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Family Law: Husband and Wife

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FAMILY LAW: HUSBAND AND WIFE

Joseph W. McKnight*

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I. STATUS

A. PREPARATIONS FOR MARRIAGE

IN 1993 a man and woman agreed to marry and in contemplation of marriage they planned the purchase and renovation of a house. In order to purchase the house, the woman created a trust to supply the purchase price of the house with herself as trustee and beneficiary, and the man agreed to live in the house and supervise improvements at an hourly rate less a deduction for rent. The man was subsequently added as a settlor, trustee, and beneficiary of the trust. In 1995, however, the woman decided not to marry the man and sought to terminate their agreements concerning the purchase of the house. An amicable agreement could not be reached, and the woman hired attorneys to sue the man for breach of fiduciary duty and an accounting for funds expended. The man filed a counter claim against the woman and a suit against her attorneys for conspiring to defraud and to injure him otherwise. The court entered a summary judgment in favor of the woman and her attorneys. In response to the man's appeal, the appellate court held¹ that the attorneys' acts were within the context of adversarial representation of their client (the woman) and that they owed no duty to the man in that regard. "Even assuming [that their] actions went beyond the bounds of ethical behavior, the remedy is public, not private."² Hence, because the man had no cause of action against the attorneys, he could not maintain the claim for conspiracy.³

1. *White v. Bayless*, 32 S.W.3d 271, 276 (Tex. App.—San Antonio 2001, no pet.).

2. *Id.*

3. *Id.* at 276-77.

B. INFORMAL MARRIAGE

1. *Burden of Proof*

Though the language of former section 3.64⁴ was omitted from the Family Code in 1973, the provisions of section 6.701 (formerly section 3.53)⁵ made it plain that a petitioner for divorce nonetheless bears the burden of establishing an alleged ground for divorce and other material allegations even though the respondent has failed to file an answer or to appear at the trial.⁶ In *Osteen v. Osteen*,⁷ the wife had filed a petition for divorce asserting an informal marriage, and her alleged husband failed to file an answer or to appear at the trial. The court granted a divorce although the alleged wife⁸ presented no evidence to support her allegations of an informal marriage. Hence, the judgment was reversed on appeal and remanded to the trial court for further proceedings.⁹

2. *Elements of Proof*

The most curious aspect of *J.C. Penney Life Ins. Co. v. Heinrich*¹⁰ is the belief in the legal acceptance of bigamy, which some of the persons involved seemingly entertained. According to the facts related by the appellate court, a man and woman began living together in 1986. After their first child was born in 1987, they agreed to be married, introduced each other as husband and wife, and filed joint tax returns. They had another child the following year. In April 1993 after their cohabitation ceased, the man began living with another woman in March 1994. In April 1994 he sued the first woman for divorce, and she promptly responded with a counter-suit for divorce. While these suits were pending, the man bought a \$100,000 life insurance policy for the benefit of his "spouse, if living; otherwise equally to [their] then living lawful children"¹¹ He and the second woman had a child, and the man suddenly died in December 1994. The first woman promptly applied to the Social Security Administration for benefits as a widow. The second woman did likewise and also filed her claim for the insurance proceeds along with her proof of informal marriage. In reliance on this evidence, the insur-

4. 1969 TEX. GEN. LAWS 2707, ch. 888, § 1 at 2725 (\$3.64) repealed by 1973 TEX. GEN. LAWS 1596, ch. 577, § 23 at 1605.

5. TEX. FAM. CODE ANN. § 6.701 (Vernon 1998).

6. See *Harmon v. Harmon*, 879 S.W.2d 213 (Tex. App.—Houston [14th Dist.] 1994, writ denied), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225 1263-64 (1995); *Considine v. Considine*, 726 S.W.2d 253, 254 (Tex. App.—Austin 1987, no writ) (dictum). See also Joseph W. McKnight, *Commentary to the Title 1 of the Family Code*, 21 TEX. TECH. L. REV. 911, 988 (1990); Joseph W. McKnight, *Commentary to the Title 1 of the Family Code*, 5 TEX. TECH. L. REV. 281, 312 (1974).

7. 38 S.W.3d 809 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.).

8. The headnote writer describes her inaccurately as a "putative wife" and inaccurately describes her alleged husband as a "putative husband." *Id.* at 809-11. Those are terms of art.

9. *Id.* at 814-15.

10. 32 S.W.3d 280 (Tex. App.—San Antonio 2000, no pet.).

11. *Id.* at 283.

ance company paid the insurance proceeds to the second woman in February 1995. In the following month, the first woman made inquiry as to the policy and in May, made her claim for the insurance proceeds. The company then filed an action for a declaratory judgment that the first woman was not the decedent's widow, and the woman responded with a counter suit for a contrary declaration. Various sorts of alternative relief were sought by both parties, and the second woman was joined in the fray.¹² The trial court concluded that statutory prerequisites to proof of the first alleged informal marriage had not been met, and the first alleged wife appealed.

When the suit was filed in 1995, section 1.91 of the Family Code¹³ provided that as a prerequisite to proof of an asserted informal marriage, a proceeding asserting the marriage had to be commenced within one year of the terminated cohabitation of the parties. The appellate court held¹⁴ that the man's suit for divorce, filed within the time specified in the statute, satisfied the need for a timely reliance on the validity of the marriage by initiation of a proceeding, "as long as there has been no determination on the merits of the proceeding that no common law marriage existed"¹⁵

In another suit¹⁶ by a son to claim his father's entire intestate estate, a woman claiming to be the decedent's informal wife intervened. The son sought summary judgment based on the intervenor's deposition evidence that she had not informed the Social Security Administration of the alleged marriage, that the woman did not obtain health insurance coverage from her employer in favor of her alleged husband, that the alleged couple did not maintain a joint bank account, and that in the decedent's 1994 federal income tax return and his 1998 bankruptcy petition the father described himself as unmarried. The woman had also responded in her deposition that the decedent *had not married her formally* because he was so deeply in debt, and "he didn't want to ruin me."¹⁷ The court, thereupon, rendered summary judgment in favor of the son without considering the alleged wife's evidence of her informal marriage. On her appeal, the court in *In re Estate of Rodden*¹⁸ concluded that the woman's deposition testimony was insufficient as a matter of law to establish a judicial admission that the decedent had not married the claimant, whose presumably later (but timely-filed) response raised a fact issue as to the

12. *Id.* at 284.

13. TEX. FAM. CODE ANN. § 1.91 (Vernon Supp. 1995). The statute was later amended (effective Sept. 1 1995) to provide that if a proceeding is not commenced within two years of the date of separation there is a rebuttable presumption that the couple did not enter into an agreement to be married. TEX. FAM. CODE ANN. § 2.401 (Vernon 1998) (as amended in 1997) perpetuates this provision.

14. *J.C. Penney*, 32 S.W.3d at 287.

15. *Id.* at 288.

16. *In re Estate of Rodden*, No. 05-99-01229-CV, 2000 WL 567110 (Tex. App.—Dallas 2000, no pet.).

17. *Id.* at *3.

18. *Id.*

elements to establish an informal marriage.¹⁹

In *Eris v. Phares*²⁰ the determination of whether²¹ a couple had entered into an informal marriage turned, in large measure, on the way the issue was submitted to the jury: that the couple was married before January 30, 1997. The jury had answered affirmatively. On the date referred to, the man had already conveyed a house to the woman, and he asserted in his suit for divorce that the transfer should be set aside for fraud. Evidence of third persons, as well as the parties, was conflicting and ambiguous as to the couple's living together and holding themselves out as husband and wife. In denying the existence of the informal marriage prior to January 30 1997, the woman relied strongly on the language of the man's warranty deed (sworn before a notary public) that he conveyed the house to the woman, "a single person," on that date. Considering all the evidence, the Houston First District appellate court held that the evidence was factually insufficient to support the jury's verdict and remanded the case for a new trial.²²

C. STATE-EMPLOYMENT RESTRICTIONS

Section 32.054(a) of the Election Code²³ provides that "[a] person is ineligible to serve as an election judge . . . in an election if the person is . . . related within the second degree by . . . affinity . . . to an opposed candidate for a public office or the party office of county chair in the election." The wife of the county chairman of a political party had been appointed as an election judge. The party chairman was an *unopposed* candidate for reelection to that position. The local district attorney, with whom the Election Division in the Secretary of State's office disagreed, had concluded that the wife was prohibited from serving as judge and sought the opinion of the Attorney General. The Attorney General agreed with the latter view concluding that the Secretary of State's interpretation of the Election Code was reasonable and as such, it would ordinarily be deferred to by the Attorney General.²⁴ In this instance the interpretation was also appropriate by "[g]rammar and sense."²⁵ The statute's language of disqualification referred to a person related to an "opposed candidate," and the words "a public office" and "party office" were both objects of the preposition "for" defining the words "opposed candidate."

19. *Id.*

20. 39 S.W.3d 708 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

21. *Id.* at 715.

22. *Id.* at 715-16.

23. TEX. ELEC. CODE ANN. § 32.054(a) (Vernon Supp. 2001).

24. Op. Tex. Att'y Gen., No. JC-0330 at *5 (2001).

25. *Id.*

II. CHARACTERIZATION OF MARITAL PROPERTY

A. COMMUNITY PRESUMPTION

In *Dutton v. Dutton*²⁶ the husband and wife had received a conveyance of realty during their marriage from the wife's parents for an \$18,000 note of both spouses. The following year the grantors forgave the indebtedness. In their divorce proceeding the husband listed the property as community property in his sworn inventory. The wife claimed it as her separate property, asserting that her parents (who did not testify) so intended. The trial court concluded that the property was community property and awarded the whole of it to the wife but granted the husband a money judgment of \$40,000 at interest secured by the property, but the reason for fixing the lien on the property was apparently unexplained. In his appeal, the husband asserted a separate interest in the realty with a value of \$56,000 on acquisition. Thus, the husband seems to have argued that the forgiveness of the debt created a separate property interest in the land (which it did not). He also seemed to have asserted that the initial gift of property was of a value far in excess of the \$18,000 paid. Just how the trial court or the husband arrived at their values is not clear, but the values were not contested on appeal. The appellate court refrained from expressing an opinion on the husband's argument. In affirming the trial court's finding that the realty was community property, the appellate court relied on the husband's estoppel by his judicial admission in listing the property as part of the community estate in his sworn inventory.²⁷ Because the community presumption was not detracted from but was supported by the facts of acquisition (as apparently presented to the trial court), the conveyance met all the tests of a community purchase for value at \$18,000. The trial court was clearly correct in concluding that the realty was community property. Putting aside the asserted actual value of the realty when acquired as opposed to the apparent "selling price," the subsequent cancellation of the indebtedness did not affect the character of the property nor did it create a right of reimbursement in the husband's separate estate for the excused liability, because the separate and community liability for the debt were excused simultaneously.²⁸

Whereas in *Dutton* the force of the community presumption was enhanced by the separate property claimant's estoppel as well as the inception of title rule, at first glance in *In re Case*²⁹ the presumption might seem to be affected by statute. There the parties disputed the character of a certificate of deposit purchased with funds deposited by the husband in a bank account in the name of both spouses. That was evidently the

26. 18 S.W.3d 849 (Tex. App.—Eastland 2000, pet. denied).

27. *Id.* at 853-54 (citing *Griffin v. Superior Ins. Co.*, 161 Tex. 195, 201-02, 338 S.W.2d 415, 419 (Tex. 1960) and *United States Fid. & Guar. Co. v. Carr*, 242 S.W.2d 224, 229 (Tex. Civ. App.—San Antonio 1951, writ ref'd)).

28. For a discussion of other cases involving parental gifts to a spouse and assumption of parental indebtedness on the property given by the donees see Joseph W. McKnight, *Family Law: Husband and Wife*, 42 Sw. L.J. 1 18 (1988).

29. 28 S.W.3d 154 (Tex. App.—Texarkana 2000, no pet.).

only deposit in the account. The husband then withdrew the funds deposited to purchase the certificate of deposit. Though, standing alone, the community presumption would govern the character of the certificate, section 438 of the Probate Code³⁰ provides that “[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.”³¹ But Section 437 goes on to say that “a multiple party account created with community funds is subject to Article XVI, Section 15 of the Texas Constitution and will not in any way alter community property rights”³² because (as the court somewhat inexactly explained) “the gift presumption is not a community property right, but rather a separate property presumption.”³³

In *Case* the character of the marital residence was also in dispute. The property had been bought during marriage, and thus, it was presumed to be community property.³⁴ The cost of the house was \$63,000. The wife partially rebutted the community presumption by showing that \$43,000 of the purchase price was from the proceeds of sale of a house she had owned prior to marriage. There is some ambiguity in the court’s opinion in this regard,³⁵ but if those separate funds were indeed part of the purchase price, the wife owned a proportionate part of the family home as her separate property. On the other hand, if these funds had been used to discharge an indebtedness for the purchase price, she was merely entitled to reimbursement for the funds expended.

In *Kline v. Kline*³⁶ the husband did not contest the conclusion of the divorce court that vested stock options acquired from his employer were community property. Supported by the testimony of the employer’s payroll manager that the options to buy stock of the corporate employer were granted as an inducement of continued employment, he merely asserted that the unvested options were not community property and were thus indivisible by the divorce court. His witness was unable to explain, however, why the stock agreements themselves stated that all the options were granted in consideration of past services—an uncharacteristic abdication of self-interest on the part of the corporate management. Relying on the holding of the Texas Supreme Court in *Cearley v. Cearley*³⁷ that unvested military pension rights acquired during marriage are community property subject to division by a divorce court, the conclusion of the San Antonio Court of Appeals in *Bodin v. Bodin*³⁸ that unvested stock options acquired during marriage by an employee-spouse are of community character and similar holdings from other jurisdictions to the same ef-

30. TEX. PROB. CODE ANN. § 438 (Vernon 1980).

31. *Id.*

32. *Id.* § 437.

33. *Case*, 28 S.W.3d at 159.

34. *Id.* at 160.

35. *In re Case*, 28 S.W.3d 154, 161 (Tex. App.—Texarkana 2000, no pet.).

36. 17 S.W.3d 445 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

37. 544 S.W.2d 661 (Tex. 1976).

38. 955 S.W.2d 380 (Tex. App.—San Antonio 1997, no pet.).

fect,³⁹ the Houston appellate court reached the same conclusion.⁴⁰

B. REIMBURSEMENT

In *Case* the wife further asserted that she had spent \$20,000 of separate funds for community benefit but was unable to show the source of those funds and, thus, their separate character. But if she had been able to show that she had spent a determinable amount of separate funds for the benefit of the community estate, she would have demonstrated a reimbursement claim though she might not have been able to *trace* specific expenditures into existing community property.⁴¹ *Tracing* shows an ownership interest in particular property, which requires a more demanding standard of proof, though the court may not award a lien on any particular property for its discharge.

In discussing the wife's right to reimbursement, the court relied on the authority of *Norris v. Vaughan*⁴² but explained its reliance in a fresh manner: "[W]hen separate funds are expended for normal community living expenses, such as rent, food, etc., there is no right to reimbursement because these merely extinguish the obligation of each spouse to support the family."⁴³ Thus, the court seems to relate the holding (denying reimbursement in *Norris*) to the narrower necessities doctrine, rather than a broader principle of personal contractual obligation on which the Supreme Court seemed to rely. But however the outcome in *Norris* is described, payment for family support should ordinarily fall first on community property to the exoneration of separate property and thus create a right of reimbursement for separate property so used.⁴⁴ In *Case* the family home had already been sold and distribution of the proceeds was the only problem before the trial court for which remand was ordered.

In his suit for divorce underlying the wife's appeal in *In re Gill*,⁴⁵ the husband had asserted a community right of reimbursement for funds expended for the benefit of the wife's separate realty, which she brought into the marriage. The spouses had borrowed \$40,000 from a bank using the wife's property as collateral. They deposited the proceeds of the loan in a joint checking account, in which each also deposited earnings. The spouses used the account to pay family bills, the expenses of improving the wife's realty, and payment on their note. The trial court found that

39. *In re Hug*, 201 Cal. Rptr. 676 (1984); *Goodwyne v. Goodwyne*, 639 So.2d 1210 (La. Ct. App. 1994); *In re Short*, 890 P.2d 12 (Wash. 1995); *Garcia v. Mayer*, 920 P.2d 522 (N.M. Ct. App. 1996).

40. *Kline* 17 S.W.3d at 446-47.

41. See *Schmidt v. Huppmann*, 73 Tex. 112 11 S.W. 175 (Tex. 1889); *Horlock v. Horlock*, 533 S.W.2d 52, 57 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ *dism'd w.o.j.*).

42. 152 Tex. 491, 503, 260 S.W.2d 676, 683 (Tex. 1953).

43. *In re Case*, 28 S.W.3d 154 161 (Tex. App.—Texarkana 2000, no pet.).

44. See Joseph W. McKnight, *Family Law: Husband & Wife*, 43 Sw. L.J. 1 15 (1989). Exceptions to the principle enunciated in *Norris* have tended to multiply over the years. See Joseph W. McKnight, *Family Law: Husband & Wife*, 51 SMU L. REV. 1047 1049 (1998).

45. 41 S.W.3d 255 (Tex. App.—Waco 2001, no pet.).

the community estate was entitled to reimbursement for \$23,500 and that the wife should pay the remainder of the debt on the note. The husband asserted a community right of reimbursement for \$23,500 for community funds used to improve the wife's separate property and to make principal payments on their note which he seems to have argued were benefits to the wife's separate property because they reduced their lien thereon. The trial court also found that the wife's house at divorce was worth \$62,500, on the basis of evidence offered by the wife's appraiser. The husband testified that the value at divorce was \$70,000. The only evidence of the house's value at marriage was that it was initially insured for \$65,000. Thus, the amount of the reimbursement award based on appreciation in value was clearly erroneous. The judgment was reversed and the cause remanded.⁴⁶

C. MARITAL PARTITIONS AND AGREEMENTS

An estate plan that was submitted to the Internal Revenue Service⁴⁷ for a private letter ruling on federal-tax consequences of a proposed estate plan, illustrates the result of one sort of plan that may be prepared in reliance on the 1999 amendment to the Texas Constitution⁴⁸ allowing conversion of separate property to community property in addition to the existing power (achieved in 1980) to convert prospective community property to separate property. Although the ruling does not reveal the names or domicile of the taxpayers and states that it may not be used or cited as a precedent in other matters, the ruling may, nevertheless, provide some guidance as to the attitude of the federal Treasury Department.

The husband (aged 73) owned two individual retirement accounts (IRAs), both attributable to a rollover from the husband's employer-sponsored retirement plans under section 408 of the Internal Revenue Code.⁴⁹ Each account had a balance of somewhat over \$600,000. Evidently the couple had been married for some time, and the wife (aged 75) had several children by a previous marriage. The couple sought review of their estate plan, some of which had been executed. They entered into a marital agreement by which the husband's two retirement accounts (IRAs, containing the husband's separate property, as well as, some community property) were agreed to be wholly community property. The two IRAs were then partitioned as community property in equal separate shares for the husband and the wife. A further IRA, as yet unfunded, was created for the wife as her separate property ("spousal IRA of individual property"). The wife's spousal IRA named her children as primary beneficiaries with the husband as secondary beneficiary. The terms of her IRA also provided that the wife will direct the custodian to dis-

46. *Id.* at 259.

47. Priv. Ltr. Rul. 1999-37-055 (June 24 1999).

48. TEX. CONST. art. XVI, § 15 (amended 1999).

49. I.R.C. § 408 (2001).

tribute funds annually to her and her eldest child based on their joint life expectancies subject to the minimum-distribution-incident-death-benefit rules. The couple sought a ruling that a transfer of the wife's interest (emanating from the husband's two IRAs to the wife's spousal IRA) can be achieved without incurring a federal tax.

Because the inquiry was posed in relation to section 408, the Revenue Service so confined its ruling.⁵⁰ Although the deduction provisions of the Revenue Code⁵¹ allow a contribution to be made to an employee-husband's retirement plan even though his wife may own a community interest in that contribution under state law, that fact is seemingly irrelevant to the applicability of section 408 to the plan and does not abrogate state law. The Revenue Service, therefore, concluded that the wife may have had a community interest in the husband's two IRAs. Because the couple had converted the husband's separate property in the two IRAs to community property, that process does not constitute any distribution or transfer of assets.⁵² Nor does that process fail to meet the requirements of section 408(a),⁵³ so that the resulting changed quality of the property interests are for the exclusive benefit of each spouse. But the Revenue Service nonetheless concluded that a transfer of the wife's property interest in the husband's two IRAs to her spousal IRA would constitute a taxable distribution of assets.⁵⁴

III. CONTROL AND LIABILITY OF MARITAL PROPERTY

A. CONSTRUCTIVELY FRAUDULENT DISPOSITION

In *In re Hayden*⁵⁵ the husband had set up three trusts for his sons of his first marriage with a third person as trustee in 1983. He remarried in 1985. The husband died in 1996, and his will was admitted to probate and a personal representative was appointed. The beneficiaries of the trusts asserted misappropriation of trust funds and the probate court sitting with a jury rendered judgment in favor of the beneficiaries of the trusts who showed constructive fraud or misappropriation of the trust funds on the part of the decedent's widow. The widow appealed and thereafter, filed a Chapter 11 petition in bankruptcy. Despite the widow's pleas to the contrary, the bankruptcy court concluded that the claimants were not collaterally estopped from asserting their claim of embezzlement against the widow and that the misappropriated funds should be excepted from the bankruptcy discharge.⁵⁶

50. Rev. Proc. 99-4 1999-1 C.B. 115 124.

51. I.R.C. §§ 219-220 (2001).

52. *Id.* § 408(d)(1).

53. *Id.* § 408(a).

54. *Id.* § 408(d)(1).

55. 248 B.R. 519 (Bankr. N.D. Tex. 2000).

56. 11 U.S.C. § 523(a)(4) (2001).

B. ENFORCEMENT OF A JUDGMENT DEBT AGAINST PROPERTY
DIVIDED BY UNRECORDED DECREE OF DIVORCE

In 1955 a married couple had purchased a home and had taken title in both of their names. On their divorce in 1963, the couple's residence was awarded to the wife as her separate property, but the divorce decree was not recorded. A creditor had later taken a judgment against the former husband in April, 1980 and recorded it in May, 1980. On October 2 1980 the former wife sold the property to the plaintiffs who recorded the deed the following day. The ex-husband's judgment creditor then levied execution on the property, and the defendant bought the property at the sale and received a deed from the constable on October 20 1980. In 1996 the plaintiffs finally filed the divorce decree for record and then brought suit in trespass to try title as to the ex-husband's one-half interest in the land. At that point, the defendant had not paid any taxes on the property nor made any improvements on the property. The plaintiffs showed that the former husband had no interest in the land at the time of the constable's sale, but the defendant-purchaser asserted its rights based on its good faith reliance on the deed. But the deed was a quitclaim deed, merely reciting that it granted the ex-husband's interest. The Houston First Court of Appeals held in *Diversified, Inc. v. Hall*⁵⁷ that the defendant could not assert its standing as a bona fide purchaser because it claimed under a mere quitclaim deed. Has everyone forgotten about the Civil Practice and Remedies Code section 34.046 enacted in 1879 but not re-codified accurately in 1985?⁵⁸ Section 34.046 states that "[t]he purchaser of property sold under execution is considered to be an innocent purchaser without notice if the purchaser would have been considered an innocent purchaser without notice had the sale been made voluntarily and in person by the defendant [debtor]."⁵⁹

C. LIENS ON HOMESTEADS

Without alluding to the decision of the appellate court below to the same effect,⁶⁰ the Texas Supreme Court in *Spradlin v. Jim Walter Homes, Inc.*⁶¹ authoritatively interpreted the requirements of article XVI, section

57. 23 S.W.3d 403, 405 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

58. TEX. CIV. PRAC. & REM. CODE § 34.046 (Vernon 1997).

59. The codifiers of 1994 omitted the phrase "[purchaser] other than creditor," which omission should not be effective in that the codification was a non-substantive revision under the requirements of GOV'T CODE § 323.007 (Vernon 1998) and was not amended by either house of the legislature and was not subject to floor amendment in either legislative house when offered to the legislature. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278 (Tex. 1999), does not appear to cover this situation. See Steven R. Collins, *Continuing Statutory Revision—Where Did the Civil Practice and Remedies Code Come From?*, 50 TEX. B.J. 134 (1987). See also *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 139 (Tex. 1977).

60. *Spradlin v. Jim Walter Homes, Inc.*, 9 S.W.3d 473 (Tex. App.—Dallas 2000), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 53 SMU L. REV. 995 1032 (2000).

61. 34 S.W.3d 578 (Tex. 2000).

50(a)(5)(A) through (D) of the Constitution⁶² to apply to work and materials for renovation of existing improvements on a homestead but not for new improvements. After those provisions were added to the Constitution (effective January 1 1998), the homeowner entered into a mechanic lien contract with a builder to construct a new house on realty that the owner had evidently previously occupied as his homestead. Soon afterwards the owner notified the builder that he, the owner, did not regard a lien for the work and materials as having fixed on his property because the builder had not met the requirements of paragraphs (B) and (D) of section 50(a)(5).⁶³ The builder then filed suit for a declaratory judgment that his lien for the new improvements was valid in that the requirements of that section apply only to renovation of existing improvements. Employing the canon of construction that a qualifying phrase must be confined to the words or phrases immediately preceding it, the court pointed out that the provision of paragraphs (A) through (D) are immediately preceded by language referring only to renovation of existing improvements. Although the owner argued that in proposing the amendment of 1997, the Legislature could not have meant to omit the prior requirement of spousal joinder in contracting a valid lien for *any* improvement on homestead property and thus limiting the scope of section 50(a)(5), the court saw no reason to depart from reading the clear language of the amendment as proposed by the Legislature and adopted by the electorate.⁶⁴ The court pointedly stated that it had not considered whether the builder's lien fulfilled the requirements of Property Code section 53.254,⁶⁵ where the requirement of spousal joinder for a homestead improvement lien is preserved despite omission of that requirement in the 1997 constitutional amendment.

A further interpretation of the 1997 amendments to Article XVI, section 50 of the Texas Constitution⁶⁶ was provided by the Texas Supreme Court in a certified question from the federal Fifth Circuit Court of Appeals in *Stringer v. Cendant Mortgage Corp.*⁶⁷ In order to procure a home equity loan, borrowers were required by the lender to use a large portion of the loan to discharge loans from certain other creditors without liens on the homestead. Several months later the mortgagors sued the lender to refund the money so paid on the ground that the lender's requirement was invalid under the Constitution. The Texas Supreme Court was thus called on to interpret two seemingly unreconcilable provisions of the constitutional amendment, drafted in some measure on the floor of the Legislature. Section 50(a)(6)(Q)(i) provides that a home equity lender cannot require a borrower to apply loan proceeds "to repay another debt

62. TEX. CONST. art. XVI, § 50(a)(5) (amended 1997): quote indented (B) through (D).

63. *Id.*

64. *Spradlin*, 34 S.W.3d at 581.

65. TEX. PROP. CODE ANN. § 53.254 (Vernon Supp. 2001).

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

67. 23 S.W.3d 353 (Tex. 2000).

except a debt secured by the homestead or a debt to another lender.”⁶⁸ Section 50(g) provides that at least twelve days before the loan’s closing the lender must provide notice to the borrower that includes this language: “Loans described in Section 50(a)(6), Article XVI, of the Texas Constitution must not require [the homeowner-borrower] to apply the proceeds to another debt that is not secured by [the home] or to another debt to the same lender.”⁶⁹ Both appellate courts concluded that the provisions are irreconcilable.⁷⁰ The Texas Supreme Court reviewed the legislative history of the amendment and found nothing to resolve the conflict “other than speculation that the difference in the language [of the two provisions] arises from an oversight.”⁷¹ The court concluded that “section 50(a)(6)(Q)(i) provides the substantive rights of lenders and borrowers while section 50(g)(6)(Q)(1) provides the language for the mandatory notice to borrowers . . . therefore, we hold that section 50(g)’s notice provisions do not independently establish rights or obligations for the extension of credit.”⁷² The provisions of the former accordingly prevail over the latter.⁷³ Recognizing the continuing misleading propensity that the provision has, the court went on to recommend a further notice provision that may be included in transactions to explain conflict and thus to avoid confusion.⁷⁴ Thus, the court concluded that a home-equity lender may require a borrower to use loan proceeds to pay a third person a debt not secured by the homestead.⁷⁵

Having had its conclusion sustained by the United States Supreme Court (but by way of a different analysis), a Fifth Circuit panel in *In re Bartee*⁷⁶ in turn analyzed the high court’s affirmance in the Chapter 13 lien-stripping case,⁷⁷ *Nobleman v. Am. Savs. Bank*:⁷⁸ “The Supreme Court rejected our reasoning that § 506(a) was rendered a nullity by § 1322(b)(2), but nevertheless, agreed with the end result—namely that § 1322(b)(2)’s antimodification provision protected the entire mortgage [on the debtor’s residence].”⁷⁹ In *Nobleman* the debtor-couple had submitted a Chapter 13 plan that valued their residence at \$23,500 though it was encumbered with a mortgage of \$65,250. They proposed to pay only the amount of the secured by the value of the property and to treat the rest as an unsecured claim for which the mortgagee would receive nothing. Both the Fifth Circuit Court and the United States Supreme Court

68. TEX. CONST. art. XVI, § 50(a)(6)(Q)(i).

69. *Id.* at § 50(g)(P)(1).

70. *Stringer*, 23 S.W.3d at 355 (citing *Stringer v. Cendant Mortgage Corp.* 199 F.3d 190 192 (5th Cir. 1999)); *Id.* at 356.

71. *Id.*

72. *Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353, 356 (Tex. 2000).

73. *Id.* at 357.

74. *Id.* at 357-58.

75. *Id.* at 358.

76. *In re Bartee*, 212 F.3d 277, 286 (5th Cir. 2000).

77. *Nobleman v. Am. Savs. Bank*, 508 U.S. 324 (1993); noted in Joseph W. McKnight, *Family Law, Husband and Wife*, 47 SMU L. REV. 1161 1179-80 (1994).

78. 508 U.S. 324 (1993).

79. *Bartee*, 212 F.3d at 286.

held that the entire mortgage in the home was protected from discharge. In *Bartee*⁸⁰ the debtor's home was valued at \$87,000 and there were two liens against it, the first held by a bank for \$88,840 and the second by a homeowners' association for a maintenance assessment of \$1,096. The debtor's Chapter 13 plan called for treating the homeowners' association's entire claim as unsecured, and thus as an unsecured claimant the association would receive nothing but it would retain its lien. The association objected to the plan and the bankruptcy court denied confirmation of the plan. The district court affirmed that ruling. On the debtor's appeal to the Fifth Circuit, the court undertook to apply the Supreme Court's "ambiguous"⁸¹ decision in *Nobleman* and at the outset perceived⁸² that the argument of the association was much like its own in *Nobleman*.⁸³ Just as a split in authority among the federal circuits prompted the United States Supreme Court's decision in *Nobleman*, different views have now developed in interpreting its resolution. Aligning itself with the position taken by the Third Circuit court⁸⁴ and the Bankruptcy Appeals Panel of the Ninth Circuit,⁸⁵ the Fifth Circuit panel concluded that a wholly unsecured lien of the association is not subject to the anti-modification clause in section 1322(b)(2).⁸⁶ This view, the court said, not only comports with the language of the statute and its legislative history but also serves sound public policy.⁸⁷ In response to the association's further argument that the association's annual maintenance assessment might be fitted into section 1322(c)(2), the court rightly rejected the fit as "thoroughly unpersuasive."⁸⁸

IV. DIVISION OF MARITAL PROPERTY ON DIVORCE

A. DIVORCE PROCEEDINGS

1. Request for Admissions

In *Steffan v. Steffan*⁸⁹ the husband was served with a petition for divorce and appeared at a hearing for temporary orders without counsel but failed to file an answer. Eight months later the wife served him with a request for admissions. Although on their face the requests indicated the consequences for failure to respond, the husband received the requests and did not answer them. Consequently thirty days after receipt the requests were deemed admitted as a matter of law.⁹⁰ Thereafter the

80. *Id.*

81. *Id.* at 285. See also *id.* at 290.

82. *In re Bartee*, 212 F.3d 277, 286 n.12 (5th Cir. 2000).

83. *Id.* at 285-86, 288-89.

84. *In re McDonald*, 205 F.3d 606 (3d Cir. 2000).

85. *In re Lam*, 211 B.R. 36 (B.A.P. 9th Cir. 2000).

86. *Bartee*, 212 F.3d at 288-96.

87. *Id.* at 289-95. For its policy arguments particular reliance is put on Jane Kaufman Winn, *Lien Stripping After Nobleman*, 27 LOY. L. REV. 541 (1994).

88. *In re Bartee*, 212 F.3d 277, 295 (5th Cir. 2000).

89. 29 S.W.3d 627 (Tex.App.—Houston [14th Dist.] 2000, no writ).

90. TEX. R. CIV. PROC. 169.

wife had a hearing on her petition for divorce, and a property division was awarded by the court. The husband then retained counsel and filed a motion for a new trial, which was granted. In the new trial the husband responded to further discovery requests, but the court denied withdrawal of the prior admissions and precluded the husband from offering any evidence contrary to those admissions and entered a final decree of divorce. On the husband's appeal the Houston appellate court was unable to find any merit in the husband's arguments based on his lack of counsel, his lack of knowledge of the law, or his failure to answer his wife's petition as somehow precluding his being subject to a request for admissions. Nor did the court find any abuse of discretion in the trial court's denial of his request to withdraw his admissions.⁹¹

2. *Notice of Witnesses*

In *Elliott v. Elliott*⁹² the ex-wife filed a bill of review to set aside a decree of divorce approving a property settlement agreement entered into almost four years before. At her hearing the petitioner had sought to introduce medical records and affidavits of mental health-care providers to show her mental condition at the time the settlement agreement was reached. The trial court sustained the respondent's objection to opinion evidence on the ground that the petitioner had failed to identify her health-care providers as experts. The petitioner had, however, identified her health-care providers in response to an interrogatory asking the identity of persons from whom she had received health care but had failed to do so in response to an interrogatory specifically directed to the identity of her health-care experts.⁹³ In light of the petitioner's pleadings, which put her mental condition in issue, and her identification of all those who had rendered health-care who were later called to testify, the appellate court concluded that the trial court had abused its discretion in excluding her witnesses' testimony,⁹⁴ but the court also concluded that the error was harmless in view of the fact that the petitioner had failed to meet the first prerequisite for a bill of review.⁹⁵

3. *Severance of Claims in Divorce Proceedings*

A claim may be properly severed only if the controversy involves more than one cause of action so that the severed claim is one that would be the proper subject of an independent suit not so interwoven with the remaining action that they involve the same issues and facts.⁹⁶ Thus, the operation of a motion for severance of an independent cause of action in a divorce proceeding is now limited by the conclusion of the Texas Su-

91. *Steffan*, 29 S.W.3d at 630-31.

92. 21 S.W.3d 913 (Tex.App.—Fort Worth 2000, no pet.).

93. *Id.* at 921.

94. *Id.* (citing TEX. R. CIV. PROC. 193.6(a)(2)).

95. *Id.*

96. TEX. R. CIV. PROC. 41.

preme Court in *Schlueter v. Schlueter*⁹⁷ that an assertion of fraud by one spouse against another does not constitute an independent cause of action, at least when not supported by particularly egregious facts,⁹⁸ and even then its facts and resolution are so likely to be essential to the division of property on divorce that severance is necessarily precluded.⁹⁹ In *In re Burgett*¹⁰⁰ the Texarkana Court of Appeals entertained a mandamus proceeding to vacate a severance order and to consolidate several fraud claims involving third parties in a divorce proceeding. In that instance the wife had sued the husband for divorce and had joined an action against a corporation owned by both spouses and other individuals and another corporation alleging fraud, conspiracy and breach of fiduciary obligations in dissipating the community estate. In granting the relief sought the court said:

[I]n order to determine the nature, extent, and value of the community property and make a proper division of it, the disputed claims to ownership of certain alleged community assets and the value of those assets, as well as the allegations of conspiracy to dissipate or divert community assets, must be explored and determined. Moreover, if in the divorce action [the wife] establishes her ownership in some of the disputed assets, that adjudication will not bind third parties who claim to own an interest in those assets if their claims are determined in a later separate suit . . . [The wife's] rights may be jeopardized and judicial economy may be compromised if the third-party claims are not tried with, or before, the divorce action.¹⁰¹

4. Right to Trial by Jury

In *Crittenden v. Crittenden*¹⁰² the wife's filing suit for divorce was promptly followed by the husband's suit, the trial date was continued on the wife's motion, agreed temporary orders were entered, and the case was set for trial. A successful mediation followed, including the signing of a settlement agreement by both parties. But when the wife refused to sign an agreed judgment, the husband set the case for trial on the non-

97. 975 S.W.2d 584, 586-88 (Tex. 1998).

98. See discussion of such circumstances in Joseph W. McKnight, *Family Law: Husband and Wife*, 53 SMU L. REV. 995 1002-05 (2000).

99. Thus, severance such as occurred in the *Teas* cases should not occur today. *Teas v. Teas*, 469 S.W.2d 918 (Tex. Civ. App.—Waco 1971, no writ); *Teas v. Republic Nat'l Bank*, 460 S.W.2d 233 (Tex. Civ. App.—Dallas 1970, no writ).

100. 23 S.W.3d 124 126 (Tex. App.—Texarkana 2000, no pet.).

101. *Id.* at 127.

102. 2001 WL 357118 (Tex. App.—San Antonio Apr. 11, 2001, no pet.). In the companion report, *Crittenden v. Crittenden*, No. 99-0690-CV 2001 WL 356993 (Tex. App.—San Antonio Apr. 11, 2001), no pet.), the court responded to the wife's argument that her freedom of contract had been violated by this Texas no fault divorce statute, TEX. FAM. CODE ANN. § 6.001 (Vernon 1998). The court pointed out that marriage is a status created by mutual consent and thus is not merely a contract. It is more accurate to say that marriage arises out of a contract that creates a status. To say that marriage is only one or the other is therefore meaningless. Furthermore, the legislature has the power to lay down rules as to which agreements constitute enforceable contracts. In this instance the wife had argued that she and her husband had made a contract to be married for 50 years. Clearly all the ramifications of such an agreement (if made) are not enforceable.

jury docket. After the trial date was reset three more times, the wife filed a nonsuit. The court signed the order of nonsuit but noted that the husband's suit and settlement agreement were still pending. Eight days later the wife requested a jury trial. The husband objected to the wife's request on the grounds that the trial had been continued numerous times at the wife's request, that a settlement had been agreed to, that no jury setting was available for six months, and that the request was made solely for the purpose of delay. At the pretrial hearing on the day of trial, the court denied the wife's motion for continuance and for a jury trial. After an evidentiary hearing, the court granted the husband a divorce and entered the decree in accordance with the settlement agreement. The wife appealed on the ground, among others, of her being denied a jury trial. The appellate court concluded that because the jury request had been made in writing within a reasonable time before the trial setting and not less than thirty days before the actual trial date, the request was presumptively timely¹⁰³ within Rule 216(a).¹⁰⁴ But under the circumstances, the appellate court said the request was not timely filed under the exceptions to the Rule, presumably on the ground that the jury trial would disrupt the court's docket or impede the court's business.

5. *Availability of Mandamus to Reinstate a Counter-Suit*

Following a court-approved mediated settlement but before entry of judgment the wife in *In re Kasschau*¹⁰⁵ took a non-suit of her suit for divorce. Unaware of the non-suit the husband filed a counter-suit for divorce. On discovering the state of things, the husband sought a writ of mandamus to order the trial court to reinstate his counter-suit. Because Rule 162¹⁰⁶ provides a party an unqualified right to take a non-suit before she introduces all her evidence and in the absence of any claim by the opposing party for affirmative relief and also because the husband was unable to show any exceptional circumstances why the remedy of appeal was inadequate, the Houston Fourteenth District Court of Appeals declined to address the trial court's unwillingness to consider the husband's counter-suit for divorce.¹⁰⁷

6. *Denial of Mandamus for Refusal to Enter Judgment on a Mediated Settlement Agreement*

The trial court in *Kasschau*¹⁰⁸ had also declined to enter judgment on the parties' mediated settlement agreement, which the court had approved prior to the wife's non-suit. The appellate court concluded that although the subject matter of the request was proper for a writ of man-

103. *Crittenden*, 2001 WL 357118 at *1.

104. TEX. R. CIV. P. 216(a).

105. 11 S.W.3d 305 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

106. TEX. R. CIV. P. 162.

107. *Kasschau* 11 S.W.3d at 309-10.

108. *Id.* at 310-11.

damus in the performance of a merely ministerial act by the trial court,¹⁰⁹ the trial judge did not violate his ministerial duty in light of the facts of the case. The issue was not whether the wife could revoke her consent, and the trial court had held that the non-suit did not have that effect. The issue was whether the settlement agreement was valid and enforceable. The approval of a settlement does not necessarily constitute the court's willingness to render judgment in the absence of an intention to achieve that result.¹¹⁰ The settlement agreement expressly contemplated contingencies relating to the intervention of the wife's alleged paramour. The appellate court seems to say that by approving the settlement agreement the trial court had merely approved it conditionally on the basis of contingencies it contained. But before those contingencies occurred, the trial court had realized that the settlement agreement called for the performance of an illegal act in relation to evidence under the wire-tap statutes¹¹¹ and was therefore invalid.¹¹² Although the husband argued that his wife was estopped from questioning the validity of the agreement because she had accepted a cash payment of \$1,000 under its terms, the appellate court responded that a void contract cannot be rendered enforceable by estoppel.¹¹³

7. Notice of Trial

In *In re Parker*¹¹⁴ the wife petitioned for divorce. Her husband filed an answer and requested a jury trial. The wife's attorney testified that notice of the trial setting had been sent nineteen days before the date set for trial. On receipt of that notice fourteen days before the setting, by letter to the court-administrator the husband requested clarification of the actual setting, if any. The court-administrator did not respond. On the day set for trial the husband did not appear, but the court went forward and entered a post-answer default judgment, granting the divorce and dividing the property. Thereafter, the husband took all appropriate steps to perfect his appeal. After carefully analyzing Rule 245,¹¹⁵ the Texas Supreme Court's decisions in *Craddock v. Sunshine Bus Lines, Inc.*,¹¹⁶ *Lopez v. Lopez*,¹¹⁷ *Director, State Employees Workers' Comp. Div. v.*

109. TEX. FAM. CODE ANN. § 153.0071(d) (Vernon 1998). See *Alvarez v. Reiser*, 958 S.W.2d 232, 234 (Tex. App.—Eastland 1997, writ denied), a very similar case.

110. *Kasschau* 11 S.W.3d at 311 (citing *S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 857-58 (Tex. 1995)).

111. TEX. PEN. CODE ANN. § 16.02(b)(1) (Vernon 1994); TEX. PEN. CODE ANN. § 37.09(d)(1) (Vernon Supp. 1999).

112. This analysis seems to comport to what the same court said of the *Kasschau* decision in *Cayan v. Cayan*, 38 S.W.3d 161 166 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

113. *In re Kasschan*, 11 S.W.3d 305, 314 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing *Reyes v. Storage & Processors, Inc.*, 995 S.W.2d 722, 725 n.3 (Tex. App.—San Antonio 1999, pet. denied) 11 S.W.3d 305, 314 (Tex. App. Houston [14th Dist.] 2000, no pet.).

114. 20 S.W.3d 812 (Tex. App.—Texarkana 2000, no pet.).

115. TEX. R. CIV. P. 245.

116. 134 Tex. 388, 393 133 S.W.2d 124 126 (1939).

117. 757 S.W.2d 721, 722 (Tex. 1988).

Evans,¹¹⁸ and other decisions of the intermediate appellate courts, the Texarkana Court of Appeals concluded that “when a defendant receives actual or constructive notice sufficient to comport with the requirements of due process [as was the case here], but [has] less than [the 45 days’ notice] required by Rule 245, a reviewing court must apply the first prong of the *Craddock* test [excusing the defendant when his default was not intentional or due to conscious indifference but to a mistake or accident] to determine whether the defendant is entitled to a new trial.”¹¹⁹ In light of the husband’s contention that he was under the impression that he would receive 45 days’ notice required by Rule 245, the court concluded that his letter to the court-administrator and “his reasonable belief that he would receive [the proper] notice . . . negates a finding of intentional conduct or conscious indifference.”¹²⁰

In *Blanco v. Bolanos*,¹²¹ in which it was not certain that the respondent-wife received any notice of the trial setting, the El Paso Court of Appeals had held a week before the decision was rendered in *Parker* that the wife was entitled to a new trial, even though her attorney in Hawaii (where she then was) had received a facsimile notice fifteen days before the hearing and was thus in compliance with Rule 21a¹²² but not with Rule 245.¹²³

8. *Conduct of Trial: Replacement of Juror*

In *Schlafly v. Schlafly*¹²⁴ the husband argued on appeal that he had been denied his right of trial by jury because the trial court had dismissed a juror without a finding that the juror was “disabled from sitting.” Thus the husband relied on the language of the Texas Supreme Court in *M^cDaniel v. Yarbrough*¹²⁵ that the Texas Constitution and Rules of Civil Procedure¹²⁶ require that trial juries in district courts “consist of twelve members unless not more than three jurors die . . . or are disabled from sitting.”¹²⁷ A female juror had approached the husband twice on days when he was testifying and said, “You need to smile more.”¹²⁸ On this showing the trial judge had dismissed the juror and replaced her with an alternate. The husband argued that he was entitled to trial by twelve jurors originally selected unless not more than three of those twelve jurors die or are disabled from sitting. The husband also relied on a more recent Texas Supreme Court case, *Yanes v. Sowards*,¹²⁹ where the court said that

118. 889 S.W.2d 266, 270 (Tex. 1994).

119. *Parker*, 20 S.W.3d at 818.

120. *In re Parker*, 20 S.W.3d 812, 819 (Tex. App.—Texarkana 2000, no pet.).

121. 20 S.W.3d 809 (Tex. App.—El Paso 2000, no pet.).

122. TEX. R. CIV. P. 21a.

123. TEX. R. CIV. P. 245.

124. 33 S.W.3d 863, 868 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

125. 898 S.W.2d 251 (Tex. 1995).

126. TEX. CONST. art. V, § 13; TEX. R. CIV. P. 292.

127. *M^cDaniel*, 898 S.W.2d at 254.

128. *Schlafly*, 33 S.W.3d at 868.

129. 996 S.W.2d 849, 850 (Tex. 1999).

a district court jury shall consist of “twelve original jurors.” In *Schalfly* the court held that the language in *Yanes* did not constitute a departure from the standard laid down in *M^cDaniel*.¹³⁰ Even if such a departure is indicated, the court went on to say, there would be no reversible error unless there is a showing of probable harm stemming from the difference,¹³¹ and its review of the entire record did not suggest that any harm was done by the replacement of the juror with an alternate.¹³²

9. *No Judicial Estoppel in New Trial as a Consequence of Statement Made at Prior Trial*

On remand for a new trial in *Steffan v. Steffan*¹³³ the husband argued that his wife was judicially estopped at the new trial from receiving more property at the new trial than she had testified was a proper award at the previous trial. Saying that “judicial estoppel only applies if the party to be estopped has made a sworn, prior inconsistent statement in a prior judicial proceeding and [has] successfully maintained the prior position . . . [the court concluded that the doctrine] does not apply to a contrary position taken within the same proceeding.”¹³⁴ Thus, the husband took his deemed admissions with him into the new trial whereas the wife was not burdened by her prior testimony as to a fair division of property.

10. *Defining “Family Member” For Purposes of Protective Orders*

At the end of the hearing for divorce in *James v. Hubbard*¹³⁵ the judge said “I am going to grant this divorce in this case.” That was in October, 1997 but a decree of divorce was not signed. In February, 1998 the wife’s mother alleged that the husband had committed acts of family violence against a “family member” under Section 81.001.¹³⁶ After a hearing the court granted a protective order against the husband in March 1998. Within 30 days the husband filed his motion to appeal the protective order. His ground for appeal was that the former mother-in-law was not a “family member” within section 81.001 and Government Code section 573.024¹³⁷ as he and his former wife had been divorced in October, 1997. The San Antonio appellate court held that the protective order to preclude family violence was an appealable order even if the protective order from which the appeal was taken had expired, because of the social stigma attaching to it.¹³⁸ The court went on to say that if the divorce had

130. *Schalfly v. Schalfly*, 33 S.W.3d 863, 869 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

131. *Id.* at 870 (citing TEX. R. CIV. P. 44.1; *M^cDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995)).

132. *Schalfly*, 33 S.W.3d at 867 n.1.

133. 29 S.W.3d 627, 631-32 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). See *supra* notes 89-91 and accompanying text.

134. *Id.*

135. 21 S.W.3d 558 (Tex. App.—San Antonio 2000, no pet.).

136. TEX. FAM. CODE ANN. § 81.001 (Vernon Supp. 1998).

137. TEX. GOV'T CODE ANN. § 573.024 (Vernon 1994).

138. *James*, 21 S.W.3d at 560.

been granted, the trial court would have been without the power to grant the order as the person seeking it would not have been a family member.¹³⁹ An oral rendition of divorce can constitute a final judgment,¹⁴⁰ but whether a final judgment was rendered depends on the language of the court. At the hearing in October, 1997 after saying that he “was going to grant this divorce,” the judge went on to say that he wanted to enter a judgment three days later. But no decree was actually signed until May 1998. In the view of the appellate court the trial judge had nevertheless not clearly expressed a present intent to grant a divorce immediately after the hearing. Thus, the couple was still married at the time that the protective order was granted and the trial court’s order was therefore affirmed.¹⁴¹ Judge Alma López dissented on the ground that the oral rendition was indeed a final judgment of divorce, as the May 1998 order recited that the divorce was “judicially . . . RENDERED . . . on October, 31 1997.”

11. Motion for New Trial

*Lee v. Lee*¹⁴² is a sequel of a prior appeal of a divorce proceeding¹⁴³ in which the Houston First District Court of Appeals concluded that there had been no informal marriage prior to a ceremonial marriage of the parties¹⁴⁴ and remanded the case for a division of the property. The property at issue included small pieces of realty which the woman had transferred to the husband (in accordance with alleged Taiwanese custom) at the commencement of their cohabitation. At this point the case was very similar to *Eris v. Phares*,¹⁴⁵ but here the similarity of the two cases diverges. On remand the wife’s counsel appears to have caused her to stipulate that the properties in issue were the husband’s separate property and the divorce court entered judgment accordingly. The wife then got new counsel and filed a motion for new trial on the ground that her prior lawyer had entered the stipulation contrary to her wishes and had not allowed her witnesses to testify as she desired. The trial court denied her motion, and the wife appealed. In response to her argument that the trial court should have granted the motion for new trial because her attorney had coerced her to make the stipulation, the appellate court concluded that even if her view of the facts were accepted, coercion as a ground for reversal in such a situation must come from the opposing party and not from her own counsel.¹⁴⁶ The appellate court went on to say that the record failed to show that the trial court had not denied her

139. *Id.* at 561.

140. *Dunn v. Dunn*, 439 S.W.2d 830, 832 (Tex. 1969).

141. *James v. Hubbard*, 21 S.W.3d 558, 561-62 (Tex. App.—San Antonio 2000, no pet.).

142. 44 S.W.3d 151 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

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

144. *Id.* at 907.

145. 39 S.W.3d 708 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

146. *Lee*, 44 S.W.3d at 151 (citing *Kosowska v. Kahn*, 929 S.W.2d 505, 508 (Tex. App.—San Antonio 1996, writ denied)) (a case involving coercion in making a contract).

an opportunity to present her evidence, though it appears from the opinion that it was her contention that it was the act of former *counsel* (in his failure to present evidence) of which she complained. Much of the confusion at trial and on appeal seems to have stemmed from lack of communication between the former attorney and his client due to misunderstanding of language and consequently an injustice may have therefore occurred.

12. *Death of a Party After Decree*

In *In re Wilburn*¹⁴⁷ the court granted a divorce of the spouses and divided the community estate in November 1998. After the husband was killed in late December 1998, the court entered a decree of divorce on March 19 1999, reducing its prior orders to writing. The ex-wife then filed a motion for new trial, which the court granted on March 23 1999. On motion for reconsideration by the ex-husband's father in June 1999, the court entered a written order stating that the motion previously granted was a motion for partial new trial and that the decree of divorce and property determinations were not affected. This order was substituted for the March 19 1999 order. The ex-wife took an appeal from the later order,¹⁴⁸ which in effect had undone the ex-wife's motion for a new trial on property issues.

The appellate court concluded that the spouses were divorced on oral rendition of the divorce in November of 1998, and a motion for new trial (not based on the husband's death) could be taken as to the division of property.¹⁴⁹ Because there was no evidence to support the trial court's order as to property division, the June 1999 order in regard to the disposition of property was set aside.¹⁵⁰

13. *Order for Support Pending Appeal*

In *In re Boyd*¹⁵¹ the husband filed his notice of appeal to a divorce decree and his bond to supersede the judgment on June 26. The wife filed a motion on June 28 for reasonable attorney's fees and support pending appeal. A hearing was had on that motion on July 7. After the hearing, the court recessed the hearing. Despite the wife's advising the court that Section 6.709¹⁵² required that an interlocutory order of the sort sought had to be made by July 26, the court did not resume the hearing until August 13 and entered an order on August 21 favoring the wife.¹⁵³ On the ex-husband's request the appellate court granted a writ of mandamus to set aside the trial court's order, and he requested a writ of prohibition

147. 18 S.W.3d 837 (Tex. App.—Tyler 2000, pet. denied).

148. *Id.* at 839-40.

149. *Id.* at 842.

150. *Id.* at 844.

151. 34 S.W.3d 708 (Tex. App.—Fort Worth, 2000, pet. filed).

152. TEX. FAM. CODE ANN. § 6.709(a) (Vernon 1998).

153. *Boyd*, 34 S.W.3d at 710.

against its enforcement should the court fail to vacate the order.¹⁵⁴

14. Appeal

a. Restricted Appeal

In *Osteen v. Osteen*¹⁵⁵ the alleged husband as respondent in a divorce proceeding took a restricted appeal to a decree of divorce in which the petitioning wife had failed to prove the material allegation of an informal marriage. The four elements necessary for a restricted appeal are (1) notice filed within six months of the date of the judgment, (2) by a party to the suit, (3) who did not participate at the trial, and (4) when the error complained of is apparent from the face of the record.¹⁵⁶ The first two elements were clearly satisfied as was the fourth because the record revealed that neither had offered any evidence of the alleged informal marriage.¹⁵⁷ The dispute turned on the third element, whether the appellant participated in the trial, that is whether he participated in the decision-making event that resulted in the judgment adjudicating his rights.¹⁵⁸ The appellee asserted that he had participated in a proceeding called to consider her motion for a new trial filed in response to the trial court's order setting aside an oral judgment in her favor and dismissing her petition for divorce.¹⁵⁹ During that hearing in October 1997 the appellant appeared by his attorney, but the record of the hearing was not among the papers before the appellate court. As to that matter, the appellate court's opinion relied on established precedent¹⁶⁰ to the effect that such participation would not preclude the appeal in this instance because the motion for new trial was totally unrelated to the final judgment entered in July, 1999 which the appellate court later set aside.¹⁶¹ Because the grounds for a limited appeal were satisfied, the court then concluded that the wife had failed in bearing the burden of proving the existence of an informal marriage to dissolve.

b. Record: Findings of Fact and Conclusions of Law

In the division of the community estate the trial court in *In re Morris*¹⁶² awarded the wife \$180,000 in cash but failed to explain the basis for the award apart from an award of \$5,000 as reimbursement for medical expenses. The trial court denied the husband's request for additional findings of fact and conclusions of law. The appellate court held that the

154. Id. at 711

155. 38 S.W.3d 809 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.).

156. TEX. R. APP. P. 26.1(c); *Osteen*, 38 S.W.3d at 811-12.

157. *Osteen*, 38 S.W.3d at 813-14.

158. *Withem v. Underwood*, 922 S.W.2d 956, 957 (Tex. 1996).

159. *Osteen*, 38 S.W.3d at 812.

160. *Lawyers Lloyds of Tex. v. Nett* 137 Tex. 107 152 S.W.2d 1098 (1941); *South Mills Mushroom Sales v. Weenick*, 851 S.W.2d 346, 348 (Tex. App.—Dallas 1993, writ denied).

161. *Osteen v. Osteen*, 38 S.W.3d 809, 813 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.) (citing TEX. R. APP. P. 30).

162. 12 S.W.3d 877, 885 (Tex. App.—Texarkana 2000, no pet.), commented on in Joseph W. McKnight, *Family Law: Husband & Wife*, 53 SMU L. REV. 995 1008 1016 (2000).

valuation of \$180,000 was a controlling issue having a direct effect on the judgment, and the husband was therefore entitled to the findings and conclusions requested.¹⁶³

c. Failure to Divide All the Community Property

In *Byrnes v. Byrnes*¹⁶⁴ it was asserted as a ground for appeal that the trial court had inadvertently failed to divide all the community property. Although a divorce court may not render a final decree of divorce without also dividing the divisible estate of the parties before the court,¹⁶⁵ it is not altogether clear that reimbursement rights between spouses are necessarily included in that rule and even less clear that obligations of spouses to third persons need to be addressed by the divorce court, as they are certainly not assets of the spouses' estate. But a divorce court ordinarily deals with both of these matters in rendering a divorce decree if such matters are brought to the court's attention. In *Byrnes* the appellant-wife complained that the court had failed to deal with the parties' debts, but because she failed to raise the issue before the trial court, the appellate court held that she had waived any right to complain.¹⁶⁶

d. Consequences of Mischaracterization of Property

Under the rule in *Jacobs v. Jacobs*¹⁶⁷ remand to the trial court is ordinarily necessary when it is shown on appeal that the divorce court mischaracterized separate or community property. In *Case v. Case*¹⁶⁸ there was not only mischaracterization of assets but also significant errors in their valuation. Remand to the trial court for redivision of the community estate was therefore necessary.¹⁶⁹

e. Attorney's Misconduct and Award of Costs to Opposing Party

In *Schlafly v. Schlafly* the Houston Fourteenth District appellate court was critical of counsel for both parties in straying outside the record to introduce extraneous matter in their arguments.¹⁷⁰ The misrepresentations of the husband's counsel were so egregious that he was ordered to

163. *Morris*, 12 S.W.3d at 885-86 (citing TEX. R. CIV. P. 297); *Finch v. Finch*, 825 S.W.2d 218, 221 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (quoting *Balderama v. W. Cas. Life Ins. Co.*, 794 S.W.2d 84, 89 (Tex. App.—San Antonio 1990), *rev'd on other grounds*, 825 S.W.2d 432 (Tex. 1991)).

164. 19 S.W.3d 556, 560-61 (Tex. App.—Fort Worth 2000, no pet.).

165. See *In re Johnson*, 595 S.W.2d 900, 902 (Tex. App.—Amarillo 1980, no writ). As to debts owed to third persons, see Joseph W. McKnight, *Family Law: Husband & Wife*, 51 SMU L. REV. 1047 1078 (1998).

166. *Byrnes* 19 S.W.3d at 561.

167. 687 S.W.2d 731, 733 (Tex. 1985), discussed in Joseph W. McKnight, *Family Law: Husband & Wife*, 40 Sw. L. J. 1, 38 (1986); Joseph W. McKnight, *Family Law: Husband & Wife*, 42 Sw. L. J. 39-40 (1988); Joseph W. McKnight, *Family Law: Husband & Wife*, 53 SMU L. REV. 995 1042-43 (2000).

168. 28 S.W.3d 154 161-62 (Tex. App.—Texarkana 2000, no pet.).

169. *Id.* at 162.

170. 33 S.W.3d 863, 874 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing TEX. R. CIV. P. 43.4).

pay all costs of the appeal.¹⁷¹

B. MAKING THE DIVISION

1. *Property Settlement Agreements in Anticipation of Divorce*

Unless recited in open court and made part of the record, a binding property settlement must be in writing as provided for in Family Code section 6.602¹⁷² (formerly section 158.0071 enacted in 1995). The same rule applies to an agreement in aid of divorce under section 7.006.¹⁷³ Because the consequences may be different, however, there is good reason to know from the start under which banner one chooses to sail. In some instances parties to a divorce, or one of them, seem to have given that matter little thought. In *Byrnes v. Byrnes*¹⁷⁴ the appealing wife complained of the divorce court's refusal to enforce a section 7.006 agreement incidence to divorce that the husband had repudiated under section 7.006(a) in his answer to the wife's petition. The agreement provided that the husband would assign to the wife all current and future interest of his Air Force retirement benefits. The trial court had also ruled that the agreement was not binding as a mediated settlement agreement under section 6.602.¹⁷⁵ The appellate court sustained the trial court's ruling on the non-binding effect of the property settlement agreement on the basis of the husband's repudiation and the provision of the agreement itself that the court should approve the agreement.¹⁷⁶ In response to the wife's argument that the agreement should stand as a partition, the appellate court pointed out that the agreement did not provide for a division of any interest but only for an assignment.¹⁷⁷ Nor was the spouses' agreement enforceable as an ordinary contract apart from the term of the contract that required court approval. The wife's argument also disregarded the fact that, apart from its standing as a property settlement contract, Texas spouses cannot by mere agreement change the character of their community property to separate property.¹⁷⁸

*Cayan v. Cayan*¹⁷⁹ involved a mediated property settlement reached by the spouses under section 6.602 and approved by the trial court despite the effort of the husband to repudiate it. The appellate court upheld the trial court's ruling in that regard, and though the husband had not raised any constitutional or statutory objections to preserve his points for appellate review, the appeals court nevertheless did not regard section 6.602 as

171. *Id.*

172. TEX. FAM. CODE ANN. § 6.602 (Vernon 1998). Although, as seen in *Schalffy*, unwritten terms continue to be advanced in argument. *Schalffy v. Schalffy*, 33 S.W.3d 863, 863 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

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

174. 19 S.W.3d 556 (Tex. App.—Fort Worth 2000, no pet.).

175. TEX. FAM. CODE ANN. § 6.602 (Vernon 1998).

176. *Byrnes*, 19 S.W.3d at 559-60.

177. *Id.* at 559. The court might have cited *Hibbler v. Knight*, 735 S.W.2d 924, 926-27 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

178. *See Maples v. Nimitz*, 615 S.W.2d 690, 695 (Tex. 1981).

179. 38 S.W.3d 161 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

in conflict with section 7.006 or 4.102 and the underpinning of the latter in article XVI, section 15 of the Texas Constitution. Distinguishing the conclusion in *In re Kasschau*,¹⁸⁰ which the court described as dealing with a void section 6.602 agreement (because of an “illegal provision” in the agreement), the court concluded that a valid section 6.602 settlement agreement is irrevocable by the parties “notwithstanding Rule 11 . . . or another rule of law.”¹⁸¹ “[S]ection 6.602 [is] simply . . . an exception to section 7.006(a) whereby parties to a divorce may elect to make their agreement binding as of the time of its execution rather than at the subsequent time [when] the divorce is rendered.”¹⁸² Nor is a section 6.602 agreement subject to the trial court’s determination that the settlement is just and right as provided in sections 7.001 and 7.006.¹⁸³ Section 6.602 agreements can also divide separate property interests as the spouses deem fit.¹⁸⁴ Finally, the court said,

[I]f a party fails to exercise diligence in investigating facts or law or otherwise enters into a section 6.602 agreement inadvisedly, he will not be rewarded for doing so with a reprieve from the agreement. Conversely, if a party is wrongfully induced to enter into a section 6.602 agreement, he has the same recourse as one who discovered such a circumstance after judgment was entered on a non-section 6.602 agreement.¹⁸⁵

In *Elliott v. Elliott*¹⁸⁶ two days prior to the setting of the final hearing for divorce, the wife without counsel entered into a section 7.006 property settlement agreement with her husband, who was represented by counsel. The divorce court approved the agreement and entered a decree in accordance with its terms. Almost four years later the ex-wife brought an equitable bill of review to set aside the decree, although she had received all the benefits to which she was entitled under the agreement. The benefits included compensation for employment by a corporation controlled by her ex-husband even though she had not been allowed to perform actual services for the corporation. The trial court dismissed her claim because she had failed to make a *prima facie* case for a bill of review under the first of the three prerequisites for that relief in *Baker v. Goldsmith*:¹⁸⁷ that the petitioner could show “a meritorious defense to the cause of action alleged to support the judgment.”¹⁸⁸ Under these circumstances, the appellate court concluded that she should show that the agreement to divide the community estate was not just and right when made.¹⁸⁹ The

180. 11 S.W.3d 305, 311 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

181. *Cayan*, 38 S.W.3d at 165.

182. *Id.*

183. *Id.* at 166 (quoting TEX. FAM. CODE ANN. § 6.602(c)).

184. *Id.*

185. *Cayan v. Cayan*, 38 S.W.3d 161, 166 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

186. 21 S.W.3d 913 (Tex. App.—Fort Worth 2000, pet. denied).

187. 582 S.W.2d 404 (Tex. 1979).

188. *Id.* at 406

189. *Elliott*, 21 S.W.3d at 917-19 (citing a similar dispute in *Martin v. Martin*, 840 S.W.2d 586 (Tex. App.—Tyler 1992, writ denied)).

Fort Worth appellate court affirmed the trial court's denial of her claim, as well as an award of attorney's fees and other costs incurred by the ex-husband in defending her suit as provided in the settlement agreement.¹⁹⁰

In a Texas divorce proceeding, the wife in *Johnson v. Johnson*¹⁹¹ sought to impeach a prior North Carolina separation decree barring her from asserting any right to her husband's retirement benefits that had arisen during marriage. Although the basis for the North Carolina order was an unsigned (and thus unenforceable) agreement allegedly entered into by the wife with her husband, her earlier effort to invalidate the decree in North Carolina had failed because she had waited too long before attacking the decree. Hence, the Texas court was bound to give effect to the sister-state's order.¹⁹²

2. Adjudication of Division

In *Wilson v. Wilson*¹⁹³ the husband objected to the divorce court's division of property and award of attorney's fees to the wife. His appeal failed because he was unable to show from the evidence in the record that the division (including the provision for attorney's fees) was so unjust and unfair as to amount to an abuse of discretion.¹⁹⁴ In making the award of attorney's fees the decree stated that the court did so "to effect an equitable division of the estate of the parties."¹⁹⁵ In this language the appellate court found a suggestion that the trial court took attorney's fees into account in making the property division.¹⁹⁶ Although the couple had been separated for ten years prior to the divorce, all property acquired was presumptively community property and the husband had not borne the burden of proving that any property was his separate estate.¹⁹⁷

C. EFFECT OF BANKRUPTCY

In *In re Smith*¹⁹⁸ an ex-husband sought the application of section 523(a)(15)¹⁹⁹ of the Bankruptcy Code to relieve him of obligations of his agreed divorce decree, apart from ex-spousal maintenance or child support. This provision enacted in 1996 allows a discharge of a debt "incurred by the debtor in the course of a divorce" when "discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse"²⁰⁰ In their divorce decree incorporating their agreement, the ex-husband was ordered to pay a mutual credit debt for tools bought for his use and a business debt, and the ex-wife was

190. *Id.* at 922.

191. 37 S.W.3d 523 (Tex. App.—El Paso 2001, no pet.).

192. *Id.* at 526-27 (citing U.S. CONST. art. IV, § 1).

193. 44 S.W.3d 597 (Tex. App.—Fort Worth 2001, no pet.).

194. *Id.* at 600-01.

195. *Id.* at 600.

196. *Id.* .

197. *Id.* at 601.

198. 256 B.R. 590 (Bankr. N.D. Tex. 2001).

199. 11 U.S.C. § 523(a)(15)(A) (2001).

200. *Id.* at § 523(a)(15)(A)-(B).

ordered to pay another mutual credit debt and medical bills. Each was also required to pay one-half of the couple's federal tax liability. In the course of two years, the ex-wife had substantially reduced the credit debt which the ex-husband had agreed to pay, and she had made minimum payments toward discharging the credit debt she had agreed to pay. She had also saved child support payments toward their children's later expenses of education. In that time the ex-husband had evidently not discharged any of his non-support obligations imposed by the divorce decree but had received a bankruptcy discharge for other substantial indebtedness. His new wife was apparently in ill-health, but the ex-husband did not offer evidence of any unpaid medical expenses.²⁰¹ His pleadings and testimony with respect to assets and liabilities, however, were so demonstrably misrepresented that his credibility had been seriously undermined so that the court was unable to find his inability to pay the agreed debts.²⁰² Although the ex-wife's financial situation was substantially better than that of the ex-husband, the court concluded that further relief of the ex-husband from the non-support debts imposed by the divorce decree would impose some hardship on the ex-wife.²⁰³ In denying the relief sought, the court concluded that "if the debt were discharged, [the ex-wife] would, in effect, be punished for apparently handling her financial affairs since the divorce more responsibly than has [the ex-husband]."²⁰⁴

D. OTHER POST-DIVORCE DISPUTES

Two cases dealt with post-divorce disputes that were or should have been foreseen by the parties. In *Stephens v. Marlowe*²⁰⁵ the couple was divorced in 1989, and the decree of divorce awarded the wife "all sums . . . related to any . . . retirement plan, pension plan, . . . or other benefit program" in her name.²⁰⁶ In late 1990 the ex-wife, as a party to a class-action against her former employer in connection with its pension plan, received \$50,000. In late 1992, the defendant-employer informed the ex-husband by letter about the outcome of the action. Believing that he was entitled to a share of the proceeds, the ex-husband commenced an action against his ex-wife and was awarded one-half of those proceeds. The ex-wife appealed. Relying on the principle of *res judicata*, the Texarkana appellate court found the language of the divorce decree conclusive as the ex-wife's entitlement to all the proceeds of her action as there provided.²⁰⁷

*Swoboda v. Swoboda*²⁰⁸ was a somewhat more difficult case. The parties were divorced in late 1995. The decree provided that the wife was

201. *Smith*, 256 B.R. at 592.

202. *Id.* at 593.

203. *Id.* at 593-94.

204. *In re Smith*, 256 B.R. 590, 594 (Bankr. N.D. Tex. 2001).

205. 20 S.W.3d 250 (Tex. App.—Texarkana 2000, no pet.).

206. *Id.* at 252.

207. *Id.* at 254.

208. 17 S.W.3d 276 (Tex. App.—Corpus Christi 2000, no pet.).

entitled to all of the husband's interest in a thrift plan maintained by his employer. In 1996 a qualified domestic relations order ("QDRO") accordingly provided an award of \$771,000 for the ex-wife, who in 1997 made a claim against the ex-husband for the tax-liability she had incurred as a consequence of her receipt of the award under the decree. In affirming a summary judgment for the ex-husband, the Corpus Christi Court of Appeals concluded that

[b]y providing that the cash award would be paid out of [the ex-husband's] interest in the thrift plan, the decree contemplated that this distribution would constitute a taxable event. . . . [The ex-husband agreed] to the QDRO that was subsequently entered by the court which identified [the ex-wife] as an 'alternate payee' of the thrift plan. But once the QDRO was entered without objection, and the [ex-wife] received her distribution, she had knowledge or should have had knowledge that she would be responsible for the federal income tax on the award.²⁰⁹

The Internal Revenue Code provides that as to any amount of money distributed to a former spouse of a distributee of a qualified trust, the former distributee-spouse will be taxed for the distribution.²¹⁰

In granting a divorce in 1980 the trial court in *Reiss v. Reiss*²¹¹ found that the parties had a vested interest in the husband's employer's retirement plan as community property and awarded the wife fifty percent of the husband's pension benefits when and if received. The ex-husband remarried, continued to work for the same employer, and retired in 1998. The ex-wife moved to enforce the decree, and the trial court awarded her one-half of the entire pension benefits. On the ex-husband's appeal, the Houston First District Court interpreted the 1980 decree as awarding the wife fifty percent of the community portion of the retirement benefits, relying on the reference to the vested interest in the 1980 decree.²¹² The court went on to say that if the 1980 decree required the wife's community interest in the benefits to be valued as of the date of receipt, it would now impermissibly award a portion of the ex-husband's separate property to the ex-wife,²¹³ contrary to the Texas Supreme Court's 1983 decision in *Berry v. Berry*.²¹⁴ But the decision in *Berry* was not retrospective in effect.²¹⁵ Because the consequences of that conclusion could the husband's separate property, the court had this to say:

Here, the divorce judge expressly found the parties had a vested, community-property interest in the retirement plan. Due to the community's portion being valued at the date of receipt, he then awarded some of what likely was [the ex-husband's] separate-prop-

209. *Id.* at 280.

210. 26 U.S.C. § 402(e)(1)(a) (2001).

211. 40 S.W.3d 605 (Tex. App.—Houston [1st Dist.] 2001, no pet.), 2001 Tex. App. Lexis 704.

212. *Id.* at 608.

213. *Id.* at 612-13.

214. 647 S.W.2d 945, 946 (Tex. 1983).

215. *Reiss*, 40 S.W.3d at 613. *Id.* at 947.

erty interest in those benefits to [the ex-wife]. However, we presume that the divorce judge found whatever he divided to be entirely community property. His finding so indicates, and we would presume that even had he made no express finding. Therefore, [the ex-husband] is faced in this collateral attack with a potentially erroneous, but not void, finding that *all* of the divided property was community. Because the divorce court unquestionably had subject-matter jurisdiction to characterize and then divide community property, [the ex-husband] cannot prevail.²¹⁶

The Waco appellate court held in *Weaver v. Keen*²¹⁷ that the divorced wife, as designated beneficiary of two ERISA-qualified pension plans,²¹⁸ could not take the benefits thereunder on the employee-ex-husband's death despite the fact that she was named as the primary beneficiary. The decedent's interest in the plans was acquired during the couple's marriage. Furthermore, the decedent had designated his wife as the primary beneficiary and his mother as the alternative beneficiary. In their 1982 divorce the husband's interest in the plan was awarded to him, but he failed to change the beneficiary designations. The ex-husband later remarried and died twelve years later. The ex-wife sued to establish her right as primary beneficiary. The Waco court concluded that applicability of Family Code § 9.302 (Pre-Decree Designation of Ex-Spouse as Beneficiary in Retirement Benefits and Other Financial Plans)²¹⁹ was clearly preempted by the terms of the federal act.²²⁰ Putting aside a federal Sixth Circuit appellate case to the contrary,²²¹ the court followed decisions of the Fifth and other circuits²²² in concluding that a divorce terminates a former spouse's designation as primary beneficiary of an ERISA plan. Further, the Fifth Circuit court had concluded that a spouse designated during marriage as an ERISA beneficiary of a life insurance policy had waived her benefits in an agreed divorce decree.²²³ In that case, the ex-wife's counsel had drafted the divorce settlement agreement by which the husband took the retirement benefits as his separate property. The court held that the ex-wife therefore would be deemed to have waived her right to the benefits voluntarily and in good faith.²²⁴

In *In re Alford*,²²⁵ the issue before the appellate court was whether the trial court intended its order as a clarifying order, and whether it was essential that the court hold a trial on the merits before issuing a clarify-

216. *Id.* at 616. Reiss, 2001 Tex. App. LEXIS 704 at *21-24.

217. 43 S.W.3d 537 (Tex. App.—Waco 2001, no pet.), 2001 Tex. App. Lexis 215.

218. 29 U.S.C. § 1002(2)(A) (2000).

219. TEX. FAM. CODE ANN. § 9.302 (Vernon 1998).

220. 29 U.S.C. § 1144(a) (2000). *See Egelhoff v. Egelhoff*, ___ U.S. ___ 121 S. Ct. 1322 149 L. Ed.2d 264 (2001).

221. *See Metro. Life Ins. Co. v. Marsh* 119 F.3d 415 (6th Cir. 1997).

222. *See Brandon v. Travelers Ins. Co.* 18 F.3d 1321 1326-27 (5th Cir. 1994); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 280-81 (7th Cir. 1990); *Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693 (8th Cir. 1989).

223. *See Brandon*, 18 F.3d at 1326.

224. *Weaver v. Keen*, 43 S.W.3d 357, 543-44 (Tex. App.—Waco 2001, no pet.).

225. 40 S.W.3d 187 (Tex. App.—Texarkana 2001, no pet.).

ing order. In its decree on the wife's motion the court had awarded as her separate property 200,000 frequent flier miles attributed to the husband by Lufthansa Airline (not a party to the suit). The ex-wife asserted that her ex-husband had failed to comply with the decree in refusing to arrange for the mileage to be redeemed as airline tickets. The ex-husband responded that the airline would not transfer the mileage from one account to another. The trial court then held a hearing at which it ordered the parties to file briefs supporting their positions. The court rendered a clarifying decree that the ex-husband was to take all necessary steps to permit the ex-wife to redeem the frequent flier miles. By way of dicta the court seemed to say that a clarifying order under section 9.008²²⁶ cannot be issued if it is not enforceable by contempt.²²⁷ The court went on to say that a clarifying order may be rendered on the request of a party or on the court's own motion unless otherwise provided in section 9.001(b).²²⁸ Thus, the order could issue without a hearing on the merits.²²⁹

By agreement of the parties on divorce, the decree at issue in *Wright v. Eckhardt*²³⁰ awarded the wife one-half of the husband's naval retirement benefits when the husband's "name is officially added to the Navy retirement list."²³¹ At the time of the divorce in 1994, the ex-husband was in active naval service though in 1997 he had left active duty status and had joined the Fleet Reserve. Thus, the ex-husband was then in receipt of retainer pay in an amount equal to his future retirement pay, but he had not been recalled to active duty. Nonetheless, his name had not been added to the Navy's retirement list. After the ex-wife had begun to receive payments under a clarifying decree, a second motion for clarification was filed by the ex-husband in 1998. This motion asserted that the decree should be further clarified to provide that the ex-wife should not be entitled to receive her share of his retirement benefits until after completion of his duty in the Fleet Reserve in 2007. The court granted the ex-husband's request and it was that clarification that was before the appellate court.

In reversing the second clarification order, the Corpus Christi appellate court concluded²³² that the original decree had thereby been modified rather than clarified. It is not required by section 9.008(b)²³³ that in order to clarify a decree the court *must* find that the division is not specific

226. TEX. FAM. CODE ANN. § 9.008 (Vernon 1998). 1998, no writ), also decided under § 3.72.

227. See *Traylor v. Traylor*, 789 S.W.2d 701, 703 (Tex. App.—Texarkana 1990, no writ) (decided under TEX. FAM. CODE ANN. § 3.72, the precursor of § 9.008); *McLaurin v. McLaurin*, 968 S.W.2d 947, 949 (Tex. App.—Texarkana 1998, no pet.) (also decided under § 3.72).

228. TEX. FAM. CODE ANN. § 9.001(b) (Vernon 1998).

229. *Alford*, 40 S.W.3d at 190.

230. 32 S.W.3d 891 (Tex. App.—Corpus Christi 2000, no pet.).

231. *Id.* at 893.

232. *Id.* at 894-95.

233. TEX. FAM. CODE ANN. § 9.006(b) (Vernon 1998).

enough to be enforceable by contempt. That is merely one of two grounds that the court may employ to enter a clarifying order. The other ground is provided in section 9.006(a), which states that the court may render "further orders to enforce the division of property made in the decree of divorce . . . to assist in the implementation of or to clarify the prior order."²³⁴ The substantive division of property as made in the original decree had been modified because it extended the time for her entitlement beyond the ex-husband's retirement from active duty.²³⁵ Thus, the phrase in the original decree that referred to the husband's name being "officially added to the Navy retirement list" was not a formal prerequisite of the ex-wife's entitlement. Rather, it was merely to be interpreted in conjunction with other terms of the decree to mean when the ex-husband would receive his half-share of retainer pay of which he had been in receipt since he joined the Fleet Reserve.²³⁶

The appeal in *Jackson Law Office, P.C. v. Chappell*²³⁷ stemmed from a dispute arising from an oral fee-contract between a law firm and its client. The firm asserted that the wife retained the firm to represent her in a suit for divorce at \$150 an hour for a total of over \$60,000. The client responded that the entire fee was not to exceed \$3,000, which had been paid. The firm also asserted that the client (while insolvent) had made fraudulent transfers of assets to third-party defendants (her mother and a close friend and former business partner of her husband) to hinder the efforts of the firm to collect its fee. The client asserted, in turn, that the firm had breached its fiduciary duty in representing her and had violated the Deceptive Trade Practices Act and the Debt Collection Act. The jury rendered a verdict of \$43,000 to the firm for its fees and \$5,000 in damages for the fraudulent transfers. The jury also found that the firm had breached its fiduciary duty to the client for which it awarded \$5,000 despite suffering no damage therefor. The jury further found that the firm had violated the statutes as alleged, but that the client had not suffered any damage for those violations. The trial court decreed a \$5,000 forfeiture of the plaintiff-firm's fee for its breach of fiduciary duty. Despite the trial court's denial of the firm's damages for the fraudulent transfers, the appellate court restored these damages²³⁸ and remanded the case on the issue of the firm's claim for attorney's fees.²³⁹

In *Brown v. Fullenweider*²⁴⁰ the parties to a divorce reached an agreement incident to a divorce by which, among other things, each party would pay "all outstanding attorneys fees and fees for other professionals

234. *Wright*, 32 S.W.3d at 894.

235. *Id.* at 895-96.

236. *Wright v. Eckhardt*, 32 S.W.3d 891, 895-96 (Tex. App.—Corpus Christi 2000, no pet.).

237. 37 S.W.3d 15 (Tex. App.—Tyler 2000, no writ).

238. *Id.* at 27-28, 31.

239. *Id.* at 29, 31.

240. 7 S.W.3d, 333, 335 (Tex. App.—Beaumont 1999), *rev'd*, No. 00-0137, 2001 WL 299317, 44 Tex. Sup. Ct. J. 553 (Tex. Mar. 29, 2001).

incurred by [him of her] in connection with this lawsuit.”²⁴¹ The court further ordered that the parties “shall do all necessary acts to carry out the provisions of such agreement.”²⁴² Under former Family Code sections 3.70 - 3.77 (now sections 9.001 – 9.014) just over a year after rendition of the decree incorporating the parties’ agreement, the ex-husband’s attorney sought a judgment against his client for his fees and those of others employed in connection with the divorce. At the attorney’s request, the divorce court severed the attorney’s claim from the divorce case, docketed it under a new number, and granted him a judgment for his fees. A divided Court of Appeals speaking through Justice Hill (retired, sitting by assignment) concluded that the attorney for the husband was a party to the proceedings for the purpose of his claim,²⁴³ and that fixing the uncertain amount owed was a clarification for enforcement of the order. On further appeal by the husband’s attorney, in a per curiam opinion the Supreme Court of Texas held that the attorney’s “motion was filed long after the trial court’s plenary jurisdiction . . . had terminated, and jurisdiction was not properly maintained under section 3.70.”²⁴⁴ The court gave two further reasons for its conclusions. First, the court said that the decree did not award fees to the attorney, but merely “allocated responsibility for any such fees” between the spouses as it did “for all the parties’ obligations.”²⁴⁵ The court’s second reason for its conclusion was that the expeditious means provided by these provisions were meant solely for “those related to the division of a marital estate. An attorney’s claim against his client for fees is not such an issue.”²⁴⁶

241. For the specific provisions of the terms see *Brown v. Fullenweider*, 7 S.W.3d 333, 335 (Tex. App.—Beaumont 1999), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 53 SMU L. REV. 995 1045 (2000).

242. *Brown*, 7 S.W.3d at 334.

243. See *John M. Gillis, P.C. v. Wilbur*, 700 S.W.2d 734, 736 (Tex. App.—Dallas 1985, no writ); *Mullinax, Wells, Mauzy & Collins v. Dawson*, 478 S.W.2d 121 123 (Tex. Civ. App.—Dallas 1972, writ ref’d n.r.e.).

244. *Brown*, 2001 WL 299317, at *2.

245. *Id.* at *1.

246. *Brown v. Fullenweider*, No. 00-0137, 2001 WL 299317, *2 (Tex. Mar. 29, 2001).

