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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. NON-MARITAL UNIONS

THE man and woman who were parties to the suit on appeal in *In re Marriage of Braddock*¹ had been married and divorced. In 1994 they began living together again. Later that year the woman conveyed real property to the man with the apparent object of supplying him with collateral for a loan of \$45,000. The woman also guaranteed the loan. The man promised to reconvey the land. After some of the money had been repaid to the man, he nevertheless refused to reconvey the property to the woman, and she brought suit for divorce from an alleged informal marriage. The trial court, however, found insufficient evidence to support an informal marriage. But the facts showed that the woman placed a great deal of trust in the man and hence there was a confidential relationship between them. The man's breach of his agreement to reconvey therefore provided a ground for imposing a constructive trust on the property in favor of the woman on the basis of a constructive as well as an actual fraud.² In 1982 a similar situation arose involving female cohabitants in *Small v. Harper*.³

Despite the usual spate of literature on unisexual unions, however, Texas made no discernable development on that subject.

B. INFORMAL MARRIAGE

A couple's holding themselves out publicly as being married is a vital element in proving an informal marriage. In *Knight v. Volkart-Knight*,⁴ as in *Winfield v. Renfro*,⁵ the court found that the evidence was insufficient to support a public holding out by the alleged wife. In both cases only a small circle of family, friends, and fellow employees knew of the alleged marriage. In *Knight* the fact that each alleged spouse filed a federal income tax return as a single person and both received a loan as single co-borrowers also detracted from the alleged wife's assertion. In response to being asked why the couple had not sought either a religious or civil ceremonial marriage, she testified that "they did not want public acknowledgment of their marriage."⁶ The couple lived together for only about ten months and during that time the woman did not use the man's name. The court did not find it necessary to consider the other two statutory elements of an informal marriage.⁷

1. 64 S.W.3d 581 (Tex. App.—Texarkana 2001, no pet.).

2. *Id.* at 586-87.

3. 638 S.W.2d 24 (Tex. App.—Houston [1st Dist.] 1982, no writ).

4. No. 13-00-514-CV, 2001 WL 892250, at *1 (Tex. App.—Corpus Christi 2001, no pet.).

5. 821 S.W.2d 640, 640 (Tex. App.—Houston [1st Dist.] 1991, writ. denied), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 45 Sw. L.J. 1831, 1833-34 (1992).

6. *Knight*, 2001 WL 892250, at *2.

7. TEX. FAM. CODE ANN. § 2.401(a)(2) (Vernon 1998).

The alleged wife in *Amaye v. Oravetz*⁸ had the burden of proving her alleged marriage because she did not file her petition until over two years had passed after the couple had ceased living together.⁹ In any case, that burden of proof rests upon the petitioner even in the absence of the statute, whether the marriage is formal or informal. The alleged husband's defense was stated in a motion for summary judgment supported by his affidavit that no marriage existed between him and the petitioner, that they had not agreed to be married, and that over six years had elapsed since the parties had ceased living together. The court granted the respondent's motion. The appellate court held that the alleged wife "was required to present more than a scintilla of evidence" to defeat the respondent's motion for summary judgment and that she had failed to do so.¹⁰

C. PERSONAL RIGHTS

In *Clayton v. Richards*¹¹ a husband brought suit for invasion of privacy against his then estranged wife and her assisting private investigator, who had secretly installed a hidden video-camera in the husband's bedroom. Both defendants sought summary judgment on the pleadings. The wife's motion was denied. The wife's agent's case was severed from that of the wife and his motion was granted. The husband appealed. The Texarkana Court of Appeals reversed the judgment of the trial court and remanded the case for trial. On the basis of the facts underlying the agent-defendant's motion, the appellate court concluded that the wife's acts, if proved, could be tortious, though a spouse with equal rights of access to a shared bedroom might, without liability, "as an invasion of privacy . . . open the door of the bedroom and view [the other] spouse in bed. . . . The videotaping of a person without consent or awareness when there is an expectation of privacy, however, goes beyond the rights of a spouse because it may record private matters, which could later be exposed to the public eye." Hence if on the facts of this case the wife's acts were tortious, and if her agent knowingly aided her in the commission of the acts, then his acts were tortious also.¹²

D. DIVORCE JURISDICTION

In *Goodenbour v. Goodenbour*¹³ the court considered whether Texas was the last marital residence of the parties in order to determine whether a Texas court had jurisdiction to grant the wife's petition for divorce. The family had lived in the state of Washington until the husband took a job in New Zealand in 1996. The wife decided to stay behind with

8. 57 S.W.3d 581 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

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

10. *Amaye*, 57 S.W.3d at 584.

11. 47 S.W.3d 149 (Tex. App.—Texarkana 2001, no pet.).

12. *Id.* at 155-56.

13. 64 S.W.3d 69 (Tex. App.—Austin 2001, no pet.).

the children until 1997. Then she was offered a job in Texas and moved to Austin. The husband still hoped to convince his wife to move to New Zealand, but she preferred to stay in Texas where the husband visited the family in early 1998. Though the husband opposed the purchase of a house in Texas and returned to work in the Far East, a house was bought with his approval in the names of both spouses, and the husband continued to visit the wife and children in Texas. For that year the spouses filed a joint federal income tax return from Austin, and the husband filed a non-resident tax return in New Zealand. In 1999 the wife filed her petition for divorce in Texas and the husband was served with a citation in New Zealand. He then filed a petition for divorce within a week, and the wife received a citation from the New Zealand court. The husband answered in Texas with a special appearance to contest the court's jurisdiction. The trial court held that there was insufficient evidence to establish general or special jurisdiction over the husband and that the wife had failed to establish that Texas was the couple's last marital residence under Family Code section 6.305(a)(1) and (a)(2).¹⁴ The court of appeals distinguished between work-separation of spouses (as in this case) and marital separation when the spouses have decided to dissolve their marriage. The court analogized the work-separation situation to that of a couple when one is assigned elsewhere by military responsibility.¹⁵ The court added that "[a]s long as the parties choose to maintain a marriage, there will be a marital residence somewhere."¹⁶ There was evidence that the husband in this case intended to maintain his marriage while his family was living in Texas.¹⁷ Hence the court found that the marital residence was in Texas for the purpose of divorce jurisdiction.¹⁸ The appellate court concluded that for federal due-process purposes, there were sufficient minimum contacts between the husband and Texas to subject him to the specific jurisdiction of the court.¹⁹ The court also held that, despite the geographical distance involved, in this instance when the respondent's employer was willing to pay for his visits to Texas, that state's exercise of personal jurisdiction over him was reasonable and fair. Under the circumstances, a great financial burden would be placed on the wife if she were required to respond to pleadings in the New Zealand court.²⁰

14. *Id.* at 74-75. See TEX. FAM. CODE ANN. § 6.305(a)(1)-(2) (Vernon 1998).

15. *Goodenbour*, 64 S.W.3d at 76-77. In *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 849 n.17 (Tex. 2000), the court noted that military assignment does not establish a new domicile for a service-person for conflict of laws purposes.

16. *Goodenbour*, 64 S.W.3d at 77.

17. *Id.*

18. *Id.* at 78.

19. *Id.* at 81 (distinguishing *Dawson-Austin v. Austin*, 968 S.W.2d 319, 321, 326 (Tex. 1998), where the contacts of the petitioner with Texas were based on the husband's unilateral acts, and thus the Texas court did not have personal jurisdiction over the nonresident respondent).

20. *Goodenbour*, 64 S.W.3d at 81.

E. GROUNDS FOR DIVORCE

1. Cruelty

In *Henry v. Henry*²¹ a petitioner relied solely on the ground of cruelty²² for divorce. The motive for such reliance at a time when most petitioners for divorce rely solely on insupportability²³ is often attributable to a strategy designed to influence the trial court toward a favorable division of property for the petitioner. In *Henry*, however, it seems to have been argued on behalf of the respondent that the ground of cruelty had been superceded by the ground of insupportability. This argument was firmly rejected. At the time that the no-fault ground of insupportability was proposed and enacted, it was understood that all other grounds provided in the code maintained their prior force.²⁴ In *Henry* the appellate court held that the trial court had reasonably concluded that the facts were sufficient to support the petitioner's allegation of cruelty.²⁵

2. Insupportability

Assuming a generally faith-oriented position, the husband (as the respondent-appellant) in *Waite v. Waite*²⁶ mounted a broad constitutional attack on his wife's petition for divorce on the ground of insupportability.²⁷ He argued that the ground not only violates the Free Exercise and Establishment²⁸ clauses of the United States Constitution but also the Rights of Conscience,²⁹ Rights to Open Courts,³⁰ and Rights of Privacy³¹ provisions of the Texas Constitution. With respect to the last of these the appellate court held that the case was not ripe for determination.³² As to the appellant's other arguments, the entire court rejected the husband's reliance on the federal Constitution and the Open Courts provision of the Texas Constitution, but the justices differed with respect to the Rights of Conscience provision of the Texas Constitution. A majority of the court rejected the appellant's argument in this respect, with a dissent on the part of Justice Frost. There was agreement, however, that most of the constitutional arguments did not support the husband's position because the divorce statutes' secular foundations are sound in light of the essentially secular orientation of the constitutional provisions.

21. 48 S.W.3d 468 (Tex. App.—Houston [14th Dist.] 2001, no pet.)

22. TEX. FAM. CODE ANN. § 6.002 (Vernon 1998).

23. TEX. FAM. CODE ANN. § 6.001 (Vernon 1998).

24. See Joseph W. McKnight, *Commentary to the Family Code, Title 1, Husband and Wife*, 13 TEX. TECH. L. REV. 675, 677 (1982).

25. *Henry*, 48 S.W.3d at 468.

26. 64 S.W.3d 217 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

27. TEX. FAM. CODE ANN. § 6.001 (Vernon 1998).

28. U.S. CONST. amend. I.

29. TEX. CONST. art. I, § 6.

30. TEX. CONST. art. I, § 13.

31. TEX. CONST. art. I, § 9.

32. *Waite*, 64 S.W.3d at 223-24.

II. CHARACTERIZATION OF MARITAL PROPERTY

A. PREMARITAL AND MARITAL PARTITIONS

1. Premarital Partition

Before approaching a negotiation leading to a premarital or a marital partition, one should be well apprised of the problems associated with such partitions. Open questions should be carefully studied by reference to available literature, both with respect to Texas law and that prevailing elsewhere, where one or both parties might live in the future.³³ The degree to which retirement benefits can be waived in partition or exchange agreements is not altogether clear.³⁴

The premarital agreement in *McClary v. Thompson*³⁵ provided that income derived from several specific premarital assets of each party would remain separate property. The court concluded that the parties, in their premarital agreement, had meant to partition the future income referred to in their agreement, and that effort was apparently successful as to "profits, dividends, interest, and proceeds [of existing separate property]."³⁶ During the marriage the couple had disposed of all the items of property mentioned in the agreement except the husband's interest in a contributory retirement plan stemming from his employment. As to that property the agreement merely referred to the husband's premarital interest in "all benefits, dividends and earned and unearned proceeds in a retirement program"³⁷ established by the husband's employer. Before trial of their divorce case, the parties agreed that each would be awarded one-half of the portion of the retirement plan found by the court to be community property.³⁸ The trial court awarded all of the interest in the contributory retirement plan to the husband and the wife appealed. The

33. See, e.g., Judith T. Younger, *Antenuptial Agreements*, 28 WM. MITCHELL L. REV. 697 (2001). 24 FAMILY ADVOCATE (no. 2, Winter 2002) is wholly devoted to these issues and contains a very useful bibliography.

34. See Anne Pachciarek & Julie Laece, *Can Prenups Waive Pension Benefits?*, 24 FAMILY ADVOCATE 41 (No. 2, Fall 2001). But the waiver of certain post mortem homestead rights does not preclude the existence of a homestead for other purposes. *PaineWebber Inc. v. Murray*, 260 B.R. 815, 82526 (E.D. Tex. 2001) (correction of homestead claim in bankruptcy).

35. 65 S.W.3d 829 (Tex. App.—Fort Worth 2002, no pet.).

36. *Id.* at 838 (citing *Dokmanovic v. Schwarz*, 880 S.W.2d 272, 275 (Tex. App.—Houston [14th Dist.] 1994, no writ.); *Winger v. Pianka*, 831 S.W.2d 853, 856 (Tex. App.—Austin 1992, no pet.)). Thus, if the parties have entered into a premarital partition, a further marital partition (as some recommend) is unnecessary. Further, if the terms of a subsequent marital partition seem to depart from those of the former, an agreement to arbitrate differences as provided by the premarital partition is controlling along with the terms of the Texas Arbitration Act. *Koch v. Koch*, 27 S.W.3d 93 (Tex. App.—San Antonio 2000, no pet.); TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 et seq. (Vernon Supp. 2002). But if the husband and wife, among others, are partners and the wife joined the partnership as a party in her petition for divorce, an arbitration clause (on which she did not seek to rely) in the partnership agreement does not have any bearing on the wife's divorce proceeding. *Southwest Texas Pathology Assoc. v. Roosth*, 27 S.W.3d 204, 209 (Tex. App.—San Antonio 2002, no pet.).

37. *McClary*, 65 S.W.3d at 837.

38. *Id.* at 832.

appellate court properly rejected the husband's argument of total separate ownership based on the inception of title doctrine.³⁹ The aspects of the plan in dispute were the husband's contributions and interest earned thereon. The plain language of the agreement did not specifically deal with these particular aspects of the retirement plan, and the premarital agreement nowhere referred to anything more than separate property interests at the time the agreement was made. There was "no mention of salary, earnings, income or employment benefits."⁴⁰ Neither did the agreement exclude the creation of community property nor state that future salary would be separate rather than community property.⁴¹ The appellate court therefore concluded that the interests in issue were community property.

2. *Marital Partition*

In *Nesmith v. Berger*⁴² the appellate court considered the validity of a 1992 marital partition and commented on its terms in a motion for rehearing. Prior to their marriage, the couple had engaged in extended negotiations over several months toward a premarital partition of property to be acquired during marriage. Several draft-agreements were considered, but as the wedding day (May 16) approached, an agreement had not been reached. The couple then agreed in writing that "[i]t is our intention to have a post-nuptial agreement completed by June 12th."⁴³ After the wedding the husband insisted on reaching an agreement by the date specified, and he stated on May 21 that they would not depart on their honeymoon until the agreement was signed. The agreement was executed later that day, though there was a conflict of evidence as to whether the appendices were attached to it. Also, the wife asserted that her oath (unnecessary in this instance) was irregularly appended to the writing.

Both spouses complied with the terms of the instrument for several years thereafter. In her petition for divorce in 2000 the wife asserted that the partition was invalid for lack of volition on her part in that she had been coerced by her husband's threat not to go on their honeymoon unless she had signed it. In reviewing the trial court's conclusion that she had not discharged her burden of proof, the appellate court agreed that the trial court's conclusion should stand in light of the mutual desire of the parties to protect their interests by entering into the agreement, their long but unsuccessful efforts to reach a premarital agreement, their expressed intent to enter into such an agreement after the wedding ceremony, the husband's fixing a deadline for doing so, and the spouses' compliance with the terms of their agreement to execute the partition by

39. *Id.* at 836.

40. *Id.* at 838.

41. *Id.*

42. 64 S.W.3d 110 (Tex. App.—Austin 2001, no pet.), prior opinion of June 29, 2001 withdrawn.

43. *Id.* at 114.

June 12.⁴⁴

During the marriage a home was acquired by the husband with a payment from his separate funds and giving a community obligation for the rest of the purchase price. The pre-marital partition provided that all acquisitions of the acquiring spouses would be separate property with which all indebtedness would be discharged. Despite the partition the wife asserted that these terms meant that this acquisition was community property because the seller did not agree to look only to the husband's separate property for payment of the purchase-money indebtedness, as is ordinarily required to make credit-purchases separate property.⁴⁵ Looking to all the circumstances in which the debt had arisen, the trial court had concluded that the community presumption as to the property acquired on credit had not been overcome.⁴⁶ But, in the acquisition of the home on credit, only the husband had signed the note to the lender of the purchase price (beyond the initial separate payment) and the wife joined in the deed of trust "pro forma for the reason that the property described herein is the sole and separate property of [the husband]."⁴⁷

During the marriage, the wife had "bought in" to the home with the proceeds from the sale of her separate property premarital home in order to escape capital gains taxes.⁴⁸ The trial court had awarded the wife a monetary sum in lieu of her interest in the home. The wife argued on appeal that she was thereby deprived of her separate interest in the property. The husband argued on appeal that this transaction would have caused the home to become his and his wife's partnership asset. The appellate court, however, pointed out that he waived that argument by not offering it at trial. The court went on to add that, even if the argument had been made in the court below, the requirements of a partnership would not have been met,⁴⁹ notwithstanding that the court had said in its earlier opinion that co-ownership of the property had been achieved by the wife's "buying in" to the house. Because of the way in which the matter had been pled and argued, the wife was barred from claiming any more than she had been awarded by the trial court.⁵⁰

The court did not suggest that the parties' marital partition, by its particular terms, purported to deal with the problem of co-ownership of the home which arose through the "buy-in" arrangement. Nor did the court suggest that the couple could not have dealt with their uncertain objects

44. *Id.* at 115.

45. *See* *Gleich v. Bongio*, 612, 99 S.W.2d 881, 884 (Tex. 1937).

46. *Nesmith*, 64 S.W.3d at 117.

47. *Id.* at 117. At this point one might have thought that the husband would have relied on the rule in *Lindsay v. Clayman*, 254 S.W.2d 277 (Tex. 1952), and *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1967).

48. *Nesmith*, 64 S.W.3d at 113.

49. *Id.* at 117 (citing TEX. REV. CIV. STAT. ANN. art. 6132B-2.03 (Vernon Supp. 2001)).

50. *Id.* at 119. The wife's assertion that the trial court's deduction from the monetary award of a proportional amount of mortgage and tax payments was also excluded. Though the appellate court pointed out that the wife could have argued entitlement as a cotenant to and offset for her constructive ouster, she had failed to do so. *Id.*

effectively by terms that might have been appropriately included in the partition agreement. If such an eventuality is foreseen, its resolution should be dealt with in the partition. In the court's view, such a situation clearly could not be dealt with by mere inferences from the agreement.⁵¹

B. TRACING

The fundamental means of proving that a spouse's marital property is separate property are (1) identification of the property as acquired when the owner was single,⁵² (2) a showing that particular property was the subject matter of a gift or recovery for personal loss not measured by earning power,⁵³ (3) proof that specific property was an inheritance, or (4) an identification of the property as a mutation of property acquired by one of those means. An application of the principle of tracing to the contents of a brokerage account is illustrated by *Tate v. Tate*.⁵⁴ The account had been held by the wife's father who had designated her as joint tenant with a right of survivorship. Hence, on the father's death in 1991 the wife became sole owner of the account. She thereupon added her husband's name to the account as a joint tenant with the right of survivorship, and he signed a card confirming that status. At the trial for divorce, the wife explained that her husband's name had been added to the account only as a means of giving him access to the account in case of her incapacity and of providing for his succession to the account if she should predecease him. The wife testified that she had not intended to make a present gift of any of the account to her husband and there had been no discussion between them concerning a gift. The account was later transferred to another broker. At the time of the trial the account had a value that was depleted by half through the wife's withdrawals, some of which were converted to travelers' checks still in the wife's possession. Only the wife had made withdrawals from the account. After her father's death only one deposit was made to the account, and that was made by the wife. That deposit consisted of proceeds of a judgment recovered by the husband, apparently his separate property, as it is stated that no community property went into the account. The amount of that deposit is not revealed nor was there any apparent evidence of a gift to the wife by her receipt of the check from her husband. The trial court made no findings of fact or conclusions of law other than making an "order confirming that certain assets [including the account and the travelers' checks] were [the wife's] separate property."⁵⁵ The dispute as to the character of the brokerage account was thus before the El Paso Court of Appeals. The court,

51. This point is very apparent from the earlier (withdrawn) opinion of the court.

52. TEX. CONST. art. XVI, § 15; TEX. FAM. CODE ANN. § 3.001 (Vernon 1998).

53. *Id.* The additional means of showing that property was acquired as a replacement for personal loss not measured by loss of earning power does not appear on the face of the Constitution but is derived from a broad interpretation of its meaning in *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972); TEX. FAM. CODE ANN. § 3.001(3).

54. 55 S.W.3d 1 (Tex. App.—El Paso 2000, no pet.).

55. *Id.* at 3.

however, dodged the characterization issue by treating the dispute as fundamental of division of property and thus minimizing the need for removal. The court concluded that the husband had first to show that the trial court's division of the community estate (with which an item of the wife's separate property may have been fortuitously included) constituted an abuse of discretion.

The Texas Supreme Court's conclusion in *Jacobs v. Jacobs*⁵⁶ is simply stated: if there has been a significant mischaracterization of marital property in a matter of divorce, an intermediate appellate court must remand the case for redivision. Thus, when there has been some error in characterization of property, the question of remand turns on what constitutes a "significant" mischaracterization. Rather than treating characterization as amounting to a preoccupation with trifles⁵⁷ (which under the circumstances would probably not have unreasonably affected the division of the large community estate) and in the absence of any findings as to the court's bases for division,⁵⁸ the court tested the result in *Tate* as an exercise of judicial discretion.⁵⁹ The court acknowledged this as "one of the tougher appellate propositions."⁶⁰ In response to the husband's argument that the wife had failed to trace the contents of the brokerage account to the assets she had inherited (and assuming that his argument had merit), the court concluded that his position was unsound because he had failed to show how any alleged mischaracterization caused the trial court to abuse its discretion. "In short, he [had] wholly failed to conduct a harm analysis."⁶¹ To determine the application of the law to facts of a particular dispute, the court carefully described three instances of exercise of judicial good judgment (sometimes called judicial discretion). The court treated the second as describing the case at hand:

First, suppose Wife claims Blackacre is her separate property and Husband claims the asset is community property. Second, suppose the trial court characterizes it as community property and awards it to Wife. On appeal, Wife must establish error; she must challenge that the characterization is against the great weight and preponderance of the evidence (a factual sufficiency complaint) or establish that separate property status was established as a matter of law (a legal sufficiency complaint). She must also establish that the characterization error was harmful—that because of the mischaracterization, the overall division of property constitutes an abuse of discretion.

Now suppose that given the same fact pattern, the trial court characterizes Blackacre as Wife's separate property and awards it to her.

56. 687 S.W.2d 731, 732-33 (Tex. 1985).

57. *Tate*, 55 S.W.3d at 7. (The printer is guilty of twice misspelling a key word of the maxim *de minimis non curat (ex.)*.)

58. *Id.* at 10.

59. *Id.* at 5-7 n.3 (relying on the same court's conclusion and explanation in *Lindsey v. Lindsey*, 965 S.W.2d 589, 592 n.3 (Tex. App.—El Paso 1998, no pet.)).

60. *Id.* at 5.

61. *Id.* at 7. By the court's analysis it was concluded that "[t]he characterization error, if any, represents 8.5 percent of the total estate." *Id.* at 10.

This time, Husband appeals. He must first establish error by challenging the legal or factual sufficiency of the evidence to support the separate property characterization. He must also conduct a harm analysis—that because of the mischaracterization, the overall division of property constitutes an abuse of discretion.

It is only in the third scenario that reversible error exists as a matter of law. In this example, Wife claims Blackacre is separate property and Husband claims it is community property. The trial court characterizes it as community property and awards it to *Husband*. If Wife can establish that Blackacre is her separate property, it is unnecessary to show harm because divestiture of separate property is reversible error. In this singular instance, there is no need to demonstrate that the overall property division constitutes an abuse of discretion.⁶²

The court succinctly summarized its conclusions:

In the absence of an issue concerning divestiture, we can draw the following conclusions. If property is mischaracterized and the mischaracterization affects the just and right division of the community estate, we must remand the entire community division. If the mischaracterization has a *de minimis* effect on the division, then there has been no showing of an abuse of discretion. It is only when the court mistakenly characterizes property that is of such magnitude that it materially affects the just and right division of the community estate that reversible error is demonstrated.⁶³

In *Tate* the El Paso court did not comment on the Dallas appellate court's solution of a somewhat similar fact situation involving management of an account containing the wife's solely managed community property in *Brooks v. Sherry Lane National Bank*.⁶⁴ In *Brooks* the wife had given her husband access to her bank account for reasons similar to those relied on in *Tate*. In that instance, however, the husband had actually used the account (but only once) for the purposes intended. The court concluded that the account was therefore subject to joint management of the spouses. The two cases are clearly distinguishable on several grounds, principally because, in *Tate*, the character of the property was put in issue whereas, in *Brooks*, the issue was the management of it. In *Tate* the court put aside the difficult tracing question in that *divorce* case by merely considering the result of the judicial exercise of discretion in making its division. In a death case or one involving a creditor's claim, the characterization question would have to be precisely resolved.

62. *Tate*, 55 S.W.3d at 6-7 (citations omitted). “[M]ere mischaracterization of separate property as community property does not require reversal; it is appellant’s burden to prove that any disparity in the division was caused by the mischaracterization of property and that it was of such substantial proportions that it constituted an abuse of the trial court’s discretion.” *Id.* “[M]ischaracterization of community property as separate property is not reversible unless the mischaracterization had more than a *de minimis* effect on the just and right division.” *Id.* at 7.

63. *Id.* at 11 (citations omitted).

64. 788 S.W.2d 874, 877 (Tex. App.—Dallas 1990 no writ.). The case was evidently not cited to the court in *Tate* and no mention is made of it by the court.

*In re Case*⁶⁵ involved different considerations. As a general proposition only clear and convincing evidence can rebut⁶⁶ the community presumption. With respect to gratuitous transfers between spouses, a gift is presumed in several instances,⁶⁷ but may be rebutted by contrary proof—most commonly by a showing of contrary intent of the transferor. In cases when one spouse merely takes title in the name of the other spouse, and payment is made with community property or the purchase is made with community credit, there is no presumption of gift. In that instance the intent to make a gift must be proved. The legislature can, of course, vary this presumption just as it required clear and convincing evidence to rebut the general community presumption in 1987.⁶⁸ Another instance of such legislative action is Probate Code section 438,⁶⁹ dealing with the contents of a bank account or a certificate of deposit. The statute provides that the separate property so deposited by one spouse in the names of both spouses does not lose its separate character during the lifetime of both spouses whereas, by application of the ordinary presumption, a gift of one-half the deposit to the other spouse. Only “clear and convincing evidence of a different intent” will disprove the Probate Code’s presumption.⁷⁰ Thus, a proportional interest of separate and community property would apply to purchases with those funds held in the account.⁷¹ The consequence of this result is illustrated in *Case*.⁷² There the husband bought a certificate of deposit with his separate property and put title in the names of both spouses. Thus, the court said that the entire interest in the certificate of deposit belonged to the husband. In the court’s view, the fact that the names on the certificate were those of both spouses did not affect this conclusion.⁷³

When the court in *Case* described the spouses’ “purchase”⁷⁴ of a home with community and separate funds, it did not state whether both types of funds were used initially so that a proportionate purchase would result⁷⁵

65. 28 S.W.3d 154 (Tex. App.—Texarkana 2001, no pet.).

66. TEX. FAM. CODE ANN. § 3.003(b) (Vernon 1998).

67. If separate property of one spouse is used to pay for property to which title is taken in the name of the other, there is a presumption of gift to the transferee-spouse. *Smith v. Strahan*, 16 Tex. 314 (1856). If separate property of one spouse is transferred gratuitously to the other spouse there is also a presumption of gift. *Goldberg v. Zellner*, 235 S.W. 870 (Tex. Comm’n App. 1921, judgment adopted). Further, a gratuitous transfer of community property to the other spouse raises a presumption of gift. *Story v. Marshall*, 24 Tex. 305 (1859). For a recent summary of the law of donative transfers to a spouse, see Bill Dudley, *Donor’s Remorse: When a Gift Is not a Gift*, 2001 STATE BAR [OF TEXAS FAMILY LAW] SECTION REPORT 7 (No. 1, Sprint 2001). But rules applicable to married couples do not necessarily apply to persons about to marry. See *In re Loftis*, 40 S.W.3d 160, 165 (Tex. App.—Texarkana 2001, no pet.) (premarital discharge of premarital obligation of other spouse).

68. TEX. FAM. CODE ANN. § 3.003(b).

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

70. *Id.* § 438(a).

71. See *Duncan v. United States*, 247 F.2d 845, 851-52 (5th Cir. 1957).

72. *Case*, 28 S.W.3d at 161.

73. *Id.* at 159.

74. *Id.* at 160-61.

75. TEX. FAM. CODE ANN. § 3.006 (Vernon 2002); *Love v. Robertson*, 7 Tex. 6 (1851).

or whether the separate funds were used to discharge a probable purchase-money lien on the property which had been disposed of prior to the dispute. The latter was apparently the fact, for the court's analysis of the payment of separate funds as giving rise to a right of reimbursement⁷⁶ would otherwise be erroneous.

Although the statute of 1957⁷⁷ made it plain that a life insurance policy constitutes an item of property, the character of term policies as marital property has not been clear. In its analysis of Texas law, the Fifth Circuit Court of Appeals reached the conclusion in 1995 that a term policy, like a "whole life" policy, takes its character from the date of acquisition.⁷⁸ The Corpus Christi appellate court agreed with this proposition three years later in *Camp v. Camp*.⁷⁹ In *Barnett v. Barnett*⁸⁰ the Texas Supreme Court seemed to be inclined to the same conclusion.⁸¹

In distinguishing between separate and community estates in *Beard v. Beard*⁸² the court dealt with a plethora of transactions dealing with accounts containing both separate and community funds. In one instance⁸³ the court applied the *identical sum inference* derived from *McKinley v. McKinley*.⁸⁴ An identical sum inference is a withdrawal of funds from a mixed fund of separate and community property in the precise amount of the community deposit. As in *McKinley*, the *Beard* court identified the withdrawal as community property.

C. REIMBURSEMENT AND ECONOMIC CONTRIBUTION

1. Reimbursement

Although the point is dealt with in *Beard*⁸⁵ in rather summary fashion, the court's conclusion concerning the wife's claim for payment of her separate property to discharge a community debt to purchase a ring is of some importance. The husband apparently testified that he had bought the ring with \$7,000 of his separate property. The wife alleged, however, that she had paid over \$4,000 of her separate property toward that purchase, though by that time the husband had probably given the ring to

76. *Case*, 28 S.W.3d at 161 (co-ownership of property by separate and community estates from the time of acquisition).

77. TEX. GOV'T CODE ANN. § 312.011(13) (Vernon 1998).

78. *See Estate of Cavanaugh v. Comm'r*, 51 F.3d 597, 601-04 (5th Cir. 1995).

79. 972 S.W.2d 906 (Tex. App.—Corpus Christi 1998, no pet.).

80. 67 S.W.3d 107, 111 (Tex. 2001).

81. *See infra* Part IV.B.1 at the end.

82. 49 S.W.3d 40 (Tex. App.—Waco 2001, no pet.).

83. *Id.* at 61 (the deposit and withdrawal of \$1,948.12).

84. 496 S.W.2d 540, 542 (Tex. 1973). *See Joseph W. McKnight, Family Law: Husband and Wife*, 52 SMU L. REV. 1143, 1154-56 (1999). In addition to what is said there, it should be added that, for reimbursement purposes, tracing requirements are met by a showing that the property for which reimbursement is sought was used to benefit another estate. There need not be further tracing to show that the property contributed is still in the other estate. In *Beard* the husband had used separate funds to discharge a home improvement loan for the benefits of community property. The court held that the husband had therefore discharged his burden of proof of benefit to the property. *Beard*, 49 S.W.3d at 56.

85. *Beard*, 49 S.W.3d at 56, 58.

her. The court said that the wife's proof of that fact was immaterial because the ring was awarded to her in the judgment. The reimbursement question presented has long gone unanswered. Another example of the same sort of question arises when a husband buys a particular item of property on community credit and, after using her separate property to discharge the indebtedness, his wife as legatee of the property under the husband's will claims reimbursement for her payment. The holding in *Beard* supports a negative response to her claim.

With respect to the wife's claim for reimbursement for her separate payment of closing costs for the community purchase of the family home, in order to prove payment, she must show that her funds were still in the account at the date of payment. If other purchases deemed separate had already accounted for all separate purchases from the account, her claim would fail.⁸⁶ This conclusion is unexceptionable: The claimant cannot recover twice. The court's reasoning is consistent with its disposition of the claim of separate funds to purchase the ring.

Other issues in *Beard* involved claims for reimbursement when the wife's separate estate was commingled with community property. Insofar as the husband made withdrawals from the commingled accounts, they should have been presumed to be community property under the actual holding in *Sibley v. Sibley*⁸⁷ because the husband is subject to a fiduciary duty to preserve the wife's separate property and to withdraw the community property in which he has a one-half interest.⁸⁸ With respect to withdrawals by the wife from an account containing *her* separate property and community property, the court relied on the inequitable bastard-descendants of *Sibley*⁸⁹ for the proposition that the wife's withdrawal should also be presumed to have been community property. But surely if *her* separate funds and community funds were subject to her care, she should be deemed first to withdraw the funds which were wholly hers rather than those in which her husband had a one-half interest. The court's conclusion that community funds were withdrawn first and were, as a result, depleted, leaving only her own separate funds, therefore, seems erroneous for tracing purposes. However, it should be noted that, if both spouses act in concert to make a withdrawal of funds from a commingled community account and a separate property fund of one (or both) of them, a presumption of withdrawal of community funds seems reasonable. In *Beard*⁹⁰ the court reached this conclusion, but for the wrong reasons, *i.e.* simplistic reliance on the bastard-*Sibley* line of cases, which are contrary to all principles of equity.⁹¹ If one spouse expends the other

86. *Id.* at 60.

87. 286 S.W.2d 657, 659 (Tex. Civ. App.—Dallas 1955, writ dismissed w.o.j.). See Joseph W. McKnight, *supra* note 84.

88. *Id.*

89. *E.g.*, Smith v. Smith, 22 S.W.3d 140, 146-47 (Tex. App.—Houston [14th Dist.] 2000, no pet.), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 53 SMU L. REV. 995, 1006-07 (2000).

90. *Beard*, 49 S.W.3d at 58.

91. See authorities cited *infra* note 92.

spouse's property and stands in a fiduciary position in doing so, reimbursement is due to the other spouse on fiduciary principles.⁹² But if a spouse expends his or her own property, or the community property, for an alleged reimbursable purpose, recovery should depend on the nature of the purpose.

In *Beard*⁹³ the wife appealed the divorce court's rejection of her claim for reimbursement of the community estate for payment on a secured bank loan to her husband, and for payment on an unsecured loan to him by his father and the father's partner. Both loans had been made to the husband while single to procure purchase money for his investment in income-producing rental property. The community estate had reduced the husband's secured bank loan by \$7,528. On the couple's federal income tax returns, the couple had saved over \$7,000 in taxes for their losses on the rental property. Business income from the property had amounted to over \$41,000. On the basis of the equities involved, the appellate court affirmed the exercise of the trial court's good judgment in making no community reimbursement. Under the 2001 statute⁹⁴ the community estate would be entitled to recover the \$7,528, the amount by which the husband's separate property had benefited for reduction of the *secured* debt. As for the losses suffered by the husband's separate property, under the 2001 statute the husband's separate estate might claim and recover over \$7,000 as reimbursement for reduction of community taxes. Though the community estate was entitled by operation of law to the \$41,000 in income, many courts have treated that sort of income as an equitable offset against a community reimbursement claim. Section 3.407, with respect to offsetting claims, seems inapplicable to this situation.

In *Beard*⁹⁵ the trial court denied the community estate reimbursement for the husband's waste of community funds for his immoral recreation expended at strip clubs over several years. The wife's expert estimated these expenditures as \$12,000. The husband had responded in effect that he did not enjoy more conventional types of recreation (such as golf, fishing, and hunting) and that his wife had squandered \$11,000 of community funds (on furs and jewelry) and more community property on expensive clothes and the appearance and cleanliness of her hair. The trial court's judgment was affirmed, and under the 2001 statute⁹⁶ a similar conclusion would be reached.

2. *Economic Contribution*

As a type of reimbursement, it is assumed that claims for economic

92. See McKnight, *supra* note 84, at 1156.

93. *Beard*, 49 S.W. 3d at 63.

94. TEX. FAM. CODE ANN. § 3.403 (Vernon Supp. 2002).

95. *Beard*, 64 S.W.3d at 63-64.

96. TEX. FAM. CODE ANN. § 3.408 (Vernon Supp. 2002).

contribution provided in the 2001 legislation⁹⁷ are subject to the same general rules as for reimbursement claims generally: that claims cannot be enforced prior to the termination of the marriage although they may already be tentatively fixed subject to prior repayment, and that no interest is imposed on the advancement unless specifically provided by statute. A contractual loan or advancement is not, of course, subject to restrictions of reimbursement, which operate in accordance with the terms of the contract or along the lines of quantum meruit and quantum valebat. As in the case of community reimbursement, it is provided in section 7.007(a)(1)⁹⁸ that community recoveries for economic contributions are subject to a just and right division on divorce.⁹⁹ Section 7.007(b) provides that “[i]n a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for reimbursement . . . and (2) order a division of the claim for reimbursement if appropriate, in a manner that the court considers just and right. . . .” This provision presumably refers to *community reimbursement* only, as the reference to “rights of both spouses” indicates, and that reading of the section is consistent with the correlative provisions of sections 3.402, and 3.404, and 7.007(a) with respect to claims for economic contribution.

Section 3.401¹⁰⁰ of 2001 Texas Family Code replaces the somewhat similar section 3.401 of 1999 that dealt with “financial contribution.” In its modified form, the new concept applies only to discharging a lien-burdened marital estate or for capital improvements on another marital estate “other than by incurring debts.”¹⁰¹ As for liens fixed for “ordinary maintenance and repair” and for “taxes, interest, or insurance,” the rules of economic contribution do not apply.¹⁰² “Ordinary maintenance and repair” presumably does not cover an expenditure such as replacing a roof, a major repair of a swimming pool or sprinkler system, or in the case of rural property, significant expenditures for fencing, clearing brush, putting in a new well or irrigation system, or providing substantial accommodations for hunters or fishermen. “Taxes” in this context presumably refers mainly to local ad valorem taxes, and “interest or insurance” seems to refer to periodic payments involving loans and insurance protection. But “taxes” might refer to a federal tax lien or interest thereon, and insurance might refer to title insurance. It may be difficult in some instances to fit a particular fact situation within the catalogue of

97. See TEX. FAM. CODE ANN. §§ 3.401-.404, 3.406-.410, 7.002. Despite the clarity of the 2001 statutory scheme as compared to that of 1999, there are nonetheless some aspects of the new scheme left undefined. Two extensive commentaries on the 2001 act mention a number of uncertainties. See Warren Cole, *Developing, Presenting and Defending Economic Contribution and Reimbursement Claims*, PROCEEDINGS OF THE TEXAS ACADEMY OF FAMILY LAW SPECIALISTS 32 (Feb. 8, 2002), and Jerry Frank Jones, *Claims for Economic Contributions: House Bill 1245*, 39 [STATE BAR OF TEXAS] REAL ESTATE, PROBATE & TRUST LAW REPORTER 72-75 (No. 4, July 2001).

98. TEX. FAM. CODE ANN. § 7007(a)(1) (Vernon Supp. 2002).

99. TEX. FAM. CODE ANN. §§ 3.402, 3.404, 7007(a) (Vernon Supp. 2002).

100. TEX. FAM. CODE ANN. § 3.401 (Vernon 2001).

101. TEX. FAM. CODE ANN. § 3.402(a)(b) (Vernon Supp. 2002).

102. § 3.402(b)(1).

economic contributions in section 3.402.¹⁰³ One is reminded of *In re Gill*,¹⁰⁴ where the Waco Court of Appeals held that the phrase “debt on separate property,” in the context of the 1999 version of section 3.402,¹⁰⁵ meant “only debts of a spouse that are separate obligations of that spouse’s estate secured by that spouse’s separate property”¹⁰⁶ for the purpose of determining a community right of reimbursement for a “financial contribution” in paying the debt. The court denied community reimbursement in that instance for the discharge of the lien fixed on the wife’s separate property for a loan to both spouses using the wife’s separate property as collateral.¹⁰⁷ The statutory language was thus interpreted to refer only to a debt for which the creditor has agreed to look solely to a borrowing spouse’s separate property for payment. For purposes of an economic contribution claim under the 2001 version of section 3.402,¹⁰⁸ the court presumably would have reached the same conclusion. In light of the rarity of instances in which a creditor agrees to limit recovery to a borrower’s separate property, the statute will probably be interpreted very narrowly.

Section 3.402(b)(2) excludes recovery of an “economic contribution” for a spouses’s services expended for a separate marital estate, but such a benefit seems compensable as a reimbursement under section 3.408.¹⁰⁹ In section 3.409 (added in 2001) certain claims are also *not* compensable as reimbursement. Such claims include “contributions of property of a nominal [or trifling] amount,” “payment of child support, alimony, or spousal maintenance” (presumably under court order, contractual obligation, or some other enforceable duty), “living expenses of a spouse or child of a spouse,” and “a student loan owed by a spouse.”¹¹⁰ Some of these exclusions from reimbursement may dampen frivolous claims though they cannot be excluded by the operation of equitable principles. But these exclusions will achieve some uniformity of reimbursement standards.

The approach of the Legislature to redefinition of the rules of reimbursement as defined in 1999 and 2001 is significantly different from its approach to earlier major reform of family property law. The recent enactments, as seen from the vantage point of the end of the 2001 session, seem analogous to a series of drafts, with each subsequent tentative enactment merely replacing and correcting what went before. This criticism

103. § 3.402 (Vernon Supp. 2002).

104. *In re Marriage of Gill*, 41 S.W.3d 255, 258 (Tex. App.—Waco 2001, no pet. filed).

105. TEX. FAM. CODE ANN. § 3.402.

106. *Gill*, 41 S.W.3d at 258 n.3.

107. *Id.* at 259.

108. TEX. FAM. CODE ANN. § 3.402.

109. TEX. FAM. CODE ANN. §§ 3.402, 3.408. The hourly rate for such services, however, should not exceed that of a person ordinarily competent in rendering the services performed. That is, for hedge-clipping and rent collection for her husband’s rental property his lawyer’s wife’s services should not be charged at a lawyer’s rate but at the rates charged by hedge-clippers or rent collectors.

110. TEX. FAM. CODE ANN. § 3.409 (Vernon 2001).

is merely of legislative technique. Though one may disagree with the wisdom of some of the provisions, the legislation that emerged in 2001 was carefully drafted and is generally clear in its meaning.

The drafters of the 2001 legislation were generally careful to define economic contribution and to provide that the rules of reimbursement would continue to deal with other interspousal claims.¹¹¹ The rules governing financial contribution and reimbursement had already been defined as somewhat different sorts of claims in 1999, but the details of the new system were not well defined. Now the elements of the system are far more clearly indicated. What is not an economic contribution compensable by one marital estate to another may still be a right of reimbursement.¹¹² As a general rule, however, claims for reimbursement will usually be those for depletion of the community estate or the other spouse's separate estate, as well as claims for betterment of property not related to the discharge of secured liability.¹¹³

By statutory definition, an economic contribution reflects a betterment of one marital estate by an advancement made by another marital estate.¹¹⁴ If there is any unreasonably large withdrawal from the community estate and no benefit to either separate estate, a right of reimbursement as defined prior to the statute may be claimed.¹¹⁵ These are rights previously defined as rights of reimbursement which are now excluded from the definition of economic contribution in sections 3.402, 3.403, and 3.408(a). Apart from the category defined as an economic contribution, there are the further provisions of section 3.402, which exclude recovery for betterments of another marital estate but are not defined as an economic contribution by section 3.402.¹¹⁶ A good example of this sort of reimbursement for betterment is that which is *not made in favor of property subject to a secured interest*. Those sorts of betterments left undefined as economic contributions in section 3.402 are therefore still subject to claims for reimbursement. Besides property burdened by a secured interest as defined in sections 3.402(a)(1)-(6), a further striking redefinition of interests achieved by these statutes are the effects of equitable considerations excluded by, or omitted from, section 3.403.¹¹⁷ However, such factors are still effective for claims of reimbursement.¹¹⁸ The new statute (as built on the foundation of the old concept of reimbursement) specifically provides that recovery for economic contributions arise, not only when a marriage is dissolved by divorce or annulment,¹¹⁹ but also when a marriage is dissolved by death.¹²⁰

111. TEX. FAM. CODE ANN. § 3.408 (Vernon 2001).

112. *Id.*

113. *Id.*

114. § 3.403.

115. § 3.408.

116. § 3.402(b).

117. TEX. FAM. CODE ANN. § 3.403 (made more specific by the terms of § 3.403(e)).

118. § 3.403(c).

119. § 3.406(a).

120. § 3.404(b).

III. EXEMPTIONS OF MARITAL PROPERTY FROM LIABILITY

A. NATURE AND EXTENT OF HOMESTEAD PROPERTY

1. *Rural Homestead*

The distinction between the urban and rural homestead is fundamental to Texas law. The Legislature may allow up to ten acres for an urban homestead and up to two hundred acres for a rural homestead.¹²¹ In both instances the Legislature has allowed the maximum acreage for those purposes, except that a single claimant nor a part of a family is not entitled to more than one hundred rural acres.¹²²

In 1989, the provisions of the Property Code section 41.002¹²³ were amended to protect rural landowners from an encroaching municipality and its ad valorem taxation of otherwise rural realty.¹²⁴ The statute provided that such rural land did not become urban for homestead purposes unless certain municipal services were extended to the property.¹²⁵ The provision was construed to mean that even if such municipal services were provided, the land that was otherwise a rural homestead did not lose its rural character.¹²⁶ In 1999 municipal taxing authorities and lenders, wishing more certainty for the non-homestead character of realty that might be subject to municipal taxation or that might serve as security for a loan, achieved a statutory amendment¹²⁷ providing that such land becomes an urban homestead if located within municipal boundaries "or its extraterritorial jurisdiction or a platted subdivision" and if it is served with certain more broadly defined municipal amenities.¹²⁸ Thus, the reality of a rural location as a standard for determining rural homestead character of such land was even further diminished.

In *In re Perry*¹²⁹ a debtor filed for in bankruptcy in 2000 and claimed about twenty-six acres where his mobile home and (apparently) his home were located, and five acres adjoining it further into the country, and an adjoining fifty-nine acres. All ninety acres were claimed as exempt property.¹³⁰ The court explained that the first step in determining the rural or urban character of homestead property is application of section 41.002(c).¹³¹ If the property is found to be within urban boundaries, the

121. TEX. PROP. CODE ANN. § 41.002 (Vernon 2000).

122. *Id.*

123. 1989 TEX. LAWS 1517, ch. 391, § 2 at 1519.

124. *In re Perry*, 267 B.R. 759 (Bankr. W.D. Tex. 2001).

125. TEX. PROP. CODE ANN. § 41.002(c) (Vernon 2000).

126. See Joseph W. McKnight, *Family Law: Husband and Wife*, 53 SMU L. REV. 995, 1026 (2000), Joseph W. McKnight, *Family Law: Husband and Wife*, 46 SMU L. REV. 1475, 1494 (1993).

127. PROP. CODE ANN. § 41.002 (c) (West 2000).

128. *Id.*

129. 267 B.R. 759 (Bankr. W.D. Tex. 2001).

130. *Id.* at 762.

131. *Id.* at 766; PROP. CODE ANN. § 41.002(c).

court must then consider the relationship of the site to a municipality.¹³² If both of these tests for an urban location are met, the property is urban.¹³³ If either test is not satisfied, the property is deemed rural.¹³⁴ In this instance the entire area was claimed as rural.¹³⁵ But as to the mobile-home park, the court found that those acres could not be characterized as a rural homestead because the debtor used them "for business purposes,"¹³⁶ seemingly identifying any business purpose as making the area non-rural. The result may be usefully compared to that in *Hollifield v. Hilton*,¹³⁷ in which the construction of a mobile-home park on rural acreage was said to constitute a lien on the rural homestead, including the debtor's adjacent home.¹³⁸ In *Hollifield*, the court started with an acknowledgment of a rural homestead of long occupation, within which a mobile-home park was later constructed,¹³⁹ an approach not fundamentally different from that of the court in *Perry*. The court then went on to consider the validity of the lien for an improvement of the rural property without any analysis of its later use.¹⁴⁰ There the court was concerned principally with the validity of the lien and its extent and stated that the lien supporting the loan for an improvement would have been valid on the land underlying the improvement even whether or not the property had character when the improvement lien allegedly arose. The court concluded that the lien extended to the site of the family home, thus treating the subject matter of the lien as an improvement on the entire rural homestead.¹⁴¹ There was no suggestion, however, that business use of a commercial character thereby made the land urban.

A situation in *Perry* may also be usefully compared to that *In re Mitchell*,¹⁴² where the issue was the extent of a rural homestead as defined by its non-use rather than its use. There the use of the rural homestead had

132. *Id.* The court enumerates five factors: "(1) the location of the land with respect to the limits of the municipality; (2) the situs of the lot in question; (3) the existence of municipal utilities and services; (4) the use of the lot and adjacent property; and (5) the presence of the platted streets, blocks, and the like . . ." (quoting *U.S. v. Blakeman*, 997 F.2d 1084, 1091 (5th Cir. 1992)).

133. *Perry*, 267 B.R. at 767.

134. *Perry*, 267 B.R. at 767.

135. *Id.*

136. *Id.* at 768, 770 (citing *In re Bradley*, 960 F.2d 502 (5th Cir. 1992, cert. denied sub nom.) *Commonwealth Land Title Ins. Co. v. Bradley*, 507 U.S. 971 (1993): "the operation of a business on part of a rural homestead forfeits the homestead on that part of the property." *Id.* at 506 n.6.

137. 515 S.W.2d 717 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.); compare *Auty v. Reasor*, 108 S.W. 1162, *rev'd on hearing by* 113 S.W. 748 (Tex. 1908). There the Texas Supreme Court said in relation to a rural homestead that farming on shares does not allow inclusion of property (so used) as part of a rural homestead even though the profits therefrom may be used for the benefit of the family. In that instance, however, the court was considering later acquisitions of non-contiguous rural land classified as an expansion of the already existing rural homestead.

138. The debtor seems to have lived on the 26 acres.

139. *Id.* at 719.

140. *Id.* at 720-21.

141. *Id.* at 721. See Joseph W. McKnight, *Family Law: Husband and Wife*, 29 Sw. L. J. 67, 94 (1975).

142. 132 B.R. 553 (Bankr. W.D. Tex. 1991).

deteriorated from farming and ranching for the support of the family to no agricultural or commercial use at all—except for the psychic support supplied to the family by the surrounding scenery.¹⁴³ In a general sense the court departed from the holding in *In re Spencer*¹⁴⁴ to conclude that the rural homestead was maintained to *its full extent*. In *In re M^cCain*¹⁴⁵ the court followed *Mitchell*. Hence, in both instances, the use of rural land as a home sufficed to fix a homestead character on the entire acreage allowed regardless of use.¹⁴⁶ Thus for over a century judicial interpretation of the definition of a rural homestead has departed significantly from the single requirement of agricultural use of rural land for the family's direct benefit as enunciated in *Autry v. Reasor*.

2. Urban Homestead

The court in *In re Webb*¹⁴⁷ considered what used to be thought of as an even more elementary application of homestead law.¹⁴⁸ There a debtor in bankruptcy claimed three rural rent-houses located on separate parcels of land near his rural homestead.¹⁴⁹ The Bankruptcy Court denied inclusion of those improved lots in the debtor's rural homestead.¹⁵⁰ Gathering rents, treated as a decisive non-homestead *use* in a rural setting, also has a non-homestead use in an urban context.¹⁵¹ But is this still so as to the urban rental property contiguous to the family home and within the allowed dimensions of an urban homestead¹⁵² if the "business" of the homestead claimant is that of renting realty?

In *Blum v. Roger*, the Texas Supreme Court held in 1890 that a lien put on urban property for the improvement of a segregated portion of the property will fix only that segregated part used for the non-homestead purpose—in that instance an adjacent rent house.¹⁵³ Now that conclusion may be altered. In *Perry* the court observed that "[r]enting activity is generally classified as investment activity rather than a business or calling, because it requires little time and attention and does not comport to the generally accepted notions of business."¹⁵⁴ In *Autry* the Supreme Court of Texas said, in relation to a rural homestead, that farming on

143. *Id.* at 556-57, cited by the court in *In re Perry*, 267 B.R. at 765 n.6.

144. 109 B.R. 715, 718 (Bankr. W.D. Tex. 1989).

145. 160 B.R. 933, 938 (Bankr. E.D. Tex. 1993).

146. *Mitchell*, 132 B.R. at 568.

147. 263 B.R. 788 (Bankr. W.D. Tex. 2001).

148. *Cf. PaineWebber Inc. v. Murray*, 260 B.R. 815, 830-31 (E.D. Tex. 2001), where some of these issues are further discussed.

149. *Webb*, 263 B.R. at 790.

150. *Id.* at 796.

151. *Id.* at 795-96.

152. TEX. CONST. art. XVI, § 50 (as amended 1999).

153. 15 S.W. 115 (Tex. 1890). In *Atwood v. Guaranty Construction Co.*, 63 S.W.2d 685 (Tex. Comm'n App. 1933, judgment accepted), the Commission of Appeals held that a lien for construction of two rent-houses on a segregated portion of urban homestead property cannot impose an incumbrance on the family home. *But see Rancho Oil Co. v. Powell*, 175 S.W.2d 960 (Tex. 1943); *Sayers v. Pyland*, 161 S.W.2d 769 (Tex. 1942).

154. *Perry*, 267 B.R. at 769 (citing C.D. Shamburger Lumber Co. v. Delavan, 106 S.W.2d 351, 357 (Tex. Civ. App.—Amarillo 1937, writ. ref'd.)).

shares (a common rental arrangement at that time) does not allow inclusion of property so used as part of a rural homestead, even though the profits may be used for the benefit of the family.¹⁵⁵ In light of shifts of public attitudes toward land use, the homestead provisions of the Texas Constitution may require, not only general simplification, but also some considerable rethinking in relation to economic changes that have occurred over the last century and a half.

The Texas Attorney General reached an anomalous result in the interpretation of the Tax Code section 11.13(h)¹⁵⁶ regarding homesteads.¹⁵⁷ Although a temporary renting of the entire homestead to another does not cause the homestead claimant to lose the homestead exemption for ad valorem tax purposes, a renting of only a portion of a residential homestead to another while the homestead claimant occupies the rest does cause the loss of the homestead tax exemption for the proportional part of the homestead so rented.¹⁵⁸ The latter conclusion is inconsistent for exemption purposes with a bankruptcy court's determination in *In re Root*¹⁵⁹ that an entire urban lot is exempt when the debtor constructs a duplex there and occupies only one side of the duplex.

B. EQUITABLE ELECTION AS AFFECTING HOMESTEAD RIGHTS

The principal decision of the Texas Supreme Court defining the doctrine of equitable election in relation to homestead rights is *Miller v. Miller*,¹⁶⁰ and as so often occurs in equitable election disputes, the problem arose there accidentally. There, the husband-father will devised the family home to his wife and daughter to "share and share alike" and made other provisions for his widow.¹⁶¹ Thus, he had deprived the widow of her rights of sole occupancy of the homestead by granting the daughter a testamentary right of co-occupancy. The decedent had, however, made other provisions in his will for his widow to take certain property rights to which she was not otherwise entitled. This provision constituted a conflicting detriment and hence a conditional benefit. The widow was therefore put to an equitable election between the sole occupancy of the homestead and the other benefits given to her under the will.¹⁶² In *Garner v. Estate of Long*¹⁶³ the wife's will described the family home as her separate property but gave her husband a life estate in it. He was also bequeathed certain personal property of the decedent in which he presumably held no prior interest.¹⁶⁴ The widowed husband brought suit

155. *Autry*, 108 S.W. at 1164.

156. TEX. TAX CODE ANN. § 11.13(h) (Vernon 1997).

157. Tex. Att'y Gen. Op. JC-0415 (2001).

158. *See id.*

159. No. 281-00035 (Bankr. N.D. Tex. June 29, 1981, commented on in Joseph W. Mc Knight, *Family Law, Husband and Wife*, 36 Sw. L.J. 97, 123 (1982).

160. 235 S.W.2d 624 (Tex. 1951).

161. *Id.* at 546, 625.

162. *Id.* at 550, 628.

163. 49 S.W.3d 920 (Tex. App.—Fort Worth 2001, no pet.).

164. *Id.* at 921-22.

against his late wife's independent executor for a declaration that the family home was the community estate of him and his deceased wife and a determination of his homestead rights.¹⁶⁵ The husband's independent executor was substituted for the widower after his death before the trial. It was stipulated by both parties, however, that the home had been the community estate of the spouses, and that its contrary characterization had not been affected by the decedent's will.¹⁶⁶ The parties further stipulated that the will had not put the widower to an election.¹⁶⁷ However, the problem of the widower's election had been resolved by the prior stipulation, and there was therefore no dispute to adjudicate. A decision of the Probate Court of Tarrant County, which was nonetheless in favor of the husband's executor, was affirmed by the Fort Worth Court of Appeals.¹⁶⁸ The court had been merely called upon to approve a settlement between independent executors to which they had apparent full power to agree.

One of the first rules in applying the principle of equitable election is that there should be no election if the will can be construed so that a need for an election is avoided.¹⁶⁹ The wife's executor seems to have appealed merely to attach the imprimatur of the appellate court to the settlement in the interest of extraneous considerations. The arguments of the parties were thus presented in an adversary fashion. The appellant argued that the widower had already been put to an election and that he was therefore estopped from making any further contest because he had already accepted benefits under the will.¹⁷⁰ His executor argued in turn that the wife's will had not put her husband to an election.¹⁷¹ The appellate court concluded that, because a surviving spouse has a right of occupancy in the family home for life, regardless of receiving a life estate by the will, the wife's characterization of the property as her separate estate was irrelevant.¹⁷²

The surviving spouse's right of occupancy of the homestead resembles a life estate in fee, but the two rights are not coextensive. For example, the widower might convey his fee interest for life to another as an estate *pur autre vie*, but by being out of possession of his mere homestead right of occupancy for an unreasonably long time, he would cause the homestead right (and hence the right to rent the property) to be lost during the widower's lifetime. Further, the husband with a life estate could give up that estate in what the wife termed her separate property and still maintain his constitutional homestead right of sole occupancy. But his taking a life estate in the deceased wife's share of community property did not

165. *Id.* at 922.

166. *Id.*

167. *Id.*

168. *Garner*, 49 S.W.3d at 923.

169. *See Wright v. Wright*, 274 S.W.2d 670 (Tex. 1955).

170. *Garner*, 49 S.W.3d at 922.

171. *Id.*

172. *Id.*

conflict with receipt of other items of the widow's separate or community property interest. But if no agreement as to the marital character of the property had been reached, and the husband had knowingly made the choice to take a life estate to the entire homestead as described in the will, he would have made an election between that right in her *separate* property as well as other bequests of her separate property and his community interest in the home. In all likelihood the outcome was not produced by a very serious dispute. But if the residuary takers under the wife's will and the takers under the husband's will were different or took different shares, and if the husband had not asserted any community claim to the homestead, he could have enjoyed all the benefits of his wife's separate property and a life-estate in all of the home under her will. But the remainder interest in the home after the husband's life estate would have passed to the wife's devisees. On the other hand, if the husband had elected his community rights to the home, as well as his constitutional right of occupancy of the entire property for life, he would have lost his entire testamentary interest in the rest of his wife's property apart from his right of homestead occupancy of the home. His share of the community home, however, would have been excluded from her estate. If the husband had been merely left to enjoy his right of homestead occupancy but his wife had devised the entirety of the home to someone else, he could have rented out her half of the property (as well as his own) only temporarily during his lifetime.

C. HOME-EQUITY LOANS¹⁷³

In *Doody v. Amirquest Mortgage Co.*¹⁷⁴ it was asserted that an over-charge of closing costs in violation of the constitutional limit of three percent¹⁷⁵ vitiated a home-equity lien even though the over-charge was refunded within a reasonable time of making the charge. The Texas Supreme Court concluded that the further constitutional provision preventing forfeiture of principal and interest applicable to all obligations of the lender validated the lien if the lender (or a subsequent holder of a promissory note) complied with its obligations within a reasonable time after closing the transaction.¹⁷⁶

D. LIENS ON HOMESTEADS

There are several longstanding myths generated by realtors and banks with respect to our community property system. One of these is that all conveyances of homes must be made to both spouses and that both

173. See Julia Patterson Forrester, *Home Equity Loans in Texas: Maintaining the Texas Tradition of Homestead Protection*, 55 SMU L. REV. 157 (2002); [Texas] Office of Consumer Credit, *Home Equity Lending: Common Questions and Answers for Texans*, from which some of its contents are extracted in *Home Equity Loans: Common Questions and Answers*, 65 TEX. B. J. 381 (April 2002).

174. 49 S.W.3d 342 (Tex. 2001).

175. TEX. CONST. art. XVI, § 50(a)(1).

176. *Doody*, 49 S.W.3d at 347.

spouses must join in borrowing money whether it is for the purpose of buying a homestead or not. Of course the lender may not be willing to lend money on any other terms, but that is merely the lender's law, not the law of Texas. From time to time the real laws in these matters need restatement. *Skelton v. Washington Mutual Bank*¹⁷⁷ dealt with the first of these myths. In 1995 a husband and wife agreed that only the husband would negotiate a loan to buy a house because of the wife's poor credit history. The husband represented himself as a single man on the loan application. After receiving the loan, the sale was closed and payments were made on the note with both spouses' earnings. Due to the husband's illness the couple fell behind in their payments and about a year later the husband died. After his death the mortgagee undertook to foreclose its deed of trust lien, and the widow moved for a declaratory judgment concerning her homestead and community property claims. The mortgagee responded with a countermotion concerning the validity of its lien and its motion was granted. In her appeal the widow asserted that her homestead rights were superior to the mortgagee's right to foreclose. The Amarillo Court of Appeals sustained the trial court's judgment in favor of the mortgagee, pointing out that the homestead lien and the homestead interest were created simultaneously,¹⁷⁸ though actual occupancy occurred somewhat thereafter. If the couple had already begun their move into the house or had completed the move prior to the closing, there is room for argument that because the husband had an enforceable equitable contract to purchase the home, the wife's joinder in creating the lien was necessary. But she did not join and that argument was not later made. As to the wife's argument that community property rights were somehow superior the rights of the mortgagee, the court concluded that because those rights were based on the warranty deed's reservation of a vendor's lien, a party (if the widow were a party) cannot claim benefits under an instrument without confirming its validity and accepting its burdens.¹⁷⁹ It is, however, an erroneous stretch of concepts to say in this instance that because the property was a community acquisition for which there was also community liability, the widow became a party to the contract. As to her husband's representation that he was single (to which she agreed though she may have been unaware of the representation itself) the court said that there was no fact question which would bar the mortgagee's right to summary judgment because the issue of the husband's *bona fides* as purchaser was irrelevant to the widow's homestead and community property claims.¹⁸⁰ The court also attached some sort of estoppel to the widow's alleged concealment of her interest in the property

177. 61 S.W.3d 56 (Tex. App.—Amarillo 2001, no pet.).

178. *Id.* at 60. Whether a lien on a homestead is fixed on particular property is subject to dispute. See *CVN Group, Inc. v. Delgado*, 47 S.W.3d 157 (Tex. App.—Austin 2001, no pet.). See also *Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871 (Tex. App.—Waco 2001).

179. *Skelton*, 61 S.W.3d at 61.

180. *Id.*

when purchased¹⁸¹ but that observation (if true) also seems irrelevant.

Maintenance of homestead character of property despite deterioration of homestead use is clearly different in consequence from an assertion of change of homestead. The consequences of a change in an ex-husband's bankruptcy proceeding was examined in *In re Dawson*.¹⁸² During much of the marriage the couple had made their home in the wife's separate property. During the marriage the husband had acquired an apartment building as community property; when the couple separated the husband moved to that building where he was still living when the wife filed her petition for divorce and when he filed his petition in bankruptcy a short time afterward.

The divorce court divided the parties' community property equally between them and ordered sale of the apartment building to facilitate division. As the bankruptcy proceeding was still pending, the ex-husband (by that time) amended his schedule to claim the apartment building as his homestead. His ex-wife objected to that designation and insisted that his homestead continued to be at her residence as the family home during the marriage when he filed his bankruptcy petition. In favor of the ex-wife's position the bankruptcy court stressed the bankruptcy rule that a homestead for the purpose of exemption is determined as of the time the petition in bankruptcy is filed. The Bankruptcy Court also relied on the Texas Constitution article, XVI, section 50(b)¹⁸³ providing that neither spouse can unilaterally abandon or change the homestead without the consent of the other spouse. The purpose of that provision, however, is principally to prohibit unilateral abandonment *to affect the homestead claim of the other spouse* in the family home. The United States Supreme Court's application of Texas law in *United States v. Rodgers*¹⁸⁴ illustrates that implication of the Constitution in favor of continuity of the homestead after the death of a spouse when the homestead is the decedent's separate property. It has been long understood, however, that one spouse may voluntarily abdicate his or her own homestead claim by abandoning the other spouse who continues to reside in the homestead,¹⁸⁵ and an ex-spouse living alone outside the marital homestead may establish another homestead for the purposes of maintaining a home for the visits of a mutual minor child.¹⁸⁶ The most telling argument that might have been relied on by the ex-wife is simply that a co-owner husband could not

181. *Id.*

182. 266 B.R. 355 (Bankr. N.D. Tex. 2001). The homestead is protected from seizure and sale from the moment that a bankruptcy petition is filed, even if minutes after the filing, a foreclosure sale is conducted. *In re Pierce*, 272 B.R. 198 (Bankr. S.D. Tex. 2001).

183. TEX. CONST. art. XVI, § 50(b) (amended 1999).

184. 461 U.S. 677, 685 (1983).

185. *Earle's Ex'rs v. Earle*, 9 Tex. 630 (1853).

186. *Renaldo v. Bank of San Antonio*, 630 S.W.2d 638 (Tex. 1982). See Joseph W. McKnight, *Family Law: Husband and Wife*, 38 Sw. L.J.131, 150 (1984) (as to whether the claim might be made by a single person after divorce); Joseph W. McKnight, *Family Law: Husband and Wife*, 37 Sw. L.J. 65, 82-83 (1983). It was not until 1973 that a single person could claim an independent homestead except as head of a family.

successfully assert a homestead claim without the consent of another co-owner of the community apartment building. In that instance either spouse is entitled to a partition,¹⁸⁷ and sale and division of the proceeds may be the only practicable means of achieving a partition, as in this case.

Though the debtor in *Dawson* was satisfied with an exempt one-half interest in the proceeds of his community residence as divided by the divorce court,¹⁸⁸ in *In re Zibman*¹⁸⁹ a debtor-couple sought an exemption for the full amount of the sales price for their Texas home which they had not reinvested in a new homestead. They succeeded before a bankruptcy court and a federal district court but failed in the trustee's appeal to the Court of Appeals for the Fifth Circuit. The debtors had filed for bankruptcy within six months of sale of their homestead and claimed the proceeds as exempt property within Property Code section 41.001(c),¹⁹⁰ which provides that the proceeds of sale of a homestead are exempt for six months. After six months had elapsed and the debtors had not reinvested the sales-proceeds in a new homestead and had moved from the state, the trustee in bankruptcy filed an objection to the exemption claimed. The Bankruptcy Court had reasoned that because the debtors were entitled to the sale proceeds still on hand at the date of filing their petition, that amount was fully exempt for bankruptcy purposes,¹⁹¹ regardless of the fact that the couple testified that they did not intend to reinvest the funds in another Texas homestead.¹⁹² Adopting the trustee's argument that the reinvestment aspect of the Texas homestead exemption is integral to the exemption process and is not interrupted by a filing for bankruptcy by the claimants,¹⁹³ the Fifth Circuit court concluded that "the 6-month limitation is inextricably intertwined with the exemption the state has chosen to provide to proceeds from the sale of the homestead. . . . [This] decision. . . conforms with the objective of . . . Texas's exemption for proceeds from the sale of a homestead. . . . [T]he object of the proceeds exemption statute was *solely* to allow the claimant to invest the proceeds in another homestead, *not to protect the proceeds, in and of themselves.*"¹⁹⁴ It might have been added that in *In re Evans*¹⁹⁵ a bankruptcy court had held that if only a part of the proceeds of sale of a homestead is invested in a new homestead for the debtor, the rest of the proceeds are not exempt in bankruptcy.

187. But a prior court's order may bar such a partition. See *First Huntsville Properties Co. v. Laster*, 797 S.W.2d 151 (Tex. App.—Houston 1990) (giving one former co-owner spouse sole occupancy before a partition is sought after the other co-owner's assignment), *aff'd* 826 S.W.2d 125 (Tex. 1991). See Joseph W. McKnight, *Family Law: Husband and Wife*, 45 SMU L. REV. 1831, 1848-48 (1992).

188. *Dawson*, 266 B.R. at 357.

189. 268 F.3d 298 (5th Cir. 2001).

190. TEX. PROP. CODE ANN. § 41.001(c) (Vernon 2001).

191. *Zibman*, 268 F.3d at 303.

192. *Id.* at 305 n.29.

193. *Id.* at 301.

194. *Id.* at 304 (quoting *In re England*, 975 F.2d 1168, 1174-75 (5th Cir. 1992) (second emphasis added by the court)).

195. 135 B.R. 261, 264 (Bankr. S.D. Tex. 1991).

In another case involving notice,¹⁹⁶ a widow and her late husband had given a purchase money lien on acquiring the family home. After foreclosure of the lien the widow and children brought suit to set aside a foreclosure sale for gross inadequacy of price,¹⁹⁷ and as a necessary irregularity in the sale they alleged failure to give proper written notice to the family members as heirs of the deceased husband-father. Property Code section 51.002(d)¹⁹⁸ requires that when foreclosure on residential realty is sought against the resident debtor, there must be notice to cure the default in payment, apart from the general notice of foreclosure provided for in section 51.002(b).¹⁹⁹ The gross inadequacy of price, coupled with failure to give notice to the resident-plaintiffs, was sufficient to set aside the foreclosure sale.²⁰⁰

In *Jones v. Bank United of Texas*²⁰¹ as part of a property settlement agreement the wife, soon to be divorced, was granted a vendor's lien on the marital home,²⁰² though there was a prior lien on the home that gave notice of foreclosure to the lender of the purchase-price. In this instance the prior lien-holder failed to give notice of foreclosure to the ex-wife, as she soon became. The court held that the ex-wife was not entitled to further notice because the recorded prior lien gave her notice of possible foreclosure by the prior lienholder.²⁰³ As a result of the ex-wife's junior-lien position, she could not be satisfied from the proceeds of the first mortgagee's sale.

When called upon to interpret section 62.003 of the Property Code,²⁰⁴ the Attorney General concluded that the language stating that a personal property lien on a "manufactured [mobile] home" fixes a lien on realty to which the home is attached.²⁰⁵ The opinion pointed out, however, that article XVI, section 50 of the Texas Constitution, which deals specifically with homesteads, provides that a purchase money "debt" fixes a lien on "land" and "improvements thereon" but does not permit a purchase money debt for the acquisition of personalty there on to become a lien for the acquisition of land.²⁰⁶ Further, it was the attorney general's opinion that "a purchase money lien against the homestead is valid only to the extent of the . . . purchase money debts used to acquire the property."²⁰⁷ A lien on a manufactured home permanently attached to homestead realty as an improvement nevertheless continues to be valid against the

196. *Mills v. Haggard*, 58 S.W.3d 164 (Tex. App.—Waco 2001, no pet.).

197. The foreclosing lender's bid was about 5.1 percent of the fair market value of the property interest foreclosed. *Id.* at 165.

198. TEX. PROP. CODE ANN. § 51.002(d) (Vernon 1995).

199. TEX. PROP. CODE ANN. § 51.002(b) (Vernon 1995).

200. *Mills*, 58 S.W.3d at 167.

201. 51 S.W.3d 341 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

202. Apparently as a means of giving her security for payment by the homestead for her share of the home.

203. *Id.* at 344.

204. TEX. PROP. CODE ANN. § 62.003 (West Supp. 2001).

205. Tex. Att'y Gen. Op. JC-0357, at *5 (2001).

206. *Id.* at *1.

207. *Id.* at *2.

structure itself.²⁰⁸

This opinion provoked an almost immediate proposal by lenders to amend the homestead provisions of the Texas Constitution, already top-heavy with provisions in favor of creditors. In November, 2001 the amendment to article XVI, section 50(a) passed handily by about fifty-eight percent of the vote. For good measure the amendment also included a provision²⁰⁹ shortening the time from twelve days to five for a written application for a loan.

IV. DIVISION OF MARITAL PROPERTY ON DIVORCE

A. PROPERTY SETTLEMENT AGREEMENTS

In the wake of an appellate adjudication of a prior dispute in the course of the husband's appeal of a divorce decree,²¹⁰ the Fort Worth Court of Appeals took up the appeal in *Boyd v. Boyd*²¹¹ concerning the validity of a mediated property settlement. Prior to the trial the wife had become aware of her husband's failure to disclose a substantial community property asset that he had earned and was about to receive, and the wife therefore rejected the mediated settlement agreement, which by the terms of Family Code section 6.602(b)²¹² is irrevocable if signed by both parties and their attorney. The trial court set aside the settlement and proceeded to divide the couple's community estate. The appellate court rejected the husband's appeal, while pointing out that settlement agreements are not binding when one party withdraws unless the other party sues successfully to enforce the settlement as binding under Rule 11.²¹³ The husband defended his position on the ground that he had not failed to file an answer in formal discovery which was not yet due at the time the mediation was conducted. The trial court had evidently regarded the husband's information as intentionally withheld and affirmed its rejection of the mediated settlement.²¹⁴ The standard for setting aside the settlement agreement is certainly less exacting than that required for a bill of review, but this challenge of the validity of the settlement occurred in trial and not after judgment. In this situation the motion came up on direct appeal and not on collateral attacks.²¹⁵

208. *Id.* at *3.

209. TEX. CONST. art. XVI, § 50(a)(5)(6) (West Supp. 2002).

210. *In re Boyd*, 34 S.W.3d 708 (Tex. App.—Fort Worth, 2000, pet. filed), briefly noted on a procedural point in Joseph W. McKnight, *Family Law: Husband and Wife*, 54 SMU L. REV. 1383, 1404 (2001). A seemingly conditional mediated property settlement also failed in its purpose in *In re Kasschau*, 11 S.W.3d 305 (Tex. App.—Houston [14th Dist.] 2000, no pet.), also noted in McKnight, 54 SMU L. REV. at 1399.

211. 67 S.W.3d 398 (Tex. App.—Fort Worth 2002, no pet.).

212. TEX. FAM. CODE ANN. § 6.602(b) (Vernon 1998).

213. TEX. R. CIV. P. 11.

214. *Boyd v. Boyd*, 67 S.W. 3d at 403. The court relied on the rejection of the seemingly conditional mediated property settlement in *In re Kasschau*, 11 S.W. 3d 305, *op. cit.*, also noted in Joseph W. McKnight, note 210, at 1399.

215. For a particularly egregious case of fraud that provoked a successful bill of review, see *In re Ham*, 59 S.W.3d 326 (Tex. App.—Texarkana 2001, no pet.).

In *In re Marriage of Nolder*²¹⁶ the husband and wife had entered into a property settlement agreement by which the wife would be awarded fifty-five percent of the husband's stock options. In the course of the negotiations the husband did not reveal that he had exercised the options to avoid their expiration and that he had already sold the stock and reinvested the proceeds in a manner such that there was some risk of loss. By the time of the trial the investment of the proceeds of sale had nevertheless fortuitously increased in value. The trial court awarded the wife the value of fifty-five percent of the options and all the gains represented by the reinvestment. In affirming the trial court's judgment the appellate court concluded that the wife was in equity entitled by mutation-tracing principles to the gains attributable to the property dealt with in the settlement agreement.²¹⁷ The ex-wife's claim was not merely that of a creditor against a debtor.²¹⁸

In *Stewart v. Stine*²¹⁹ an alleged third-party beneficiary of a contract sought to recover on a term of a property settlement agreement.²²⁰ To buy a house in 1984, a husband and wife had borrowed \$100,000 from the wife's mother. During the following year one-half the loan was repaid. The couple was divorced in 1992. Their property settlement agreement (incorporated in the divorce decree) provided that the wife would have occupancy of the house, and she agreed to make mortgage payments on the purchase-money note and to maintain the property until its sale. It was further agreed that on sale the husband would pay closing costs, the outstanding mortgage debt, and the debt owed to the wife's mother. After all those payments, any of the sales proceeds remaining would be divided equally between the parties, but if no proceeds remained, both parties agreed to discharge the debt to the mother in equal shares. It was further agreed that either party might seek appointment of a receiver to sell the property at any time. In 1995 the ex-husband sold the home, and the proceeds were insufficient to repay the mother. In 1998 the mother sued the ex-husband claiming that she was a third-party beneficiary of the property settlement agreement. She asserted a breach of the contract claim under general law, rather than enforcement of the agreement incident to division as provided in the Family Code. The Fort Worth appellate court supported its judgment for the ex-husband in reliance on *Brown v. Fullenweider*.²²¹ The Fort Worth court held that because the

216. 48 S.W.3d 432 (Tex. App.—Texarkana 2001, no pet.).

217. *Id.* at 434-35.

218. *Id.*

219. 57 S.W.3d 94 (Tex. App.—Fort Worth 2001, no pet.).

220. Such a property settlement agreement must be entered into in writing or entered into in open court under TEX. R. CIV. P. 11 as reflected in the record of the court. A mere recital in the judgment that the parties entered into such an agreement will not suffice. *Schlaflly v. Schlaflly*, 33 S.W.3d 863, 872 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

221. *Stewart*, 57 S.W.3d at 101-02 (relying on *Brown v. Fullenweider*, 52 S.W.3d 169 (Tex. 2001)); see also Joseph W. McKnight, *Family Law: Husband and Wife*, 54 SMU L. REV. 1383, 1414-15 (2001).

mother was not a party to the contract, she could not recover.²²² She was, furthermore, neither a donee-beneficiary nor a creditor-beneficiary of the contract because she could not enforce her statute-barred debt and because the agreement contained no acknowledgment of the debt as subsisting.²²³ A creditor-beneficiary status, the court said, arises only when performance of the contract is in satisfaction of a legal obligation.²²⁴ As in *Brown*, which also involved enforcing an agreement incident to divorce, the court stated that the contract was enforceable only between the parties. The court went on to say²²⁵ that only the ex-wife had the right to enforce the contract.²²⁶ The mother was merely an incidental beneficiary of the property settlement agreement; therefore, she lacked standing to sue the ex-husband for breach.²²⁷ Hence, the trial court was without subject matter jurisdiction.²²⁸

B. ADJUDICATION OF DIVISION

1. *Just and Right Division*

In making an equitable division of the community estate in *Wright v. Wright*,²²⁹ the trial court awarded eighty-eight percent of the property to the wife. The court considered several factors in making this decision: the length of the marriage (thirty-two years), the husband's contribution to the marital breakdown, the husband's education and earning capacity, the wife's lack of education and inability to engage in business, the husband's good health, the wife's extremely bad health, the husband's excessive alcohol consumption, and the husband's physical and mental abuse of the wife.²³⁰ After announcing its decision, the trial court stated that religion was not a factor in the division. The court, however, went on to "offer. . . a word of encouragement" to the wife²³¹ by reading a passage from the Old Testament.²³² The Eastland Court of Appeals rejected the husband's complaint that the trial court's division of the property was based on religious grounds.²³³

In *Lifshutz v. Lifshutz*²³⁴ the San Antonio Court of Appeals dealt with an alter ego case involving five corporate and partnership entities in all of which (but one) the husband's separate property owned a minority inter-

222. *Stewart*, 57 S.W.3d at 99-100 (citing *MCI Telecomm. Corp. v. Texas Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999)).

223. *Id.* at 103-04.

224. *Id.* at 103.

225. *Id.* at 100.

226. *Id.* at 102. But the court did not address the applicability of TEX. FAM. CODE ANN. § 9.003(b) (Vernon 1998); *Stewart*, 57 S.W.3d at 103 n.1.

227. *Id.* at 101-02.

228. *Id.* 99-100, 101-02.

229. 65 S.W.3d 715, 716 (Tex. App.—Eastland 2001, no pet.).

230. *Id.* at 716.

231. *Id.* at 718.

232. BOOK OF ISAIAH, ch. 54.

233. *Wright*, 65 S.W.3d at 718.

234. 61 S.W.3d 511 (Tex. App.— San Antonio 2001, no pet.).

est. These entities intervened in the divorce proceeding, asserting breach of fiduciary duty against the husband, its principal officer. Although the appellate court did not address all of the trial court's findings, it is apparent that the husband used his position to enrich the community estate contrary to the interest of the entities. But there was apparently no finding of fact as to the enrichment of the husband's separate property and, if so, whether it was due to an increase in value or due to the operation of the entities. Nor was there any fact finding as to whether there was a boundary between the husband's personal interest and those of the entities. The trial judge found, however, that despite the husband's minority interests in all but one of the entities, those entities were his alter-egos and therefore the judge divided their property as the couple's community estate.²³⁵ Although the appellate court rightly rejected the entities' assertion that an entity had to be *wholly* owned by the person controlling it for the alter-ego principle to operate, the appellate court did not seem to require that the managing spouse own a controlling interest in order to show an alter-ego relationship.²³⁶ The appellate court defined an alter-ego relationship in the divorce context as dependent on (1) a "unity between the separate property [entity] and the spouse such that the separateness of the [entity] has ceased to exist and (2) . . . use of the [entity to damage] the community estate beyond that which might be remedied by a claim for reimbursement."²³⁷ Despite finding that the husband breached his fiduciary duty in favor of the community estate, the trial court made no award of damages or a finding of a constructive trust in favor of the intervenors.²³⁸ The wife nonetheless was awarded twenty-five percent of the community property, apparently amplified by the assets of the entities that were said to be alter-egos of the husband.²³⁹

The appellate court curiously concluded that the corporate and partnership veils should not be pierced because the community estate was not only unharmed but enhanced by the husband's dealings.²⁴⁰ Because the court regarded piercing of the corporate veil as improper, the appeals court concluded that the husband's separate property had been improperly invaded in the division of the community estate.²⁴¹ The issue of liability for breach of fiduciary duty was remanded to the trial court.²⁴² The appellate court further concluded that because any change in the judgment of the trial court "on liability or damages for breach of fiduciary duty could potentially result in a loss of property [by] both the commu-

235. *Id.* at 514.

236. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984) (finding that a separate interest of 47.5 percent plus an interest of 2.5 percent as trustee for others constituted actual control to invoke the alter-ego principle).

237. *Lifshutz*, 61 S.W.3d at 517.

238. *Id.* at 514.

239. *Id.*

240. *Id.* at 517-18.

241. *Id.* at 518.

242. *Lifshutz*, 61 S.W.3d at 519.

nity estate and [the wife's] separate estate,"²⁴³ the property divisions should also be remanded to the trial court.²⁴⁴

In *Egelhoff v. Egelhoff*²⁴⁵ the United States Supreme Court tightened the application of federal preemption doctrine on the interpretation of employee-retirement plans under the Employee Retirement Income Security Act of 1974 (ERISA).²⁴⁶ For those plans under its control the Act provides that administrators of ERISA plans must pay benefits according to "the documents and instruments governing the plan" rather than simply looking to a particular state law as determinative.²⁴⁷ Thus the law of the state of Washington did not necessarily determine the taker of an employee's life insurance policy under a retirement plan governed by ERISA. Rather the terms of the plan must govern the outcome. In this instance under a Washington statute a divorce terminated the beneficial designation of a spouse as beneficiary of a life insurance policy subject to a plan. Under the Court's holding in *Egelhoff* the plan administrator must look to the terms of the plan for that determination though the same result would be reached if the plan actually provided that the statutory law of that state was determinative. Hence, under *Egelhoff* sections 9.301 and 9.302 of the Family Code,²⁴⁸ as well as sections 7.003 and 7.005,²⁴⁹ do not automatically determine such matters unless the plan so directs. But plans beyond the coverage of ERISA as well as private income retirement accounts seem to be governed by those provisions.²⁵⁰

In *Barnett v. Barnett*²⁵¹ the Texas Supreme Court dealt with a term life insurance policy acquired during marriage by the husband through his employer's pension benefit plan. Reading *Egelhoff* as holding that any state rule that departs from the designation of the insured is preempted by ERISA, the majority of the Texas Supreme Court concluded that the husband's designation of his estate as beneficiary of the policy should prevail over his widow's claim in favor of the community estate.²⁵² Four judges, however, concluded that the majority of the court had read *Egelhoff* too strictly in favor of the doctrine of preemption. The majority's result meant, in effect, that application of ERISA preemption not only determines the disposition of the insurance proceeds but also precludes the claim of the community estate to a one-half interest in those pro-

243. *Id.*

244. *Id.*

245. 532 U.S. 141 (2001).

246. 29 U.S.C. § 1144(a) (1974).

247. *Id.* § 1104 (a)(1)(D).

248. TEX. FAM. CODE ANN. §§ 9.301, 9.302 (Vernon 1998).

249. §§ 7.003, 7.005.

250. The federal Supreme Court's decision in *Egelhoff* is merely cited but not discussed in Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies*, 42 SANTA CLARA L. REV. 105, 109 n.14 (2001).

251. 67 S.W.3d 107 (Tex. 2001).

252. 29 U.S.C. § 1003(a). Though the majority of the Texas Supreme Court seemed to lean in favor of applying the inception of title rule to the term insurance policy, it was not required to make that decision in light of the fact that the policy in issue was not a renewal of a premarital policy though there were premarital policy interests that it replaced.

ceeds, an outcome similar to that in *Free v. Bland*.²⁵³

2. Retirement Benefits

The divorcing couple in *Limbaugh v. Limbaugh*²⁵⁴ were married in Spain in 1974 and lived in the United States for sixteen years before moving to Texas in 1993, after the husband retired from the Navy. After moving to Texas, the couple obtained a divorce. This divorce, however, occurred before the amendment of the Texas Family Code section 6.711²⁵⁵ was effective. This amendment requires the trial court, after a proper request, to characterize and value all familial assets on which disputed evidence was presented. In *Limbaugh* the husband had requested a valuation of each item of the community estate, but the trial court made no findings as to value. On the husband's appeal the court found that there were only a few items on which the parties presented disputed evidence. The appellate court concluded that the divorce court divided the community property "roughly equally," though by the valuations of each there was a "not material" disparity in favor of the wife.²⁵⁶ With respect to the husband's naval retirement benefits, he had designated his wife as beneficiary to a survivor-benefit annuity; the appellate court affirmed the trial court's order, allowing this designation to stand altered as federal law allows.²⁵⁷ In addition to the trial court's award to the wife of her community share in the husband's naval retirement benefits, the appellate court modified a portion of the trial court's decree that had ordered the husband to pay his wife any decrease in her share of the monthly naval retirement payments that might occur because of an increase in his disability benefits.²⁵⁸ The appellate court held that this order was beyond the trial court's power because, if the husband was required to pay that amount involuntarily, his rights under federal law would be curtailed.²⁵⁹

3. Emotional Distress

In her suit for divorce, the wife in *Toles v. Toles*²⁶⁰ sought damages from her husband for intentional infliction of emotional distress. During the trial the jury heard evidence of the husband's physical and verbal abuse and his destruction of her property.²⁶¹ Ultimately, the jury awarded the wife \$320,000 in damages.²⁶² The trial judge, however, granted the husband's motion in denying the recovery.²⁶³ On appeal the Dallas court stated that the husband's conduct was relevant to the wife's

253. 369 U.S. 663 (1962).

254. 71 S.W.3d 1 (Tex. App.—Waco 2002, no pet.).

255. TEX. FAM. CODE ANN. § 6.711 (Vernon Supp. 2002).

256. *Limbaugh*, 71 S.W.3d at 10.

257. *Id.* at 15 (citing 10 U.S.C. § 1450(f)(4)).

258. *Id.* at 18 (citing 10 U.S.C. § 1450(f)(4)).

259. *Id.* at 17-18 (citing *Ex parte Burson*, 615 S.W.2d 192, 196 (Tex. 1981)).

260. 45 S.W.3d 252 (Tex. App.—Dallas 2001, no pet.).

261. *Id.* at 260.

262. *Id.* at 258.

263. *Id.* at 258.

claim.²⁶⁴ The court found that the evidence was sufficient to support the jury's findings (1) that he had acted intentionally or recklessly, (2) that his conduct was extreme and outrageous, (3) that his outrageous conduct had caused his wife emotional distress, and (4) that the emotional distress suffered was severe.²⁶⁵ The court noted that "intentional conduct requires a showing that the actor desired the consequences of his act."²⁶⁶ The court also stressed that in a divorce case "[a] spouse should not be allowed to recover tort damages and a disproportionate division of the community estate based on the same conduct."²⁶⁷ In this instance, however, the appellate court said that there was no point in the husband's even challenging the division of the property and affirmed the trial court's judgment.²⁶⁸

4. Attorney's Fees

In *Beard v. Beard* the trial court awarded the wife \$1,500 as "reasonable and necessary attorney's fees,"²⁶⁹ though she had claimed \$60,000 in attorney's fees, which the trial court did not regard as justified. The court also intimated that an award of attorney's fees in divorce cases is exclusively based on the division of property.²⁷⁰ There is nonetheless room for interpretation of earlier caselaw indicating that attorney's fees are recoverable as necessary.²⁷¹ This is especially so when a destitute or nearly destitute spouse is the respondent in a divorce proceeding and there is little property to divide.

During the divorce hearing on property issues in *Toles*,²⁷² the husband requested that the court sanction his wife and her attorney for groundless pleadings concerning the husband's adultery, non-existent financial causes of action, and numerous abuses of the trial process. Though the court ordered the wife to pay \$120,000 in sanctions to her husband, the court did not specify which conduct the court considered sanctionable.²⁷³ The Dallas appellate court held that the sanctions could not stand because the particulars of the cause for sanctions were not specified as required by Rule 13.²⁷⁴ As to the sanction for alleged pretrial discovery abuse, the sanction could not be upheld because the husband had not obtained a pretrial ruling on the discovery abuse under former Rule

264. *Id.* at 261.

265. *Toles*, 45 S.W.3d at 261.

266. *Id.* at 259 (internal citations omitted).

267. *Id.* at 264-65.

268. *Id.* at 265.

269. *Beard*, 49 S.W.3d 40 (Tex. App.—Waco 2001, no pet.).

270. *Id.* at 64.

271. *See Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002 (1951).

272. 45 S.W.3d at 266. The case was tried under former Tex. R. Civ. P. 215 (1990), amended by orders of Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999. But the amendments to the rule made no substantial change that would have affected the outcome of the case if its facts had occurred in 1999 or later.

273. *Toles*, 45 S.W.3d at 266-67.

274. Tex. R. Civ. P. 13 (citing *Barnum v. Munson, Munson, Pierce and Cardwell, P.C.*, 998 S.W.2d 284, 287 (Tex. App.—Dallas 1999, pet. denied); *Gorman v. Gorman*, 966 S.W.2d 858, 867-68 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)).

215.²⁷⁵ In that the trial court had awarded attorney's fees as a sanction, the husband agreed that the sanction might be affirmed as attorney's fees in the divorce suit. The appellate court responded that a trial court does not have an inherent power to award attorney's fees in a divorce case. Though a trial court may award attorney's fees in making a property division, it failed to do so in this instance.

In *Haase v. Herberger*²⁷⁶ the husband and wife filed suit against builders regarding the construction of their community homestead. While that action was in progress, the wife sued for divorce. The builders then made a settlement offer that the wife wanted to accept, but the husband refused. The wife's attorney then filed a motion for permission to settle the construction case, and the divorce court granted her motion. Acting under the court's order, the wife accepted the offer. The couple's counsel in the construction matter then filed a plea in intervention in the divorce suit for disbursement of the funds that counsel claimed as a contingent fee. The husband objected and counterclaimed for forfeiture of the fee as an act of malpractice based on the factual difference of opinion between the spouses as to whether the offer should have been accepted. Putting aside enough of the settlement proceeds to cover attorney's fees and expenses, the divorce court divided the rest of the community estate.²⁷⁷ The husband then filed a motion for partial summary judgment for forfeiture of the attorney's contingent fee in the construction case. The court gave judgment in favor of the attorney and the husband appealed in that regard only.²⁷⁸ The appellate court²⁷⁹ concluded that the trial court's order giving the wife the right to settle the construction litigation was authorized by Texas Family Code section 6.502.²⁸⁰ Even assuming (without deciding) that there was a breach of fiduciary duty, the court went on to say that the trial court's order authorized her counsel to follow the wife's direction in the matter.²⁸¹ Thus, when an attorney represents two clients in the same matter and they disagree on the acceptance of a settlement offer, the trial court may order which client's direction should be followed.²⁸² Such a judicial order, therefore, can supersede the terms of the contract between the clients and the attorney as to approval of a settlement.²⁸³ If that should happen, the court went on to say, the clients' success in the dispute would depend on proof of damages, which had not been developed at the trial in this matter.²⁸⁴

275. *Toles*, 45 S.W.3d at 266 (citing *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993)).

276. 44 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

277. *Id.* at 269.

278. *Id.*

279. *Id.*

280. *Id.* at 270; TEX. FAM. CODE § 6.5202 (Vernon 1998).

281. *Haase*, 44 S.W.3d at 270.

282. *Id.*

283. *Id.* at 271.

284. *Id.*

C. SPOUSAL MAINTENANCE

As awards for spousal maintenance have increased, enforcement efforts have also increased. In *Lopez v. Lopez*²⁸⁵ the couple divorced after being married over ten years. The wife was in very bad health and her earning capacity was very limited.²⁸⁶ The court awarded the wife part of the community property and spousal maintenance for three years as well.²⁸⁷ Over the husband's objection, the trial court's award of spousal maintenance was sustained.²⁸⁸ The appellate court only dealt with the ex-wife's meeting statutory standards for the award.²⁸⁹

In a divorce from a marriage of only two years' duration, in *Pickens v. Pickens*²⁹⁰ the court awarded spousal maintenance payments for an indefinite period as long as the wife's disabilities made her unable to support herself. This award was also sustained without expert testimony to support the wife's testimony concerning her incapacitating physical disability.²⁹¹ Because the statute does not require expert medical testimony of incapacity, the Dallas appellate court sustained the trial court's finding.²⁹² Family Code section 8.008²⁹³ provides, nevertheless, that a modification in such a maintenance order can be sought as a result of material change in circumstances.

In *Limbaugh v. Limbaugh*²⁹⁴ the husband contested an award of spousal maintenance on the ground that the wife was awarded a sufficient amount of community property and had sufficient earning ability to provide for her minimum, reasonable needs. Because the record contained some probative evidence supporting the trial court's order, the order was left undisturbed.²⁹⁵

D. EFFECTS OF BANKRUPTCY

In *In re Kessel*²⁹⁶ the husband agreed to pay the wife alimony, and the agreement was approved by the divorce court.²⁹⁷ In his Chapter 13 bankruptcy proceeding several years later, the ex-husband sought to discharge his maintenance obligations, which were in arrears.²⁹⁸ His ex-wife contested his discharge²⁹⁹ on the ground that, despite the designation of their contact as for alimony for the benefit of the ex-husband's federal taxes,

285. 55 S.W.3d 194 (Tex. App.—Corpus Christi 2001, no pet.).

286. *Id.* at 197-99.

287. *Id.* at 198.

288. *Id.* at 197-99. On page 199 a printer once again misspelled a vital word of the maxim *de minimis non curat lex*.

289. *Id.* at 197.

290. 62 S.W.3d 212, 214 (Tex. App.—Dallas 2001, no pet.).

291. *Id.* at 215-16.

292. *Id.* at 215.

293. TEX. FAM. CODE ANN. § 8.008 (Vernon 1998).

294. 71 S.W.3d 1 (Tex. App.—Waco 2002, no pet.).

295. *Id.* at 15.

296. 261 B.R. 902, 904 (Bankr. E.D. Tex. 2001).

297. *Id.*

298. *Id.* at 905-06.

299. *Id.* at 906.

the contract was not a property settlement disguised as alimony but compensation to the wife along with support payments for the vast differences in earning power of the parties. Hence, the provisions of the contract were correctly designated as alimony.³⁰⁰ Thus, the contract was not dischargeable in bankruptcy.³⁰¹

E. ENFORCEMENT AND CLARIFICATION

In *Reiss v. Reiss*³⁰² the unappealed 1980 divorce decree was rendered three years before the Texas Supreme Court held in *Berry v. Berry* that, for the purpose of division, retirement benefits must be valued at the date of divorce.³⁰³ In response to the ex-husband's argument that enforcement of the decree constituted an unconstitutional divestiture of his separate property, the appellate court refused to allow a collateral attack on the judgment, though it was clearly contrary to the rule in *Berry*. Thus, the ex-wife's suit to receive her share of the retirement benefits as fixed by the erroneous (but not void) decree was successful.

*Mastin v. Mastin*³⁰⁴ dealt with a means of making the payment of contractual alimony more efficacious. The husband's agreed alimony payments had been incorporated in the divorce decree, under which the wife had the option to accelerate payments if the husband defaulted.³⁰⁵ The ex-husband had been in partial default for a number of years.³⁰⁶ In 1999 the ex-wife demanded full payment and noted her option to accelerate. After the ex-husband's failure to respond, the ex-wife sued and again stated her option to accelerate payments.³⁰⁷ The ex-husband asserted that his ex-wife failed to give notice of her right to accelerate payment. The San Antonio Court of Appeals agreed with the ex-husband's argument with respect to the requirement of unequivocal notice of acceleration in light of the severity of the remedy.³⁰⁸

*In re Alford*³⁰⁹ serves as a reminder that when drawing a judgment concerning airline-reward-miles or a similar interest, counsel should provide that the holder of the interest take specific action to pass that interest to the spouse awarded the interest.³¹⁰ Thus a clarification proceeding may be avoided.³¹¹ But such a term in an agreement in anticipation of divorce

300. *Id.* at 909.

301. *Kessel*, 261 B.R. at 909.

302. 40 S.W.3d 605 (Tex. App.—Houston [1st Dist.] 2001, no pet.), briefly noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 54 SMU L. REV. 1383, 1411 (2001).

303. 647 S.W.2d 945, 946 (Tex. 1983).

304. No. 04-00-00438-CV, 2001 WL 985824 (Tex. App. San Antonio 2001, no pet.).

305. *Id.* at *1.

306. *Id.*

307. *Id.*

308. *Id.* at *5.

309. 40 S.W.3d 187 (Tex. App.—Texarkana 2001, no pet.) (particular decree was not sufficiently specific to be enforced by contempt under TEX. FAM. CODE ANN. § 9.006(a) (Vernon 1998)).

310. *Id.* at 188-89.

311. But clarification may not be possible. An effort to clarify a post-divorce order acceptable for processing and a qualified domestic relations order dealing with retirement

will not give a court contempt power of enforcement and thus such a contractual provision would not produce the same objective as a court order.³¹²

benefits failed in *Marshall v. Priess*, No. 14-99-01399-CV, 2002 WL 122509 (Tex. App.—Houston [14th Dist.] 2002, no pet.), because the clarifications sought were actually substantive changes in the former orders and thus beyond the authority of the trial court under TEX. FAM. CODE ANN. § 9.007 (Vernon 1998).

312. *Woolam v. Tussing*, 54 S.W.3d 442 (Tex. App.—Corpus Christi 2001, no pet.) (A judicial award of spousal maintenance may be enforced by contempt under TEX. FAM. CODE ANN § 8.009 (Vernon 1998) but not contractual alimony.)

