reasons why such authority is so limited. *See Anderson*, 240 B.R. at 258 n.3.

231. *See id.* at 258.

232. *See Henderson v. Ford*, 46 Tex. 627 (1877); *Markley v. Barlow*, 204 S.W. 1013, 1014 (Tex. Civ. App.—San Antonio 1918, writ ref'd); TEX. CONST. art. XVI, § 51.

233. *See Sullivan v. Barnett*, 471 S.W.2d 39, 43 (Tex. 1971).

234. 13 S.W.3d 519, 523 (Tex. App.—Beaumont 2000, no pet.).

instance was to deflect the claim of the decedent's unmarried adult son who asserted a claim of homestead occupancy. Although Probate Code section 271²³⁵ gives unmarried children living with the family a right to assert the existence of a homestead that will repel creditors of the estate, the claim will not prevail against co-heir's entitlement to a partition.²³⁶

In addition to the homestead, Texas law has also long protected places for burial as exempt from creditors' claims: "one or more lots used for a place of burial of the dead," as provided in Property Code section 41.001(a), enacted in 1985 and reenacted in 1997.²³⁷ From 1875²³⁸ the statutorily optional charter for towns with a population of over one thousand contained a provision exempting cemeteries from execution. In 1879²³⁹ an adaptation to the provision for the protection of burial lots was added to the real property exemption statute where it has been since maintained. The bankrupt single woman in *In re Preston*,²⁴⁰ claimed "four burial plots" as exempt property under Texas law. The court apparently understood this to mean four burial lots rather than one lot with four plots for burial. The trustee objected to exemption of more than one plot. The language of the prior statute of 1973, reenacted in 1983, provided for "one or more lots held for use as a sepulcher of a family or a single adult."²⁴¹ Though not intended as a change in the law,²⁴² the omission of the words "to be" before "used" in the "modernized" language of the 1985 statute literally seems to limit a debtor's exemption to common law protection of lots "already" used for burial.²⁴³ The court stated in *Preston* that the drafters of the 1985 act (as reenacted in 1997)

were clearly expanding for whom burial plots could be exempt by eliminating the term 'family'. . . . Expanding the statute to allow for this kind of exemption does not seem over broad or unreasonable. However, to expand the statute any further and allow one to exempt an unlimited amount of burial plots would clearly be contrary to the intent of the drafters. The legislature had to have meant that one could claim as exempt the number of burial plots that are reasonable based on the facts and circumstances.²⁴⁴

Rather than construing the 1985 and 1997 acts literally to protect only lots "used for" a burial, the court supplied a test of exemption of burial

235. See TEX. PROB. CODE ANN. § 271 (Vernon Supp. 2000). See also Joseph W. M^cKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 52 SMU L. REV. 1143, 1166 (1999).

236. See *Casida*, 13 S.W.3d at 523-24 (citing 18 M. K. WOODWARD & ERNEST F. SMITH, III, TEXAS PRACTICE: PROBATE & DECEDENTS' ESTATES § 868 (1971)).

237. TEX. PROP. CODE ANN. § 41.001(a) (Vernon Supp. 2000).

238. See Act of March 1, 1875, 1875 Tex. Gen. Laws, §152 at 113.

239. See 1879 TEX. REV. STAT. art. 500, at 86.

240. 233 B.R. 375, 376 (Bankr. E.D. Tex. 1999).

241. Act of June 15, 1973, 1973 Tex. Gen. Laws 1627, ch. 588, § 2 (art. 3835) at 1628.

242. See Joseph W. M^cKnight, *Property Code Amendments*, 1985 STATE BAR [OF TEXAS] SECTION LETTER: FAMILY LAW 52, 53 (No. 2 1985); see also Joseph W. M^cKnight, *Texas Homestead Law*, 17 TEX. TECH L. REV. 1307, 1310 (1986).

243. *Peterson v. Stolz*, 269 S.W. 113, 115-16 (Tex. Civ. App.—Beaumont 1925, writ ref'd).

244. *Preston*, 233 B.R. at 377.

places based on the reasonable need of the bankrupt-debtor. Such a test was statutorily provided in 1985 for tools, implements, books, firearms, clothing (including jewelry), and athletic and sporting equipment but was repealed in 1991 because of the difficulty in fair application.²⁴⁵ Observing that the only relevant fact before the court was the debtor's failure to list a dependant, the court found no need for more than one burial plot and, instead, granted the debtor fifteen days to designate which "lot" she would claim.²⁴⁶ Thus, the court required the debtor to show a reasonable need for the number of burial lots claimed as exempt property. In some circumstances a single adult may reasonably need more than one burial plot (as yet unused). The statute should be amended to clarify this point.

F. SECURING LIABILITY ON A HOMESTEAD

The 1997 amendment to the Texas Constitution, article XVI, section 50 principally allows the fixing of a lien on a borrower's interest in homestead property for money borrowed for *any* purpose, a practice not previously allowed. The "home equity loan" was thus instituted along with changes in provisions for a contractor's and a mechanic's lien on a homestead. The facts underlying the dispute in *Rooms With a View, Inc. v. Private National Mortgage Association, Inc.*²⁴⁷ occurred after the amendment became effective. Homeowners contracted with a home-builder for homestead improvements, and a prospective lender indicated that it would approve a secured loan for the work to be done. The contract between the homeowners and the builder was signed at the office of American Title Services, an abstract company. The amended constitutional provision, however, required the contract for work on a homestead to be executed at (1) the lender's office, (2) an attorney's office, or (3) "a title company." Both the builder and the homeowners believed that American Title Services was "a title company,"²⁴⁸ but the lender thought otherwise and declined to close the loan on that ground. The builder sued the prospective lender seeking a declaratory judgment that the 1997 amendment was void on various constitutional grounds, some of them not considered as serious. The trial court granted the defendant's motion for summary judgment and the plaintiff appealed. The Austin Court of Appeals held that the amendment is not valid for vagueness with respect to the reference to "a title company" as a place where a loan under the amendment may be executed. Though the amendment lacks a definition of the term, the term is well-understood in Texas caselaw as referring to a title insurance company, often merely referred to as a title company. Courts, however, generally distinguish between a company so described

245. See Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 44 Sw. L.J. 1, 21-23 (1990); Joseph W. McKnight, *Texas Family Exemption Laws*, 21 TEX. TECH L. REV. 1121, 1145-46 (1990).

246. See *Preston*, 233 B.R. at 377.

247. 7 S.W.3d 840 (Tex. App.—Austin 1999, pet. denied), *petition for cert. filed*, No. 99-2048 (June 19, 2000).

248. TEX. CONST. art. XVI, § 50 (amended 1997).

and one that makes title abstractions, that is one that “compiles data, allowing an examiner to evaluate the title’s legal status. . . . A title insurer [however] guarantees the title’s status and insures owners against possible title defects.”²⁴⁹ The court noted that a bill passed at the same legislative session as the constitutional amendment, dealing with liens against homesteads, also defined the term “title company” as “a party insuring title to property.”²⁵⁰ The court concluded that the term means “a title insurer or an agent of a title insurer.”²⁵¹ The court also rejected the plaintiff’s strained argument that the amendment interferes with a corollary of a citizen’s right to travel, that is, the “right to remain home” or bring barred “from traveling to locations of their choosing, namely, contractors’ offices.”²⁵² The amendment, however, does not require that the contract be entered into at a particular place. Several alternatives are offered. The limited choices may seem absurd and without any necessary relationship to the transaction, but the purpose of that particular provision was evidently to discourage such transactions and indeed to discourage approval of the amendment itself. One must remember that the agreement was drawn under the very worst conditions: on the floor of the legislative chamber with additions being offered by opponents of the amendment who hoped that the voters would reject the cumulative mess. Regrettably, they did not do so.²⁵³ The plaintiff’s merely oratorical argument that the amendment’s provisions with respect to place of execution was excessively paternalistic was also rejected.²⁵⁴

The plaintiff in *Rooms With a View* also failed to convince the court that the provisions regarding execution violate the United States Constitution’s Commerce Clause and federal statutory law (the Truth in Lending Act and the Equal Credit Opportunity Act).²⁵⁵ The court also rejected the argument that the brief explanation of the proposed amendment on the general election ballot of 1997 was inadequate in that it failed to describe changes governing a mechanic’s lien.²⁵⁶ The court also noted that the plaintiff has failed to bring an election contest in this regard,²⁵⁷ but, in any event, the ballot description of the amendment met the standard set by prior decisions.

In *Spradlin v. Jim Walter Homes, Inc.*²⁵⁸ a homeowner asserted that the builder who had constructed a new home for the owner on his homestead property was entitled to a mechanic’s lien on charges for the builder’s work and materials because the builder’s contract did not comply with

249. *Rooms*, 7 S.W.3d at 846.

250. *Id.* at 846-47.

251. *Id.* at 847.

252. *Id.*

253. But if this scheme is to be a continuing part of our Constitution, a well-drawn provision to replace the current one is overdue.

254. *See Rooms*, 7 S.W.3d at 847-48.

255. *See id.* at 848-50.

256. *See id.* at 850-51.

257. *See id.* at 850 n. 13.

258. 9 S.W.3d 473, 474 (Tex. App.—Dallas 2000, pet. filed).

the provisions of article XVI, section 50(a)(5)(A) to (D) of the Texas Constitution.²⁵⁹ By applying the last antecedent doctrine of construction to the provisions of subsections (A) through (D) (which set out the formal requirements of the written contract) the court concluded that those subsections apply only to contracts for “work and material used to repair or renovate existing improvements” and not to contracts for “work and material used in constructing new improvements.” Looking to the meaning of “the language read as a whole” as that rule of construction requires, however, the two types of work and material joined in subsection (5) by the word “or” seem to be intended to be read together. Thus, the provisions of subsections (A) through (D) apply to both types of contracts.

In *In re Davis*²⁶⁰ the Fifth Circuit Court of Appeals, sitting *en banc*, resolved the long-smoldering effort of an ex-wife to enforce a non-dischargeable family-support obligation on the homestead of her bankrupt ex-husband and his present wife.²⁶¹ With three judges dissenting, the court found that neither the Bankruptcy Code nor the Texas turnover statute provides a means to enforce the obligation against the homestead.²⁶² The dissenting judges, on the other hand, concluded that a federal writ of execution for the prior support order would suffice as an enforcement device.²⁶³ If Congress should enact an amendment to the Bankruptcy Code whereby state homestead exemptions are eliminated and replaced by a uniform federal homestead exemption, further consideration of this question may be required.²⁶⁴

G. PERSONAL PROPERTY EXEMPTIONS

On the eve of their bankruptcy the debtor-couple whose case was before the Bankruptcy Court in *In re Coates*²⁶⁵ used non-exempt assets to

259. TEX. CONST. art. XVI, § 50:

(a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:

.....

(5) work and material used in constructing new improvements thereon, if contracted for in writing, or work and material used to repair or renovate existing improvements thereon if [certain formal requirements are met].

260. 170 F.3d 475 (5th Cir.), *cert. denied*, 120 S. Ct. 67 (1999).

261. See *In re Davis*, 170 B.R. 892 (Bankr. N.D. Tex. 1994) (decision by a divided panel), *discussed in* Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225, 1273 (1995); *In re Davis*, 188 B.R. 544 (Bankr. N. D. Tex. 1995), *discussed in* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 49 SMU L. REV. 1015, 1059-60 (1996); *In re Davis*, 105 F.3d 1017 (5th Cir. 1997), a decision by a divided panel of the court briefly discussed in Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 50 SMU L. REV. 1189, 1220-21 (1997).

262. See *Davis*, 170 F.3d at 483.

263. See *id.* at 493-94.

264. Current proposals with regard to uniformity in homestead exemptions seem to focus on a \$100,000 cap with a further proviso that it applies only to a homestead acquired within a specific time (*e.g.* 2 years) prior to bankruptcy filing. See Leslie A. Shames, *Calling a Fraud a Fraud: Why Congress Should Not Adopt a Uniform Cap on Homestead Exemptions*, 16 BANKR. DEV. J. 191, 200-01 (1999).

265. 242 B.R. 901 (Bankr. N.D. Tex. 2000).

discharge liens on their homestead and on exempt personalty. In response to their claims of Texas exemptions, their trustee in bankruptcy interposed the provisions of Property Code section 42.004(a)²⁶⁶ to assert a lien on that property in the amount of the liens discharged with non-exempt property in fraud of creditors. A denial of a discharge under Bankruptcy Code section 727²⁶⁷ for these alleged frauds, however, was not sought. The court merely concluded that the bankrupts used non-exempt funds with the intent to hinder and defraud their creditors as provided by section 42.004.²⁶⁸ Applying the statute to personalty only (as its terms require), the court allowed the exemption of the homestead despite the discharge of the lien,²⁶⁹ but granted the trustee a lien on the exempt personalty for the amount of the liens discharged on the non-exempt personalty.²⁷⁰

In *In re White*²⁷¹ the debtors claimed interest in certain computer software as exempt personalty ("tools of the trade") under Property Code section 42.002(a)(4).²⁷² In the business of computer programming, the debtors created and rented computer software to customers. Thus, the court concluded that the computer software in issue was a product and not a tool.²⁷³ As such it lacked exempt status under Texas law.

IV. DIVISION OF MARITAL PROPERTY ON DIVORCE

A. DIVORCE PROCEEDINGS

1. Jurisdiction

In *Reynolds v. Reynolds*²⁷⁴ the husband and wife lived in Texas from 1981 until they separated in 1993. The husband then moved to Colorado and then Vermont two years later. In the meantime, however, he sent his wife money both to make mortgage payments on their home and to pay for insurance on her car. The husband also continued to receive some mail at their Texas home until 1995. The mortgage on the home was foreclosed in 1996. The wife then brought suit for divorce in Texas. The husband, through a Rule 120(a) special appearance,²⁷⁵ contested the jurisdiction of the court to divide his military retirement benefits. Be-

266. TEX. PROP. CODE ANN. § 42.004(a) (Vernon Supp. 2000).

267. 11 U.S.C.A. § 727 (West 1993 & Supp. 2000).

268. See *Coates*, 242 B.R. at 905-06.

269. See *id.* at 906-07 (citing *In re Reed*, 12 B.R. 41 (Bankr. N.D. Tex. 1981)).

270. See *Coates*, 252 B.R. at 906.

271. 234 B.R. 388 (Bankr. W.D. Tex. 1999).

272. TEX. PROP. CODE ANN. § 42.002(a)(4) (Vernon Supp. 2000).

273. See *White*, 234 B.R. at 389 (citing *In re Erwin*, 199 B.R. 628, 630 (Bankr. S.D. Tex. 1996)). In *In re Legg*, 164 B.R. 69, 73 (Bankr. N.D. Tex. 1994), it is suggested that the term "trade" as used in the statute can refer to self-employment as it obviously does. While the debtors in *White* were employed by a business to which they licensed the use of the software they designed, they were apparently also independent contractors of sorts.

274. 2 S.W.3d 429 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

275. TEX. R. CIV. P. 120(a).

cause the husband waived his reliance on federal law²⁷⁶ by his failure to plead the issue at trial,²⁷⁷ and as the wife failed to bring her suit under Family Code section 6.305(1) within two years of the husband's departure from Texas,²⁷⁸ the only issue on appeal was whether the wife could rely on section 6.305(2) on general federal and Texas constitutional principles of personal jurisdiction.²⁷⁹ The husband did not question the court's power to grant a divorce or to divide the property generally. Offering no evidence to support his assertion, he merely argued that his appearance in the Texas court to defend division of his military retirement benefits would be excessively burdensome or inconvenient to him. The appellate court nevertheless concluded that the wife sufficiently proved the two elements of jurisdiction over nonresidents under section 6.305(2): (1) minimum contacts between the husband and Texas existed and (2) traditional notions of fair play and substantial justice were upheld.

In *Boots v. Lopez*²⁸⁰ the husband filed suit in Texas for divorce, division of property, and custody and support of an infant child. Within a month the wife filed a similar suit in Arizona, making a special appearance in the Texas case to contest the court's jurisdiction. Alleging that she and the child had lived in Arizona for over six months, she argued that the Arizona court had exclusive jurisdiction over custody issues.²⁸¹ The Houston Fourteenth District Court of Appeals upheld dismissal under the discretionary doctrine of *forum non conveniens* because the Arizona court had sole jurisdiction in the matter of custody, and property in Arizona required division. Reference to Arizona *realty*, if any existed would might be a significant factor in choosing the appropriate forum but personalty was not a significant factor when Texas maintained personal jurisdiction over both spouses.²⁸² Personal jurisdiction over the husband of the Arizona court for the purpose of property division and support issues was not discussed by the court.

2. Judge's Disqualification or Recusal

In *Peña v. Peña*²⁸³ the Corpus Christi appellate court provided a succinct explanation of the difference between the concepts of judicial disqualification and recusal with appropriate references to recent decisions and other literature.²⁸⁴ The wife alleged that the trial judge should have

276. Uniformed Services Former Spouses' Protection Act, 10 U.S.C.A. § 1408(c)(4) (West 1998). The federal provision preempts the minimum contacts basis of state-court jurisdiction.

277. See TEX. R. APP. P. 33.1(a).

278. TEX. FAM. CODE ANN. § 6.305(1) (Vernon 1998).

279. See *id.* at § 6.305(2).

280. 6 S.W.3d 292 (Tex. App.—Houston [14th Dist.] 1999, *pet. denied*).

281. See *id.* at 294.

282. See *id.*

283. 986 S.W.2d 696, 700 (Tex. App.—Corpus Christi 1998), *pet. denied*, 8 S.W.3d 639 (Tex. 1999).

284. See *In re Union Pac. Resources Co.*, 969 S.W.2d 427 (Tex. 1998); *Monroe v. Blackmon*, 946 S.W.2d 533 (Tex. App.—Corpus Christi 1997), *vacated*, 969 S.W.2d 427 (Tex. 1998); *McElwee v. McElwee*, 911 S.W.2d 182, 186 (Tex. App.—Houston [1st Dist.] 1995,

disqualified himself under the Texas Constitution²⁸⁵ and Rules of Civil Procedure²⁸⁶ because the attorney for the husband-father had a direct pecuniary or proprietary interest in the subject matter of the litigation by virtue of the fact that he represented the judge in an unrelated matter. Because no specific interest was shown or even argued, the wife lacked ground for disqualification. As to recusal, the wife's attorney waived objections by failing to urge the point before the trial court.

3. *Attorney's Disqualification*

In *In re Wallingford*²⁸⁷ the husband sought to disqualify the wife's attorney in a divorce proceeding because the husband's attorney divulged confidential information to a member of the wife's attorney's firm when consulting on the case with another attorney in that firm. The attorney allegedly receiving the information testified that he lacked recollection despite discussing various cases with the husband's attorney. Because the husband's attorney's statement to the contrary had not been given under oath, the Austin Court of Appeals held he thus failed to support his motion with specific evidence.²⁸⁸

4. *Right to Counsel*

In *Smith v. Smith*²⁸⁹ the husband discharged his counsel two weeks before the trial of his divorce case. After his motion for a continuance was overruled, he proceeded *pro se* with advisory counsel. After the first day of the two-day trial, however, the court forbade further advisory assistance of counsel. While the majority of the appellate court found no constitutional deprivation of counsel, Justice Hudson perceived that the husband's right to retain counsel under the Fifth and Fourteenth Amendments of the United States Constitution had been infringed.²⁹⁰

5. *Right to Trial by Jury*

In *In re Richards*²⁹¹ the Amarillo appellate court rejected the wife-respondent's argument that the district court had denied her right of trial by jury. Although she was clearly entitled to trial by jury by both the Texas Constitution²⁹² and statute,²⁹³ denial of a jury trial was proper

writ denied); William Wayne Kilgarlin and Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599 (1986).

285. TEX. CONST. art. V, § 11.

286. TEX. R. CIV. P. 18(a).

287. No. 03-99-00761-CV, 1999 WL 1186804 (Tex. App.—Austin, November 24, 1999) (not designated for publication).

288. See *id.* at *2 (citing *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997)).

289. 22 S.W.3d 140, 150-53 (majority opinion), 155-56 (concurrence by Hudson, J.) (Tex. App.—Houston [14th Dist.] 2000, no pet).

290. See *id.* at *17 (citing *Brotherhood of Railroad Trainmen v. Virginia*, 333 U.S. 1, 7 (1964)).

291. 991 S.W.2d 32 (Tex. App.—Amarillo 1999, pet. disms'd).

292. See TEX. CONST. art. I, § 15; art. V, § 10.

293. See TEX. FAM. CODE ANN. § 6.703 (Vernon 1998).

when she had chosen not to introduce any evidence to controvert her husband's testimony as to his ground for divorce. The only evidence before the court established the facts without controverting assertion in a situation warranting a directed verdict in the presence of a jury.²⁹⁴

At the 1999 legislative session, provisions were enacted for jury trial before associate judges²⁹⁵ and for the appointment of a visiting associate judge in the case of absence of an associate judge.²⁹⁶

6. Appointment of Receiver

In *Rusk v. Rusk*,²⁹⁷ during final arguments, the trial court had entertained a trial amendment to allow a request for the appointment²⁹⁸ of a receiver of community property. The appellate court held that allowing the amendment was improper in that it prejudicially reshaped the husband's conduct of the trial²⁹⁹ and the property of which the receiver took control was not community property but the husband's separate property.³⁰⁰ The appellate court was nonetheless divided on these points with one judge adhering closely to the trial court's position.³⁰¹

7. Statutory Pleading and Conduct of Trial

In two cases before the Family Court of Lubbock County and thereafter in the Amarillo Court of Appeals, the constitutionality of statutory pleading rules was addressed. In *In re Richards*,³⁰² the husband's petition for divorce alleged the ground of insupportability in the brief general terms of the statute.³⁰³ The wife excepted specially on the ground that further facts were necessary to prepare a proper defense. The judge overruled her exception saying that "there is no defense to a no fault divorce."³⁰⁴ The appellate court made it plain that the trial judge's

294. See *Richards*, 991 S.W.2d at 36-38.

295. See TEX. FAM. CODE ANN. §§ 201.001, 201.003-201.005 (Vernon Supp. 2000). See Stewart W. Gagnon, *The Last Great Family Law Legislative Update of the Millennium*, 62 TEX. B. J. 828, 831 (1999).

296. See TEX. FAM. CODE ANN. § 201.018 (Vernon Supp. 2000). See Gagnon, *supra* note 296, at 831.

297. 5 S.W.3d 299 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

298. See *id.* at 306.

299. See *id.* at 305-07 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 64.001 (Vernon 1997), and *Readhimer v. Readhimer*, 728 S.W.2d 872, 873 (Tex. App.—Houston [1st Dist.] 1987, no writ)).

300. With respect to a motion for a trial amendment during trial under TEX. R. CIV. P. 66, see *Weynand v. Weynand*, 990 S.W.2d 843, 847 (Tex. App.—Dallas 1999, pet. denied.). See also *Jenkins v. Jenkins*, 991 S.W.2d 440, 448-49 (Tex. App.—Fort Worth 1999, pet. denied).

301. See *Rusk*, 5 S.W.2d at 312-14 (relying on the argument of voluntary divestiture of title to separate property rejected in *Haggen v. Pemelton*, 836 S.W.2d 145, 146 (Tex. 1992)). Cf. Joseph W. McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L. J. 413, 446-47 (1976).

302. 991 S.W. 2d 32 (Tex. App.—Amarillo 1999, pet. dismiss'd).

303. See TEX. FAM. CODE ANN. § 6.001 (Vernon 1998).

304. *Richards*, 991 S.W.2d at 34.

comment was erroneous,³⁰⁵ but in response to the wife's further assertion that the provisions of section 6.402 and the consequent ruling on her special exception denied her equal protection of the laws, the appellate court concluded that the trial court's ruling was proper.³⁰⁶ Section 6.402(b) provides that a spouse in a divorce proceeding cannot except specially to the pleadings of the other spouse with respect to grounds for divorce stated in the general terms of the statute. The petitioner's burden of proof with respect to the facts necessary to establish insupportability as defined in the statute.³⁰⁷ She could have relied on discovery (as she actually did), but she did not request a hearing on any of her husband's objections thereto. To a motion for summary judgment adduced on the facts, she had thus failed to support the grounds asserted.³⁰⁸

In *In re Spiegel*³⁰⁹ the respondent-husband requested on constitutional grounds that the court enjoin the petitioner from invoking the provisions of both section 6.402(b) and section 6.008(a), abolishing the defense of recrimination. Following the hearing on the husband's motion, the court denied relief on each application by a separate order saying "the specific reason of the court's decision is: on record." The husband then filed a notice of appeal and designation of the clerk's record but expressly stated that he would not request a reporter's record.³¹⁰ Thus, the record before the appellate court lacked a reporter's transcription of the record. The appellate court therefore found nothing in the record explaining the trial court's ruling. Because constitutional arguments should be avoided if a dispute might be otherwise resolved, reliance was placed on other grounds.³¹¹ Those grounds should be deemed supported by the evidence in the absence of a contrary showing in the record. Here the appellate court deemed the trial court's holding supported by the evidence before it.³¹² The court also noted that the new rules on appellate procedure have not changed the law in this respect.³¹³

8. Notice of Final Hearing

In *Platt v. Platt*,³¹⁴ after the wife answered the husband's petition for divorce giving a new address, the court nevertheless sent her a notice of final hearing at the address at which she was originally served. The wife failed to appear at the hearing and the trial court entered a final decree.

305. See *id.* at 37 (citing *Cusack v. Cusack*, 491 S.W.2d 714, 716-17 (Tex. Civ. App.—Corpus Christi 1973, writ *dism'd.*)). See Joseph W. McKnight, *Commentary to Title of the Texas Family Code*, 21 TEX. TECH L. REV. 911, 988 (1990) (§ 3.53 is now TEX. FAM. CODE ANN. § 6.701 (Vernon 1998)).

306. See *id.* at 35-36.

307. See *Richards*, 991 S.W.2d at 37-38.

308. See *id.* at 36.

309. 6 S.W.3d 643 (Tex. App.—Amarillo 1999, no *pet.*).

310. See *id.* at 645.

311. See *id.*

312. See *id.* at 646 (citing *Bryant v. United Shortline, Inc.*, 972 S.W.2d 26, 31 (Tex. 1998)).

313. See *id.* at 646.

314. 991 S.W.2d 481 (Tex. App.—Tyler 1999, no *pet.*).

The wife filed a timely motion for a new trial, but the court failed to hear the motion until more than seventy-five days after entry of the judgment had elapsed. No further action was taken because her motion had been overruled by operation of law. After the wife filed a timely motion to vacate the judgment and to reconsider her motion for a new trial, the trial court overruled those motions within the time when it still had a plenary power over the matter. The Tyler Court of Appeals held that the presumption of receipt of the mailed notice of final hearing was rebutted by her affidavit of non-receipt.³¹⁵ The appellate court stated that the notice of final hearing was mailed to the wrong address,³¹⁶ that is, to an address different from that given by the respondent in her answer, and that the trial court's notice of final hearing failed to comply with Rule 245³¹⁷ in that it was mailed only a week before the day set for final hearing rather than forty-five days as required.³¹⁸

9. Prisoner's Rights To Be Heard

Two cases dealt with rights of prisoners as respondents in marital disputes. In *Zuniga v. Zuniga*³¹⁹ the husband who had been sued for divorce sought a bench warrant to order his appearance at the trial and appointment of counsel to assist him. Though the court was aware of the respondent's filing some sort of response, the court evidently overlooked his requests, granted a divorce to the wife, and provided for the husband a right of visitation with their child. Thereafter, the respondent again requested a right of appearance and appointment of counsel, followed by a notice of appeal in a form that was construed as a motion for a new trial.³²⁰ The majority of the court found the trial court remiss in failing to elicit any sort of testimony from the prisoner.

In *Dodd v. Dodd*³²¹ a woman brought suit against her alleged husband for a declaration that their bigamous marriage was void.³²² The respondent, who was then a prisoner, admitted that he had been married to another woman, that he had filed suit against his first wife for divorce prior to his marriage to the petitioner, and that his suit had been dismissed for want of prosecution after his marriage to the petitioner. He sought a bench warrant for his appearance at the hearing but his request was denied. Thereafter, the court declared the marriage void, awarded the petitioner a trailer home (principally paid for with her funds) to the petitioner, and awarded the rest of the property of both parties to the

315. See *id.* at 484. The appellant's affidavit was presumably filed with her motion for new trial but that fact is not noted in the opinion.

316. See *id.*

317. TEX. R. CIV. P. 245.

318. See *Platt*, 991 S.W.2d at 484.

319. 13 S.W.3d 798 (Tex. App.—San Antonio 1999, no pet.).

320. See *id.* at 802-03. Angelini, J., dissenting at 804-05, expressed the opinion that the prisoner's notice of appeal could not be construed as a motion for new trial under TEX. CIV. PRAC. & REM. CODE ANN. § 132.001 et seq. (Vernon 1997).

321. 17 S.W.3d 714 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

322. See TEX. FAM. CODE ANN. § 6.202 (Vernon 1998).

possessor. The respondent appealed. Again, the appellate court found that the trial court had committed error in not providing a means by which the prisoner could be heard. In this instance the respondent claimed that the trailer home was his separate property, and the petitioner evidently conceded that he had made some contribution to its purchase. But because the marriage was void, the court had no power to divide the accumulated assets equitably between the parties. Insofar as there were assets in which each party had a property interest, a partition should have been ordered.

B. MAKING THE DIVISION

1. Property Settlement Agreements

In reliance on section 7.006,³²³ divorce courts commonly urge parties to reach a settlement on the division of their property. Such settlement agreements may be in writing as provided by statute³²⁴ or entered into in open court and entered of record under Rule 11.³²⁵ Both parties must join in such an agreement and one may withdraw from it prior to judgment,³²⁶ but neither party may withdraw from the agreement effectively after judgment.³²⁷ Such an agreement in aid of divorce often takes the form of an agreed judgment, and though subject to reformation for mutual mistake,³²⁸ a unilateral mistake cannot be the basis for reformation.³²⁹

In *In re Murray*³³⁰ at trial the husband proposed in writing that realty acquired by him and his wife in equal shares prior to their marriage be awarded to the wife and that he be awarded a money judgment for the value of his share. The trial court thereupon awarded the property to the wife but did not comply with the husband's condition that he be awarded a compensatory money judgment. Thus, the Texarkana appellate court concluded that the husband could not be estopped by his agreement because it was conditional and the condition was not met.³³¹

In *Jenkins v. Jenkins*³³² a claim based on a property settlement agreement was considered in an unusual post-divorce context. As agreed in writing by the parties, the divorce decree of 1992 provided for contractual

323. TEX. FAM. CODE ANN. § 7.006 (Vernon 1998).

324. *See id.*

325. TEX. R. CIV. P. 11.

326. *See* TEX. FAM. CODE ANN. § 7.006(a) (Vernon 1998).

327. *See* Guyot v. Guyot, 3 S.W.3d 243 (Tex. App.—Fort Worth 1999, no pet.); Becker v. Becker, 997 S.W.2d 394, 395-96 (Tex. App.—Beaumont 1999, no pet.).

328. *See* Weynand v. Weynand, 990 S.W.2d 843, 846 (Tex. App.—Dallas 1999, pet. denied).

329. *See id.* *See also* Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153 (1999). The principal thesis of this study is that the process of entering into property settlement agreements should be very carefully scrutinized for duress.

330. 15 S.W.3d 202 (Tex. App.—Texarkana 2000, no pet.)

331. *See id.* at 206.

332. 991 S.W.2d 440 (Tex. App.—Fort Worth 1999, pet. denied).

alimony of \$2,000 a month to be paid by the husband over a period of twelve years, that is, a *specific* amount spread over a period of years. After the ex-husband failed to make payments under the decree, the ex-wife filed a voluntary petition in bankruptcy in 1993. In 1994 the ex-husband filed a motion to clarify and enforce the decree, and in 1995 the ex-wife's trustee in bankruptcy intervened in the ex-husband's proceeding in order to enforce the agreement for contracted alimony incorporated in the decree. The case came to trial in early 1998. The appellate court sustained the trial court's rejection of the ex-husband's argument that the trustee in bankruptcy lacked standing or capacity to sue for alimony payments other than those due within 180 days of the ex-wife's bankruptcy filing as only those were part of the bankruptcy estate. On this issue the appellate court held that the ex-husband had waived his objection because his motion was unverified under Rule 93.³³³ The court also rejected the ex-husband's argument that the trustee in bankruptcy was barred by the two-years statute of limitation from asserting a claim to any alimony payments due during the two years prior to his intervention under Family Code section 9.003(b).³³⁴ That provision, the appellate court held, is applicable to enforce a division of (undivided) future property not in existence at the time the divorce decree becomes final but not for non-payments of money under a divorce decree for which the payee may seek a money judgment for enforcement.³³⁵

2. Abuse of Discretion

It is rare that an appellate court will find that a trial court acted arbitrarily or unreasonably in the exercise of its good judgment in dividing property on divorce. This point is amply illustrated in *Frommer v. Frommer*,³³⁶ *Vandiver v. Vandiver*,³³⁷ and *Pletcher v. Goetz*.³³⁸

3. Findings of Fact and Conclusions of Law

The El Paso Court of Appeals took a different tack in *Roberts v. Roberts*.³³⁹ After having twice returned the case to the trial court for filing findings of fact and conclusions of law,³⁴⁰ the court finally reversed the division of property and remanded the case for redivision of the property.

333. See *id.* at 444-45 (citing TEX. R. CIV. P. 93(2)).

334. See *id.* at 445-46; TEX. FAM. CODE ANN. § 9.003(b) (Vernon 1998).

335. See *id.* (relying on *Bowden v. Knowlton*, 734 S.W.2d 206, 207-08 (Tex. App.-Houston [1st Dist.] 1987, no writ), and rejecting the holding in *Gonzales v. Gonzales*, 728 S.W.2d 446, 447 (Tex. App.-San Antonio 1987, no writ)).

336. 981 S.W.2d 811, 814-15 (Tex. App.-Houston [1st Dist.] 1998, pet. dismissed).

337. 4 S.W.3d 300, 305 (Tex. App.-Corpus Christi 1999, no pet.).

338. 9 S.W.3d 442, 446-47 (Tex. App.-Fort Worth 1999, pet. denied) (citing *Goetz v. Goetz*, 567 S.W.2d 892, 896 (Tex. Civ. App.-Dallas 1978, no writ) and *Mogford v. Mogford*, 616 S.W.2d 936, 944 (Tex. Civ. App.-San Antonio 1981, writ refused n.r.e.)).

339. 999 S.W.2d 424 (Tex. App.-El Paso 1999, no pet.).

340. See No. 08-97-00092-CV (Tex. App.-El Paso Jan. 8, 1998, no pet.); No. 08-97-00092-CV (Tex. App.-El Paso July 2, 1998, no pet.) (both opinions not designated for publication).

At the close of the trial the judge granted a divorce to the parties and divided the property in a manner seemingly in favor of the wife, who was also ordered to pay significant debts but the court made no findings of fact or conclusions of law, either as to the character of assets or their value. At that point the judge went out of office and her successor entered a decree purportedly prepared in accordance with her findings. The husband then filed his request for findings of fact and conclusions of law under Rule 296.³⁴¹ The new judge declined to do so in light of his not having heard the evidence and because some issues had been tried to a jury. On the husband's appeal, the judge was ordered to make findings and conclusions. Five weeks later the husband died. Thereafter the appellate court concluded that the husband's death did not render the appeal moot and extended the time for the trial judge to file his findings and conclusions. The judge again indicated his inability to make findings. The appellate court concluded that

the court must make findings on each material issue raised by the pleadings and evidence, but not on evidentiary issues. Findings are required only when they relate to ultimate or controlling issues. . . . Since jury findings as to both characterization and valuation of property are binding upon the trial court, findings of fact on those issues should be available in a bench trial. . . . [T]he trial court does not have to make findings listing the value of each item. Nor does it have to list the factors which were considered in dividing the property because the factors to be considered are not issues of fact to be determined by the trier of fact. . . . It is difficult for us to see just how a court of appeals can determine the fairness of the division without findings [made at the appellant's request] as to the values of the assets.³⁴²

The court went on to say that the failure of the trial court to file requested findings raises a presumption of harm unless the record demonstrates the contrary.³⁴³ Because the judge was unable to make the necessary findings, the case was reversed and remanded for a new division of the property. In its discussion of the problems involved, the court noted unsuccessful efforts of the Family Law Section of the State Bar of Texas to promote legislation requiring requested findings of fact and conclusions of law at the last two legislative sessions³⁴⁴ and the present state of the law under Rule 299a³⁴⁵ adopted in 1990.³⁴⁶

4. *Consequences of Mischaracterization*

In 1985 the Supreme Court of Texas, of which John Hill was then Chief

341. See TEX. R. CIV. PROC. 296.

342. *Roberts*, 999 S.W.2d at 434 (citations and footnotes omitted).

343. See *id.* at 436 (citing *Wagner v. Riske*, 142 Tex. 337, 442, 178 S.W.2d 117, 119 (1944)).

344. See *id.* at 435.

345. TEX. R. CIV. P. 299a.

346. See *Roberts*, 999 S.W.2d at 440-41.

Justice, laid down the rule in *Jacobs v. Jacobs*³⁴⁷ that if an appellate court finds that the trial court so mischaracterized marital property as to affect materially the court's division of property, the entire division must be remanded to the trial court in light of the appellate court's finding.³⁴⁸ If property is actually the separate property of one spouse and it is awarded to the other spouse or it is divided between the spouses (as it was in *Rusk v. Rusk*³⁴⁹ and *McCann v. McCann*³⁵⁰), the reason underlying the rule is readily apparent. But it is the function of the trial court, not the appellate court, to divide the community estate on divorce.³⁵¹ Thus, the process of remand inevitably entails further time and expense to the parties as a consequence of the divorce court's error, and the result can motivate the parties to compromise their dissatisfaction in the division to obviate that loss of time and expense. In several instances prior to the enunciation of the rule in *Jacobs*, appellate courts had merely let the division stand if the separate property (mischaracterized as community property) was actually divided in favor of its owner, but in those instances the trial court might have made a different decision if ownership of all the property had been properly ascertained. In *Vandiver v. Vandiver*³⁵² the Corpus Christi Court of Appeals, speaking through John Hill (retired and sitting by assignment), found a way to avoid remand in an instance of mischaracterization of approximately \$500,000 worth of the wife's separate property as community property when it was nonetheless awarded to the wife. In that instance, the trial court itself had stated that even if its questioned characterization of the property was erroneous, its award of the property was still "just and right" under the circumstances, that is, that whether the property was properly characterized as community property or as the wife's separate property, it would have been awarded to the wife. Because the trial court itself made this determination, the appellate court allowed the division to stand without remand.³⁵³ In *Evans v. Evans*³⁵⁴ where the trial court had mischaracterized community property as the husband's separate property and had awarded it to him (though he had not even claimed the property as his separate estate), a remand for redivision was nevertheless necessary.³⁵⁵

In *Licata v. Licata*³⁵⁶ the divorce court awarded the wife one-half of any fees received by her lawyer-husband on any pending cases referred to

347. 687 S.W.2d 731, 733 (Tex. 1985), discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, 40 Sw. L.J. 1, 38 (1986); Joseph W. McKnight, *Family Law: Husband and Wife*, 42 Sw. L.J. 1, 39-40 (1988).

348. See TEX. FAM. CODE ANN. § 7.001 (Vernon 1998).

349. 5 S.W.3d 299, 305 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

350. No. 14-97-01339-CV, 2000 WL 280301, at *2 (Tex. App.—Houston [14th Dist.] Mar. 16, 2000) (not designated for publication).

351. See TEX. FAM. CODE ANN. § 7.001 (Vernon 1998); McKnight v. McKnight, 534 S.W.2d 863, 866 (Tex. 1976).

352. 4 S.W.3d 300, 303-05 (Tex. App.—Corpus Christi 1999, no pet.).

353. See *id.* at 304-05.

354. 14 S.W.3d 343 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

355. See *id.* at 347.

356. 11 S.W.3d 269 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

another lawyer and thirty percent of fees recovered on any other of his pending cases up to a certain date that was about five months before the decree was signed. The husband asserted that the award from his cases included some of his future separate income because his rights to amounts received might be for services rendered by him in trials of cases after the date indicated. The appellate court agreed that the language of the decree could include post-divorce income, but the record failed to show that there were any actual pending cases.³⁵⁷ The court also said that because the husband challenged the award as an abuse of discretion, the trial court (in this non-jury case with no findings of fact and conclusion of law) had impliedly made all necessary findings in support of the judgment.³⁵⁸

5. *Temporary Alimony on Remand*

In *Herschberg v. Herschberg*³⁵⁹ the ex-wife sought continuing temporary support on remand after her successful appeal of the divorce court's property division, though the order granting the divorce was not appealed and the former husband had remarried and with his new wife had filed a petition in bankruptcy under Chapter 11. The bankruptcy court then ordered him to pay \$5,000 each month out of the former community estate to his former wife and had returned the matter to the divorce court for further proceedings. The divorce court thereupon awarded the ex-wife \$8,000 each month in temporary support and \$27,000 a month in attorney's fees. The ex-husband attacked both elements of the order by appeal and by a request for a writ of mandamus. The appellate court held that the order (as an interlocutory order) was not appealable but granted conditional relief by mandamus to vacate the order of the divorce court. The Corpus Christi appeals court concluded that the divorce decree was not final in that property of the couple had not been divided.³⁶⁰ Thus, the appeals court determined that the ruling sought by the ex-wife was for temporary support "until a final decree is entered" as provided in Family Code section 6.502³⁶¹ and as such was an interlocutory order, which is not appealable. The court nevertheless held that a writ of mandamus would lie.³⁶²

Paradoxically section 6.801³⁶³ nevertheless seems to imply that a divorce decree which is not subject to appeal is sufficiently final so that the

357. See *id.* at 278, citing TEX. R. APP. P. 8.1(h) (brief must contain citations to record to support contentions on appeal).

358. See *id.* at 279.

359. 994 S.W.2d 273 (Tex. App.—Corpus Christi 1999, no pet.).

360. See TEX. FAM. CODE ANN. § 6.502 (Vernon 1998); see also *Herschberg* at 277.

361. TEX. FAM. CODE ANN. § 6.502 (Vernon 1998). Subject to waiver, as provided in section 6.802, "neither party to a divorce may marry a third party before the 31st day after the date the divorce is decreed."

362. See *Herschberg*, 994 S.W.2d at 279.

363. TEX. FAM. CODE ANN. § 6.801 (Vernon 1998). See Joseph W. McKnight, *Commentary to Title 1 of the Texas Family Code*, 21 TEX. TECH L. REV. 911, 1029 (1990) (§3.66 was recodified as §6.801 in 1997).

parties are free to remarry someone else³⁶⁴ though property division is still before a court for determination.³⁶⁵ But that section may be subject to other interpretations.

C. AWARD OF ATTORNEY'S FEES

The divorce court ordinarily awards attorney's fees in the exercise of its good judgment as an integral part of the process of property division,³⁶⁶ though there are other reasons (such as providing necessities) that may also support the award.³⁶⁷

An award of attorney's fees on appeal is normally dependent on success of the appeal. In *Weynand v. Weynand*³⁶⁸ on the wife's appeal the appellate court remanded the case to the divorce court for division of property in accordance with the parties' agreement incident to divorce and the conclusions reached by the appellate court. On remand the trial court awarded the husband's counsel up to \$15,000 for pursuing further appeals of the matter. The wife then appealed this and other issues. With respect to the grant of prospective attorney's fees, the appellate court held that the grant of fees not conditioned on the success of the appeal was improper.³⁶⁹

In *Brown v. Fullenweider*³⁷⁰ the parties to a suit for divorce entered into an agreement incident to divorce in which the trial court ordered that the parties "shall do all necessary acts to carry out the provisions of the agreement."³⁷¹ The agreement provided that each party would be responsible for his or her own attorney's fees, and a schedule was attached to the agreement providing that the husband would pay "all outstanding attorney fees and fees for other professionals incurred by [him] in connection with this lawsuit."³⁷² Just over a year later a motion for enforcement or clarification by the ex-husband's attorney sought judgment for his fees and those of others employed in connection with the divorce. The trial court severed the attorney's claim from the divorce case and docketed it under a new number. The trial court nonetheless granted the attorney's motion for summary judgment for the fees claimed, and the ex-husband appealed. Justice Hill (retired, sitting by

364. See *Herschberg*, 994 S.W.2d at 276 (citing *Galbraith v. Galbraith*, 619 S.W.2d 238, 240 (Tex. Civ. App.—Texarkana 1981, no writ); *Underhill v. Underhill*, 614 S.W.2d 178, 181 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.)).

365. In *Dawson-Austin v. Austin*, 968 S.W.2d 319, 328 (Tex. 1998), the court allowed the divorce decree to stand but remanded matters of property division over which the court lacked jurisdiction in circumstances now more precisely defined by statute in 1997. See TEX. FAM. CODE ANN. § 6.308 (Vernon 1998).

366. See *Carle v. Carle*, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950).

367. See Joseph W. McKnight, *Family Law: Husband and Wife*, 52 SMU L. REV. 1143, 1186-87 n. 326 (1999).

368. 990 S.W.2d 843 (Tex. App.—Dallas 1999, pet. denied).

369. See *id.* at 847 (citing *Smith v. Smith*, 757 S.W.2d 422, 426 (Tex. App.—Dallas 1988, writ denied)).

370. 7 S.W.3d 333 (Tex. App.—Beaumont 1999, pet. filed).

371. *Id.* at 335.

372. *Id.*

assignment) spoke for the majority of the court in concluding that the attorney was a party to the divorce proceeding for the purpose of claiming his attorney's fees.³⁷³ The court's majority also held that fixing the uncertain amount of fees owed by the ex-husband under the divorce decree amounted to a clarification and enforcement rather than a modification of the division of property in the decree.³⁷⁴ It was apparently on the basis of this procedural posture of the case that Justice Stoner dissented on the ground that the attorney could not use this "vehicle to sue his *own client* for attorney's fees in the divorce suit—the very action in which he is representing the client."³⁷⁵

In *Jenkins v. Jenkins*³⁷⁶ the ex-husband (who had brought a post-divorce motion to clarify and enforce a divorce decree) complained on appeal that the trial court's award to the ex-wife for attorney's fees was improper because she did not prevail on any of her claims. Relying on Family Code section 9.014³⁷⁷ for the award of attorney's fees in cases for enforcement of a divorce decree, the Fort Worth Court of Appeals held that "the court must state in the record or in its judgment the good cause substantiating the award."³⁷⁸ In another post-divorce dispute (a case to divide property left undivided on divorce and to modify the decree) a different panel of the same court pointed out in *Pletcher v. Goetz*³⁷⁹ that although section 9.205 specifically provides for such awards in cases involving division of undivided property, the court's power does not extend to a motion to modify a divorce decree.³⁸⁰

D. BILL OF REVIEW

The grounds supporting an equitable bill of review are narrow and strictly construed,³⁸¹ and failure to file a notice for a mistrial or to take an appeal after judgment when such relief is available precludes the award of a bill of review.³⁸² In *Gone v. Gone*³⁸³ the ex-husband who had failed to respond to a petition for divorce in 1994, filed a petition for a bill of review of the decree in 1997 alleging fraud of his ex-wife in procuring the decree. The petitioner asserted that he was unaware of the decree when

373. See *id.* (citing *John M. Gillis, P.C. v. Wilbur*, 700 S.W.2d 734, 736 (Tex. App.—Dallas 1985, no writ)). For better support the court might have also cited *Mullinax, Wells, Mauzy & Collins*, 478 S.W.2d 121, 123 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

374. See *id.* at 334-36.

375. *Id.* at 337. Though uncited, an opinion of the Texas Ethics Commission supports this assertion in Op. Tex. Ethics Comm'n No. 2 (1974).

376. 991 S.W.2d 440 (Tex. App.—Fort Worth 1999, pet. denied).

377. TEX. FAM. CODE ANN. § 9.014 (Vernon 1998) ("The court may award reasonable attorney's fees as costs in a proceeding under this subchapter [for enforcement of a divorce decree]"). See also *Schneider v. Schneider*, 5 S.W.3d 925, 930, 932 (Tex. App.—Austin 1999, no pet.).

378. *Jenkins*, 991 S.W.2d at 450 (citing *Marichal v. Marichal*, 832 S.W.2d 797, 798 (Tex. App.—Houston [14th Dist.] 1992, no writ)).

379. 9 S.W.3d 442 (Tex. App.—Fort Worth 1999, pet. denied).

380. See *id.* at 448.

381. See *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979).

382. See *Williamson v. Williamson*, 986 S.W.2d 379 (Tex. App.—El Paso 1999, no pet.).

383. 993 S.W.2d 845 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

entered, that the couple were living together as husband and wife at the time, and that four months later the couple bought a house as husband and wife. He also alleged that he had not become aware of the decree until he was served with an order of eviction from the former marital home. The petitioner admitted that he had been served with a petition for divorce but had not answered because his wife had told him not to worry about divorce.³⁸⁴ The respondent testified that she had not counseled her husband about the divorce, that he was in and out of the house, that they fought a great deal, and that he drank heavily. The evidence offered by both parties was conflicting, but the trial court sitting without a jury found in favor of the ex-wife and concluded that the petitioner ex-husband had failed to show a meritorious defense to the divorce and was negligent in failing to file an answer.³⁸⁵ The appellate court sustained this conclusion, and the El Paso court responded similarly to another bill of review in *Williamson v. Williamson*.³⁸⁶ In the latter case the fraud complained of was misrepresentation of the character of known community property as separate property, a misrepresentation that constituted no more than intrinsic fraud and hence was an insufficient ground for a bill of review.

*Chandler v. Chandler*³⁸⁷ was the tenth instance of litigation between the same parties in a series of disputes in Texas and federal courts that have spanned almost twenty years. In the bill-of-review aspect of this case, the petitioner ex-husband had sought a bill of review in 1983 to set aside an agreed property settlement in a 1980 divorce and to redivide the property. The petitioner's ground for his proceeding was that his wife had fraudulently induced him to marry her while knowing that she was married to someone else. The court noted, however, that the petitioner had not sought a declaration that the marriage was void or that the decree of divorce was void.³⁸⁸ In 1990 the court entered an order stating that the petitioner had established a prima facie case of a meritorious defense to the divorce, and the trial on the merits proceeded to a jury trial in 1991. The jury found that the wife had not knowingly made a fraudulent misrepresentation of her marital status prior to their marriage; the court entered judgment against the petitioner and that judgment was affirmed on appeal.³⁸⁹ In 1994, however, the petitioner sought a declaratory judgment that the judgment in the bill of review litigation was void. In 1997 the court entered a judgment that the petitioner's assertion was

384. At this point the case is reminiscent of *Oliver v. Oliver*, 889 S.W.2d 271, 272, 274 (Tex. 1994).

385. See *Gone*, 993 S.W.2d at 847. Cf. *Ortmann v. Ortmann*, 999 S.W.2d 85 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (petitioner failed to show lack of negligence on his own part, though he was apparently the victim of his attorney's dishonesty).

386. 986 S.W.2d at 381.

387. 991 S.W.2d 367 (Tex. App.—El Paso 1999, pet. denied), *cert. denied*, ___ U.S. ___, 120 S. Ct. 1557 (2000).

388. See *id.* at 391.

389. *Chandler v. Chandler*, 842 S.W.2d 829 (Tex. App.—El Paso 1992, writ denied).

barred by the principle of *res judicata*.³⁹⁰ The El Paso Court of Appeals held that the petitioner had had an opportunity to declare his marriage void in his prior bill of review proceeding and had failed to do so. Thus, the court said, the bill of review had judgment become *res judicata* on that issue.

E. OTHER POST-DIVORCE CLAIMS

1. Jurisdiction

In *Ackerly v Ackerly*³⁹¹ the divorce court ordered the husband to turn over \$13,000 in a savings account to his wife. After his failure to obey the court order within two years, the ex-wife proceeded by motion in the same court under the same cause number and with notice to the ex-husband's last known address (but without citation of the ex-husband) to reduce that amount to a money judgment. The court granted the motion. After receiving a copy of the order, the ex-husband appealed on the ground of lack of service by citation. The appellate court held that a proceeding to reduce an order to a money judgment under Family Code section 9.010³⁹² and its predecessor (though the language of the former section was modestly different from that of the present section) is an original action, and the movant must proceed by service of citation.³⁹³ Without that process the judgment was void.³⁹⁴

2. Claim Barred by Limitation

The dispute in *Chavez v. Chavez*³⁹⁵ grew out of a property division on divorce in 1988. The divorce court divided certain shares of community stock (then pledged as a security for a loan) between the spouses. The court further ordered that the stock be sold after the loan (scheduled to mature in 1990) was repaid and that the wife should receive one-half of the proceeds. The husband, however, filed for bankruptcy after the divorce and was not discharged until 1994. He finally sold the stock in May, 1996 but failed to deliver one-half of the proceeds to the ex-wife. The ex-wife did not discover that the sale had occurred until April, 1997. She filed a motion for contempt against the ex-husband for violation of the order in October, 1998 and in February, 1999 filed a motion for enforcement. The court concluded that the wife had sought relief within the two years statute of limitation which had not begun to run until the wife discovered the facts in 1997.³⁹⁶

390. See *Chandler*, 991 S.W.2d at 378.

391. 13 S.W.3d 454 (Tex. App.—Corpus Christi 2000, no pet.).

392. TEX. FAM. CODE ANN. § 9.010 (Vernon 1998).

393. See TEX. FAM. CODE ANN. § 9.001(c) (Vernon 1998).

394. See *Ackerly*, 13 S.W.3d at 458.

395. 12 S.W.3d 563 (Tex. App.—San Antonio 1999, no pet.).

396. See *id.* at 565.

3. Pre-McCarty Military Retirement Benefits

In *McCarty v. McCarty*³⁹⁷ the United States Supreme Court held in 1981 that military retirement benefits were not subject to division in divorce cases. Congress responded in late 1982 (effective February 1, 1983) by providing that such benefits are divisible under state law. In response to the inclination of “some state courts [to be] less than faithful in their adherence to the spirit of the [1982 Act]”³⁹⁸ by which Congress put aside the authority of *McCarty* for division of military retirement benefits, Congress made it plain in 1990 that such benefits left undivided on divorce prior to the effective date of the *McCarty* decision are barred. Though in *Buys v. Buys*³⁹⁹ the court had found a residual provision in the decree which disposed of the benefits, the court concluded in *Havlen v. McDougall*⁴⁰⁰ that in pre-*McCarty* cases when the benefits were not divided, the Congressional act of 1990 is clearly applicable to preclude subsequent division. Thus the dissent of Walker, C.J. in *Walton v. Lee*⁴⁰¹ was vindicated.

4. Interpretation of Divorce Decrees

In *Cecola v. Ruley*⁴⁰² the husband and wife owned two adjacent tracts of land—a tract of eight acres and a narrow strip 40 feet wide and 280 feet long which connected the larger tract to a highway. Sometime during the divorce proceeding the husband placed a railway boxcar across the road through the narrow strip, and the road was thereby blocked. The divorce court found that the larger tract was community property and awarded it to the wife. The small, narrow tract was found to be a cotenancy of the husband and wife as the separate property of each. In the divorce decree the narrow co-owned tract was described as “the easement” because of its apparent use as a means of reaching the larger community tract from the highway. After the divorce the ex-wife sold the larger tract and her undivided interest in the smaller tract. The purchaser brought suit to determine that the narrow tract constituted a right of way to the larger tract. The court held that the reference to the narrow strip as “the easement” did not amount to a finding of a dominant-servient relationship between the two tracts that would benefit a subsequent purchaser of the ex-wife’s interest in the larger tract.⁴⁰³ “The court could not confirm the existence of [a relationship] that did not exist. The court also could not grant an express easement under [those] circumstances because of the merger doctrine [by which any right of way that *might* have existed

397. 453 U.S. 210, 232 (1981).

398. H.R. REP. NO. 665, at 6 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3005.

399. 924 S.W.2d 369, 375 (Tex. 1996), discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, 50 SMU L. REV. 1189, 1229-30 (1997).

400. 43 TEX. SUP. CT. J. 323, 2000 WL 19028 (Jan. 13, 2000).

401. 888 S.W.2d 604, 609 (Tex. App.—Beaumont 1994, writ denied), discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225, 1237-38 (1995).

402. 12 S.W.3d 848 (Tex. App.—Texarkana 2000, no pet.)

403. See *id.* at 852.

(though none was known to have existed) prior to acquisition by the spouses would have been lost as a result of ownership of both tracts by the same persons].”⁴⁰⁴ After the purchaser acquired an undivided half-interest in the strip, he had a right to use the *whole* of it along with his cotenant (the ex-husband) with the same right. The court went on to say that the burden of proof was upon the ex-husband, who favored partition by sale rather than partition in kind, to show that a partition in kind was not possible and would not be fair.⁴⁰⁵ The ex-husband was able to show that a partition in kind was economically “unfeasible and impractical”⁴⁰⁶ to him. The matter was therefore remanded to the trial court for further consideration of the partition sought.

Another interpretative dispute arose in *Milligan v. Niebuhr*⁴⁰⁷—in that instance the interpretation of a written contract of settlement on divorce.⁴⁰⁸ In 1983 the future husband had acquired the Orchard tract with the appurtenant right of way across Lot 13 to the riverfront tract also owned by the future husband. In 1991 the future wife acquired Lot 13 subject to a true easement in favor of the Orchard tract. In 1992 the two owners married. In their divorce in 1995 an agreed judgment was entered by which each tract was returned to its prior owner. Thereafter the former wife closed the way between the Orchard tract and the riverfront tract, and the former husband disputed her right to do so. The court concluded that the terms of the parties’ contract of settlement unambiguously expressed their intent: that the wife was awarded “any and all interest” in Lot 13 and the husband “is hereby divested of all right, title, interest, and claim in and to such property.” The husband was awarded “any and all interest” in the Orchard tract and the wife was “divested of all right, title, interest, and claim in and to” that property. There was no mention of the easement. The terms of the decree further negated any other agreements and specifically embraced the entire agreement of the parties.⁴⁰⁹ By their contract of settlement the husband therefore came away from the marriage with less separate property than he had brought into it.

5. Clarification and Enforcement

In *Zeolla v. Zeolla*⁴¹⁰ the court held that the decree might be clarified because it was incapable of being enforced by contempt.⁴¹¹ That it was not capable of such enforcement was certainly so, but the decree also made no provision for the disposition of community retirement benefits that were paid from the date of the ex-husband’s early retirement to his

404. *Id.*

405. *See id.* at 853-54.

406. *Id.* at 856.

407. 990 S.W.2d 823 (Tex. App.—Austin 1999, no pet.).

408. *See id.* at 825.

409. *See id.* at 825-26.

410. 15 S.W.3d 239 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

411. *See id.* at 241 (citing TEX. FAM. CODE ANN. § 9.008(b) (Vernon 1998)).

normal retirement date about eight years later. Rather than a motion to clarify, the ex-wife should have brought suit under the procedures provided in Family Code section 9.203.⁴¹² The husband and wife had agreed that the husband's community retirement benefits were payable to the wife "if retirement occurs at age 65" and the decree so provided. At the time the husband was 56. The ex-husband actually retired at age 57 and began receiving retirement benefits of a lesser amount but did not share them with his ex-wife. The ex-wife sought a clarification of the decree. The ex-husband responded that the prior order was specific enough to be enforced by contempt as provided in § 9.008(b)⁴¹³ and was therefore not subject to clarification. The trial and appellate courts, however, concluded that the ex-husband's taking early retirement had produced a latent ambiguity in the agreement which the court had the power to clarify and that the divorce court might thereupon adjust the terms of the decree to reflect the consequences of the husband's early retirement. The court also ordered that the ex-husband pay his ex-wife the benefits already received, though § 9.008(c) provides that "[t]he court may not give retroactive effect to a clarifying order." The appellate court concluded, however, that this provision relates only to enforcement for contempt and does not forbid such a clarifying order. The court's approach seems erroneous. Though the ex-husband's taking early retirement may have had the effect of depleting the fund from which his retirement benefits were to be paid, the agreement was fully capable of being complied with at age 65 and enforceable by contempt at that time. Thus, the ex-wife would seem to be estopped from arguing that she was entitled to a clarification of the decree so that she would receive benefits prior to the husband's projected retirement at age 65. At that time he was already required to pay the full amount specified in the decree. As for the undisposed retirement benefits received by the husband between age 57 and age 65, the wife's proper remedy was to proceed under section 9.203. If the ex-husband at age 65 would receive smaller benefits than those specified in the decree, the fixing of benefits to be paid prior to that time might take that fact into consideration.

The dispute in *Schneider v. Schneider*⁴¹⁴ occurred after the divorced couple had already modified their original divorce decree by agreement. At the time of the divorce the husband had retired from the Air Force. The divorce decree of 1994 had awarded the wife 31.9 percent of the husband's military disposable retired pay then being received by him and the same percentage of the benefits under his Armed Service Survivor's Benefit Plan. Apparently, under the rules of the plan the husband was precluded from naming anyone else as beneficiary of the plan-annuity other than the named ex-spouse, and the decree so stated. Under the divorce decree the wife was required to pay 31.9 percent of the monthly premium

412. TEX. FAM. CODE ANN. § 9.203 (Vernon 1998).

413. TEX. FAM. CODE ANN. § 9.008(b) (Vernon 1998).

414. 5 S.W.3d 925 (Tex. App.—Austin 1999, no pet.).

to maintain the plan. Following the federal statute to that effect⁴¹⁵ (the implication of which the parties were probably not cognizant at the time of the divorce), the Air Force refused to limit the ex-wife's share of the plan to 31.9 percent. The parties later perceived, however, that as long as the position of the Air Force remained unchanged, the ex-wife would take the whole of the plan-benefits if she survived the ex-husband. Thus, in 1995 the parties agreed to a modification of the divorce decree, and the modification was entered by the court. The modified order provided that the ex-wife would pay the entire monthly premium on the plan until such time as the Air Force recognized the 31.9 percent limit on her interest. The modified decree also provided that the ex-husband would supply the ex-wife with monthly evidence of the amounts deductible from his retired pay as proof of the amounts she would owe him. For a while the ex-wife reimbursed the ex-husband for the full amount of the premiums paid as agreed, but she later reduced the amount by 31.9 percent to reflect her view that she was entitled to a credit for the amount of the premium that had been deducted from her portion of the ex-husband's monthly retirement pay. The ex-husband regarded these transactions as made contrary to the modified decree (as they apparently were). In the meantime he had evidently remarried, and he brought a suit for clarification of the modified decree. In reliance upon Family Code section 9.011,⁴¹⁶ which seems designed to deal with somewhat different situations, the ex-husband sought to fix a constructive trust on the portion of the plan-benefits not covered by the divorce decree so that his new wife might share in those benefits. Sensing that the federal statute might control this issue by preemption, the trial court denied that motion though it did not express any opinion on federal preemption. The appellate court found no abuse of discretion in denial of the motion in light of the preemption concern and the fact that the Air Force might still accede to the terms of the decree to limit the ex-wife's interest in the plan-benefits to 31.9 percent.⁴¹⁷ In response to the ex-husband's motion requesting that the decree be clarified by an order that the ex-wife compensate the ex-husband for amounts she had deducted on her own initiative contrary to the terms of the modified order, the appellate court sustained the trial court's denial of the ex-husband's motion on the ground that the ex-wife was (as she argued) paying more than she should have agreed to pay,⁴¹⁸ but the

415. See 10 U.S.C.A. § 1448(b)(2)(B) (West 1998 & Supp. 2000).

416. TEX. FAM. CODE ANN. § 9.011 (Vernon 1998):

Right to Future Property

(a) The court may, by any remedy provided by this chapter, enforce an award of the right to receive installment payments or a lump-sum payment due on the maturation of an existing vested or nonvested right to be paid in the future.

(b) The subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner.

417. See *Schneider*, 5 S.W.3d at 929-30.

418. See *id.* at 930-31.

amount appeared to have been in accordance with the agreed modified decree. The trial court also denied the motion of each party for attorney's fees⁴¹⁹ in that neither party had prevailed with respect to affirmative relief sought. The ex-wife sought sanctions for the ex-husband's frivolous suit but failed to support her allegation.⁴²⁰

Sanctions were the central issue, however, in *Bradt v. Sebek*,⁴²¹ an attorney's appeal from imposition of sanctions against him in a suit in which he had represented an ex-husband who brought a suit against his ex-wife and her attorney in the aftermath of a divorce proceeding. Sanctions were imposed against the ex-husband as well as the attorney. Under the circumstances, which included filing groundless pleadings in bad faith for the purpose of harassment, the appellate court concluded that the sanctions imposed against the attorney were warranted.⁴²²

419. *See id.* at 930 (ex-husband's motion), 932 (ex-wife's motion).

420. *See id.* at 932.

421. 14 S.W.3d 756 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

422. *See id.* at 759; *see also Metzger v. Sebek*, 892 S.W.2d 20 (Tex. App.—Houston [1st Dist.] 1994, writ denied), *cert. denied*, 516 U.S. 868 (1995); *Bradt v. West*, 892 S.W.2d 56 (Tex. App.—Houston [1st Dist.] 1994, writ denied.).

