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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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* B.A., University of Texas; M.A., B.C.L., Oxford University; LLM, Columbia University. The author thanks Dustin Whittenburg for his assistance in preparing this article. Opinions not designated for publication are included here as suggestions for lines of argument which may be advanced, especially in a similar case before the same court. It has become increasingly apparent that there are a great many unpublished opinions that are of precedential value. There are also a number of opinions that are published that deal only with resolution of fact disputes and therefore do not warrant publication except to indicate that a particular appellate court has recently dealt with a case of a particular kind. In 2002 the Texas Supreme Court promulgated a new rule as to unpublished opinions. Tex. R. App. P. 47.7 Opinions which are not designated for publication remain of non-precedential value but may now be cited if properly described as "not designated for publication."

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I. STATUS

A. NON-MARITAL UNIONS

IN the legislative sessions of 2001 and 2003, unsuccessful efforts were made to enact a statute creating civil unions in Texas.¹ In the 2003 session section 6.204 was added to the Family Code to declare that recognition of same sex unions is contrary to Texas public policy.² Elsewhere adoptions of favorable proposals have been sparse.³

B. INFORMAL MARRIAGE

The couple whose dispute was before the court in *Reynolds v. Reynolds*⁴ were living together in Austin in early 1979, when they announced to their families and friends that they were married. Several months later the couple moved to Virginia where they were living in 1992, when the woman abandoned the man, although both continued to live in Virginia. After each had threatened to sue the other for divorce, the man brought an action in Texas to declare that an informal marriage did not exist between them, and the woman brought a suit for divorce in Virginia. The Texas court gave judgment for the man, and the woman appealed, though the question of the court's jurisdiction to render the judgment had not

1. Tex. H.B. 496, 77th Leg., R.S. (2001). Tex. H.B. 38, 78th Leg., R.S. (2003).

2. Tex. S.B. 7, 78th Leg., R.S. (2003).

3. See Joseph W. McKnight, *Family Law: Husband and Wife*, 53 SMU L. REV. 995, 996 n.3 (2000).

4. *Reynolds v. Reynolds*, 86 S.W.3d 272 (Tex. App.—Austin 2002, no pet.).

been raised. In its *sua sponte* consideration of jurisdiction to grant a declaratory judgment in such an instance, the Austin Court of Appeals first inquired whether the relief sought by the petitioner “is germane to a justiciable controversy already within the district court’s jurisdiction,”⁵ that is, related to a pending Texas cause of action between the parties or clearly indicated imminent action which may be presumed.⁶ But neither situation existed and the parties were by then engaged in a Virginia proceeding in which that issue would have to be resolved.⁷ The appellate court therefore found that the Texas court did not have jurisdiction to grant relief, though the court did not explain why Family Code section 6.307(b)(1)⁸ was inapplicable. That provision allows a Texas court to declare a purported marriage void and an implication may be derived from section 6.307(b) that since subdivisions (a) and (2) are stated in the alternative, no durational domicile or residence requirement needs to be met by the petitioner. The reason that section 6.307 is inapplicable requires a close reading of that section. It is implicit in the definition of an informal marriage in section 2.401(b) that failure to prove the prerequisites defined there causes the alleged marriage to be void. But that definition is in Chapter 2 of the Family Code whereas the provisions of section 6.307(a) apply only to provisions in Chapter 6, which refers only to the two types of void marriages mentioned there: those that are prohibited by rules of consanguinity and those that are bigamous. In *Reynolds* the court also concluded that there was “no impediment to the Virginia court’s considering Texas law in determining whether [the woman] may establish an informal [Texas] marriage,” and at the time that such a marriage might have been contracted both parties were apparently domiciliaries of Texas.⁹ Because this matter was resolved on jurisdictional grounds, the court did not consider the woman’s reliance on section 2.401(b)¹⁰ that the man’s suit had not been not brought within two years after their cohabitation had ceased.

In *Wilson v. Estate of Williams*¹¹ the Waco appellate court held that, because the contestant of the informal marriage had not raised the issue of factual sufficiency of the evidence, she was barred on appeal from sug-

5. *Id.* at 276.

6. *Id.*

7. *Id.*

8. Tex. Fam. Code Ann. § 6.307 (Vernon 1998) (Jurisdiction to Declare Marriage Void).

(a) Either party to a marriage made void by this chapter may sue to have the marriage declared void, or the court may declare the marriage void in a collateral proceeding.

(b) The court may declare a marriage void only if:

(1) the purported marriage was contracted in this state; or

(2) either party is domiciled in this state.

(c) A suit to have a marriage declared void is a suit in rem, affecting the status of the parties to the purported marriage.

9. *Reynolds*, 86 S.W.3d at 278 n.6.

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

11. *Wilson v. Estate of Williams*, 99 S.W.3d 640 (Tex. App.—Waco 2003, no pet. h.).

gesting applicability of the limitation statute in effect at the time the informal marriage was alleged to have existed, rather than the limitation statute in effect when the contest was filed and tried. But as a procedural provision, section 2.401(b) would not have assisted her even if timely pled.¹²

In *In re Hallgarth*¹³ a couple had begun living together in 1985, while the man was still married to another woman. He was divorced two years later. Soon afterward, the couple decided to have children, represented themselves to others as married, and participated in unsuccessful efforts toward *in vitro* fertilization from 1988 to 1990 at very considerable expense. An effort toward other means of achieving parenthood also failed in 1993. The couple finally separated in 1999. In the divorce proceeding that ensued, the trial court found that an informal marriage existed, and the man appealed on the ground that an agreement to marry had not been shown. Direct evidence of the agreement to marry occurred in 1986, while (presumably without the woman's knowledge) the man's existing marriage was an impediment to their marriage. Whether at that time there was evidence of the other two elements of an informal marriage, is not noted. If those elements had been proved and the couple had continued to live together after the removal of the impediment of the man's divorce, the informal marriage would have then become valid.¹⁴ In finding that an informal marriage existed when the petition for divorce was filed, the Amarillo appellate court relied on the cumulative evidence of the fifteen years that had passed after the agreement to conclude that the marriage existed: fifteen years of cohabitation, use of the same name, and representation of marriage to others including the officials of the hospitals in which the woman was treated. This analysis of the facts, though extending over a far longer time than that examined by the Houston First District Court of Appeals in *Winfield v. Renfro*,¹⁵ did not comply with the conclusion there that all elements should have been present simultaneously. The Waco court's approach, however, is in harmony with the Texas Supreme Court's decision in *Russell v. Russell*,¹⁶ holding that the agreement to marry might be inferred from the facts establishing the other two

12. See *Mills v. Mest*, 94 S.W.3d 72 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (dealing with little more than a dispute as to sufficiency of evidence to prove the informal marriage).

13. *In re Hallgarth*, No. 07-01-0013-CV (Tex. App.—Amarillo May 29, 2001, no pet.) (not designated for publication), 2001 WL 574833.

14. TEX. FAM. CODE ANN. § 6.202 (Vernon 1998). See, e.g., *Garduno v. Garduno*, 760 S.W.2d 735 (Tex. App.—Corpus Christi 1988, no writ).

15. *Winfield v. Renfro*, 821 S.W.2d 640, 645 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

16. *Russell v. Russell*, 865 S.W.2d 929, 932 (Tex. 1993). In *Ganesan v. Vallabhaneni*, 96 S.W.3d 345 (Tex. App.—Austin 2002, pet. denied), the dispute centered on evidence offered to show that an informal marriage existed at a specific time, and in that respect it is worthy of note. (Though such pleading may pose difficulty of proof, it may sometimes be necessary to show that the marriage occurred before particular property was acquired.) *Mills*, 94 S.W.3d at 72, dealt simply with an unsuccessful effort to marshal circumstantial evidence to show an agreement to enter into an informal marriage.

elements. On the other hand, in *Mills v. Mest*,¹⁷ a close relationship that ultimately blossomed into a ceremonial marriage was found to be insufficiently evidenced as an informal marriage. The proof showed that on only one occasion had either the man or the woman ever held the other out as a spouse, and the surmises of neighbors that the couple were married rested on evidence that might have been otherwise understood. There was no direct evidence of an agreement to be married. The Corpus Christi court concluded that *Russell v. Russell*¹⁸ requires “‘more convincing’ circumstantial proof” than was shown.¹⁹

C. JURISDICTION FOR DIVORCE

The couple in *McAlister v. McAlister*²⁰ had lived in Guadalupe County, but as differences had developed between them, the wife had rented an apartment in Bexar County. She nevertheless went back and forth to Guadalupe County from time to time, sometimes apparently for several days. The couple engaged in lengthy negotiations towards reconciliation, but the wife finally brought suit for divorce in Bexar County. Although the husband was well aware of the suit, he was not served with citation. He then sued for divorce in Guadalupe County, and the wife was served with his petition. The Guadalupe County court denied the wife’s plea in abatement and granted a divorce. Before the San Antonio Court of Appeals, the wife argued that she was a resident of Bexar County, but in light of all the testimony the appellate court concluded that she had residences in both counties sufficient to satisfy the durational residence requirement to sue in Bexar County. Though she had delayed having her husband served with citation, she had apparently been motivated by a hope of agreement between them. It was said to be customary in Bexar County to delay citation of a respondent in order to achieve reconciliation, and thus the lack of service did not constitute undue delay on the wife’s part.²¹ The appellate court therefore sustained the appeal on the ground that the Bexar County court had dominant jurisdiction in the matter and the Guadalupe County court was therefore without jurisdiction to grant the divorce.²² Without any indication of the extent or delay of citation said to have been within the standard of due diligence, this seems a rather casual interpretation of Rule 47.7.²³

In *Dawson v. Dawson*²⁴ the husband brought suit in Texas but did not serve his wife in Minnesota. She brought suit for divorce there, soon af-

17. *Mills*, 94 S.W.3d at 72.

18. *Russell*, 865 S.W.2d at 932.

19. *Mills*, 94 S.W.3d at 75.

20. *McAlister v. McAlister*, 75 S.W.3d 481, 482 (Tex. App.—San Antonio 2002, pet. denied).

21. *Id.* at 486.

22. *Id.* at 486-87.

23. TEX. R. APP. P. 47.7; see *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990).

24. *Dawson v. Dawson*, No. 13-02-138-CV, No. 13-01-812-CV (Tex. App.—Corpus Christi Aug. 29, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 6405.

terward. The husband was served with citation and sought affirmative relief from the Minnesota court. Hardly surprisingly in response to the wife's special appearance in Texas to contest its jurisdiction, the Texas appellate court affirmed the lower court in reliance on *Dawson-Austin v. Austin*.²⁵

In *Cotton v. Cotton*²⁶ the appellate court considered a spouse's standing to appeal when the appellant had not been served with process, had not waived citation, and did not participate in the trial in any manner. The appeals court concluded²⁷ that without personal jurisdiction in such a situation, the trial court lacked the power to enter a judgment for divorce against the husband, even though the husband failed to assign lack of jurisdiction in his appeal.²⁸ The husband had written a letter to the Attorney General, who had intervened on the part of the wife who was seeking child support. The letter did not constitute the husband's general appearance in the case in that it did not seek any action by the court.²⁹

D. GROUNDS FOR DIVORCE

In *In re Beach*³⁰ the wife filed a petition for divorce for insupportability, and the husband responded with an application for a mandatory injunction requiring that the divorce court order the wife to reconcile. The trial court rejected his request, and the husband appealed. The Dallas Court of Appeals concluded that the wife's testimony that the marriage was irreparable with no possibility of reconciliation constituted a prima facie case for a divorce on the ground of insupportability and that the husband's assertion that his wife had a "duty to reconcile is utterly without merit."³¹

Proof of grounds for divorce was at issue before the Houston Fourteenth District Court of Appeals in *Ratisseau v. Ratisseau*,³² as in *Harmon v. Harmon*³³ an appeal from a no-answer default divorce before the same court. In *Harmon*, the court had concluded that "[a] defendant's failure to appear or answer is taken as an admission of the allegations in the plaintiff's petition."³⁴ In *Ratisseau*, the court corrected its prior error in light of the clear provision of Family Code section 6.701 that "[i]n a suit

25. *Dawson-Austin v. Dawson*, 986 S.W.2d 319 (Tex. 1998).

26. *Cotton v. Cotton*, 57 S.W.3d 506 (Tex. App.—Waco 2001, no pet.).

27. *Id.* at 509-10.

28. *Id.* at 509-11 (citing *St. Louis & S.F. Ry. Co. v. Hale*, 109 Tex. 251, 206 S.W. 75 (1918), *Smith v. Amarillo Hosp. Dist.*, 672 S.W.2d 615, 617 (Tex. App.—Amarillo 1984, no writ), and *Toler v. Travis County Child Welfare Unit*, 520 S.W.2d 834, 836 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.)).

29. *Id.* at 511. How that letter had ultimately found its way to the district clerk's office was not apparent in the record. *Id.*

30. *In re Beach*, 97 S.W.3d 706 (Tex. App.—Dallas 2003, no pet. h.).

31. *Id.* at 708.

32. *Ratisseau v. Ratisseau*, 44 S.W.3d 695 (Tex. App.—Houston [14th Dist.] 2001, pet. dism'd by agr.).

33. *Harmon v. Harmon*, 879 S.W.2d 213 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

34. *Id.* at 217.

for divorce, the petition may not be taken as confessed if the respondent does not file an answer.”³⁵

In a recent study,³⁶ based on divorce statistics in some other states, it was concluded that from the perspective of women, “repealing no fault laws may cause harm as compared to passing reforms that will make marriages better,”³⁷ such as proposed federal tax reforms³⁸ and allowing enforceable contracts between spouses concerning housework performed by women.³⁹ The authors also favor “replicat[ion of] the patterns in marriage as closely as possible”⁴⁰ in custody rules, a result which Texas legislation has already sought to achieve by joint-custody provisions.⁴¹

Other proposals for the reform of grounds for divorce continue to be generated. Admiration for the Louisianian notion of “covenant marriage”⁴² has provoked proposals⁴³ for adoption of that sort of rule in Texas, but to no avail. Now a suggestion for the regeneration of the torts of alienation of affection and criminal conversation has also been made in Louisiana and elsewhere “to prevent adultery and save families.”⁴⁴ The need to allege fault as a ground in order to assert fault as a matter to be considered in division of the community estate, however, continues to be

35. TEXAS FAM. CODE ANN. § 6.701 (Vernon 1998) (perpetuating TEX. FAM. CODE ANN. § 3.53 (1973), in effect when *Harmon* was decided). In *Ratisseau*, 44 S.W.3d at 697 the court relied on *Roa v. Roa*, 970 S.W.2d 163, 165 n.2 (Tex. App.—Fort Worth 1998, no pet.), and *Considine v. Considine*, 726 S.W.2d 253 (Tex. App.—Austin 1987, no writ). See Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225, 1263-64 (1995).

36. Margaret F. Brinig & Douglas W. Allen, “*These Boots Are Made for Walking*”: *Why Most Divorce Filers Are Women*, 2 AMER. LAW AND ECONOMICS REV. 126 (2000).

37. *Id.* at 159. Somewhat different views are presented in publications of the Institute for American Values in New York. Its studies have been prepared by a group of family scholars to promote strengthening the bonds of marriage in American society.

38. See Thomas R. White, III, *Feds Propose New Treasury Reg to Resolve Tax Uncertainty in Marital Redemptions*, 19 THE MATRIMONIAL STRATEGIST 1 (No. 9, 2001). For further reliance on statistics see Lou Nitschke, *Marital Status and Taxes: Irreconcilable Differences?*, 57 CONG. Q. WEEKLY 2581 (1999).

39. Brinig & Allen, *supra* note 36, at 159 n.52.

40. Bing & Allen, *supra* note 36, at 160.

41. TEX. FAM. CODE ANN. §§ 153.005, 153.133 (Vernon 2002).

42. LA. CIV. STAT. ANN. § 9:272 (2003). See Heather K. McShain, *For Better or for Worse? A Closer Look at Two Implications of Covenant Marriage*, 32 FAM. L.Q. 629 (1998). This was the winning essay in the Howard C. Schwab Memorial Essay Contest for 1998. The two implications discussed are the proposals for reinstatement of fault-based divorce law and the impact that approach might have on recognition of the status of same-sex couples.

43. In 1999 such a proposal was sponsored by seventeen members of the House of Representatives but did not achieve passage. Tex. H.B. 350, 76th Leg., R.S. (1999). In 2001 and 2003 further proposals by Wohlgermoth of Bosque and Johnson Counties were introduced without success. Tex. H.B. 352, 77th Leg., R.S. (2001); Tex. H.B. 1795, 78th Leg., R.S. (2003).

After all, the “until death do us part” type of ceremonial marriage already exists in Texas and it is common practice that the very serious vows exchanged by the couple are amply witnessed—sometimes by a vast array of friends. If fault is to be assigned for not making all this stronger than it is, it must fall ultimately upon the Congress of the Republic of Texas in 1842 and succeeding Legislatures in allowing that the bonds of marriage may be untied without very much, if any, recourse to the contract of marriage as such.

44. William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985 (2002).

argued.⁴⁵

II. CHARACTERIZATION OF MARITAL PROPERTY

A. PREMARITAL AND MARITAL PARTITIONS AND EXCHANGES

Prior to their marriage in 1992, the couple, whose marriage ended in divorce in 1999, had entered into a property agreement when the woman was forty, unmarried, and pregnant. In *Osorno v. Osorno*⁴⁶ the wife who contested the validity of the agreement asserted that her condition at the time constituted duress and that she had therefore not entered into the agreement voluntarily. The appellate court upheld the trial court's conclusion that the agreement was not invalid as the wife had not been under any threat by her future husband-to-be to enter into it.⁴⁷

A bankruptcy case raised issues of the validity of a marital partition and of present and prospective interests in community property so that each spouse has, as separate property, that which would otherwise be a part of the community estate. In *In re Hinsley*⁴⁸ the federal Fifth Circuit Court of Appeals considered an attack by the bankruptcy trustee on a marital partition entered into while the bankrupt-husband and his estranged wife were attempting to reconcile their marital differences. The court concluded that the marital partition was void as to the wife.⁴⁹ Using the badges of fraud of the Texas Uniform Fraudulent Transfer Act to cover facts which the wife had failed to explain, the court concluded that the partition removing substantial assets from the reach of the husband's creditors was not for fair equivalent value received by the wife with respect to the creditors' claims.⁵⁰ The court also intimated that failure of the husband to divulge the existence of the partition to his creditors somehow barred the running of the statute of limitations in favor of his wife's interest. The court seems to have held that for purposes of creditors' claims of fraudulent transfer against one of the spouses, the other spouse need not have an intent to defraud creditors in entering into the partition. Although the context of a debtor-creditor dispute was certainly paramount in the court's consideration of this case, the court nonetheless raised the question of the need for a showing of a mutual intent to defraud creditors with respect to the validity of the partition of other contexts. In *Painewebber, Inc. v. Murray*⁵¹ the issue before the court was whether a term of a premarital agreement in which the wife waived her

45. See *Phillips v. Phillips*, 75 S.W.3d 564 (Tex. App.—Beaumont 2002, no pet.) (discussed *infra* at notes 276-80). See also *Martel v. Martel*, No. 05-99-00177-CV (Tex. App.—Dallas Aug. 31, 2001, no pet.) (not designated for publication), 2001 Tex. App. LEXIS 2691, discussed *infra* at notes 293-97.

46. *Osorno v. Osorno*, 76 S.W.3d 509 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

47. *Id.* at 541 (citing *In re Dawley*, 551 P. 2d 323, 331 (Cal. 1976), which dealt with a pre-marital agreement "signed under the pressure of unplanned pregnancy.").

48. *In re Hinsley*, 201 F.3d 638 (5th Cir. 2000).

49. *Id.* at 643.

50. *Id.* at 642 (citing TEX. BUS. & COM. CODE ANN. § 24.005(b)).

51. *Painewebber, Inc. v. Murray*, 260 B.R. 815 (E.D. Tex. 2001). See text *infra* at notes 165-68.

homestead rights in the husband's separate property affected his claim to a homestead as the head of a family. The federal district court by a very liberal interpretation of the nature of the particular homestead claim held that the husband's claim of two hundred acres as a rural homestead was not so affected.⁵²

B. TRACING

The community presumption⁵³ applied with the severity required by the clear and convincing evidence rule⁵⁴ supplies an easy answer to a very large number of tracing questions when the evidence of the separate character of particular property is unavailable or insufficiently explained. Several cases illustrate this evidentiary reality. In *Gaides v. Gaides*⁵⁵ the wife asserted that shares of stock in brokerage accounts were her separate property.⁵⁶ Though she was able to show that separate property went into those accounts, she could not show that the increments to the accounts were all of a separate character,⁵⁷ and segregating the community additions to particular shares was therefore impossible. In dealing with the characterization of an insurance policy,⁵⁸ the court devoted inordinate attention to distinguish two federal tax cases.⁵⁹ In concluding that a written transfer of a community insurance policy by one spouse to the other spouse "as owner" (without more) did not create a countervailing presumption of gift⁶⁰ which would not be overcome by the transferor-spouse's mere denial of his intention to make a gift.⁶¹ Though legislation has been suggested that a *mere* transfer of community property during marriage by one spouse to the other without *any recital as to ownership* is presumed to be intended as a change in management rather than ownership, such legislation would not apply in a situation like this one which included a recital of ownership. In this instance estoppel by the parole evidence rule is decisive,⁶² and to say as the court does⁶³ that the wife relied only on cases involving conveyances of real property seems a resort to sophistry. In fact a reasonable argument may be advanced in such a dispute that the husband's evidence of his intent is inadmissible.⁶⁴ In *In*

52. *Id.* at 827.

53. TEX. FAM. CODE ANN. § 3.003(a) (Vernon 1998).

54. *Id.* § 3.003(b).

55. *Gaides v. Gaides*, No. 14-99-0017-2-CV (Tex. App.—Houston [14th Dist.] May 3, 2001, pet. denied) (not designated for publication), 2001 Tex. App. LEXIS 2930.

56. *Id.* at *15.

57. *Id.* at *17.

58. *Id.* at *26.

59. *Parson v. United States*, 460 F.2d 228 (5th Cir. 1972); *Freedman v. United States*, 382 F.2d 742 (5th Cir. 1967).

60. *Story v. Marshall*, 24 Tex. 305 (1859).

61. *Gaides*, 2001 Tex. App. LEXIS 2930, at *24-26.

62. *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1968); *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777 (1952).

63. *Gaides*, 2001 Tex. App. LEXIS 2930, at *25.

64. *Messer*, 422 S.W.2d at 912; *Blanchard v. Blanchard*, 293 S.W.2d 825 (Tex. Civ. App.—Waco 1956, writ ref'd n.r.e.).

*re Baggett*⁶⁵ the Amarillo Court of Appeals found that the husband had failed to trace stock splits of what were initially separate shares of stock because some part of the stock splits resulted from reinvestment of community cash dividends into shares which were subsequently split. As in *Gaides* the husband's evidence of tracing was unsuccessful in showing precise amounts of separate stock held.⁶⁶

A husband's evidence failed once more in *Evans v. Evans*,⁶⁷ where in offering his income tax returns as his only proof of a separate business interest, he was unable to show a clear mutation of a separate interest, though a properly evidenced request for findings of fact and conclusions of law⁶⁸ and the finding which might have been made could have aided his argument on appeal.

In determining the separate and community elements of various types of profit-sharing plans and other types of *contributory* retirement plans in which an employee has become a member prior to marriage and continues as a member during marriage,⁶⁹ appellate courts have followed the easy approach of the Houston First District Court of Appeals in *Hatteberg v. Hatteberg*⁷⁰ by merely subtracting the pre-marital value of the interest from that at the end of the marriage in order to segregate (and thus value) the separate interest of the employee. As is pointed out in a recent reanalysis,⁷¹ this method of characterization merely measures the overall increase in the value of the participant's account during marriage and fails to identify investments and mutations of investments which have been held within the account since before the marriage. Though the old mode of characterization may have been an appropriate means of identifying and valuing proportionate separate and community interests in such plans in past times, new forms of contributory plans and changed investment practices over the last fifteen years have made that mode of characterization in a great many defined contribution plans inappropriate today. Under current practice, most defined contribution plans are invested in stocks rather than in interest-bearing accounts (commonly those operated by life insurance companies) as was the earlier practice. With this shift in

65. *In re Baggett*, No. 07-02-0087-CV (Tex. App.—Amarillo Sept. 24, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 6858.

66. *Id.* at *10.

67. *Evans v. Evans*, No. 03-01-00281-CV (Tex. App.—Austin June 31, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 4461.

68. *Id.* at *2.

69. For example, plans under I.R.C. § 401(k) and employees stock option plans (ESOPs).

70. *Hatteberg v. Hatteberg*, 933 S.W.2d 522 (Tex. App.—Houston [1st Dist.] 1994, no writ). See also, *Pelzig v. Berkebile*, 931 S.W.2d 398 (Tex. App.—Corpus Christi 1996, no writ). In the recent reappraisal of this approach by Wingate and Fowler, the old line of authority is said to stem from *Iglinsky v. Iglinsky*, 735 S.W.2d 536 (Tex. App.—Tyler 1987, no writ), though it is hard to discern a clear expression of that technique there. The court there merely seems to say that the rule in *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983), should be applied only to that part of the fund not contributed from the employee's separate property, *Iglinsky*, 735 S.W.2d at 538, as the critics recommend.

71. James M. Wingate & Dawn E. Fowler, *Divestiture of Separate Property Is Alive and Well in Texas*, 65 TEX. B.J. 584 (2002).

investment practices, characterization and valuation of marital assets in such plans is more often appropriately achieved by tracing existing assets which are the same as, or are mutations from, premarital investments in the plan. If this tracing approach is not feasible, the method employed in characterizing and valuing interests in defined benefit plans seems appropriate.⁷²

That which is earned by a spouse while the couple is domiciled in a common-law state prior to moving to Texas is that spouse's separate property. Under section 7.002,⁷³ however, that property is nonetheless divisible on divorce as community property. The Corpus Christi Court of Appeals' explanation of this point in *Zorilla v. Wahid*⁷⁴ may still be somewhat misleading. While the couple lived in New York, the wife had put aside a substantial sum designated along with its income as a fund for their children's education. Presumably that fund in time had produced further income included in the fund after the couple moved to Texas, and nothing was said in the opinion about any attempts to trace the additions to the separate property in the fund. The court merely applied the community presumption⁷⁵ to conclude that the entire fund was community property, at least for the purpose of division of the fund on divorce. Though the court cited *Ismail v. Ismail*,⁷⁶ no mention was made of the terms controlling investment of the fund by which additions to the fund and their ultimate disposition might have been determined. In the apparent absence of argument on such matters, the court merely applied the community presumption to the entire fund on divorce.⁷⁷

In *Zagorski v. Zagorski*⁷⁸ tracing of separate assets in a bank account prior to marriage was achieved by applying "the community property-out-first" method to the account wholly under the husband's control and in which he commingled community funds during the marriage. As has been so often pointed out, "the community property-out-first" approach is not an appropriate means of tracing in these circumstances when the spouse mixes his own separate funds in a community property account.⁷⁹

In a divorce context once the marital estates have been identified, the community estate must be evaluated with some care though only a general notion of the value of the spouses' separate estates may be necessary for the division of the community estate. Marketability of shares of stock

72. *Id.* at 591-92.

73. TEX. FAM. CODE ANN. § 7.002 (Vernon 1998).

74. *Zorilla v. Wahid*, 83 S.W.3d 247, 251 (Tex. App.—Corpus Christi 2002, no pet.).

75. TEX. FAM. CODE ANN. § 3.003(a) (Vernon 1998).

76. *Ismail v. Ismail*, 702 S.W.2d 216, 219 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). This was another somewhat confusing case involving a foreign domiciliary owning Texas realty as well as movables and immovables in Egypt where the couple had previously lived. See Joseph W. McKnight, *Family Law: Husband and Wife*, 41 Sw. L.J. 33, 34 (1987).

77. *Zorilla*, 83 S.W.3d at 251.

78. *Zagorski v. Zagorski*, No. 14-99-01044-CV (Tex. App.—Houston [14th Dist.] May 23, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 3721.

79. See, e.g., Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1035, 1048-49 (2002).

present some difficulty in their valuation, however. In *R.V.K. v. L.L.K.*⁸⁰ the appellate court concluded that a buy-sell agreement between the husband and other shareholders of a professional corporation (with agreed “significant restrictions on the marketability of the stock” that instance)⁸¹ was a proper factor in determining the value of the stock along with other evidence.⁸²

C. RETIREMENT PLANS

By a strict reading of *Egelhoff v. Egelhoff*⁸³ the Texas Supreme Court in 2001 concluded in *Barnett v. Barnett*⁸⁴ that a husband’s handling of a term life insurance policy (acquired by him during marriage as an employment benefit) was controlled by the Employment Retirement Income Security Act of 1974 (ERISA) rather than by Texas law. Thus, the husband’s designation of his estate as beneficiary of the policy was not subject to any claim of his widow in favor of the community estate. In *Heggy v. American Trading Employee Retirement Account Plan*,⁸⁵ decided by the Houston Fourteenth District Court of Appeals prior to the decision in *Barnett*, the employee-husband’s ex-wife was listed as the beneficiary of any amounts remaining in his retirement account at his death, and after his death his second wife unsuccessfully sought those benefits claimed by the ex-wife, who had waived any interest in the husband’s retirement benefits in their divorce settlement. Even so, the controlling factor in the disposition of the retirement benefits under ERISA was the designation of the plan-beneficiary by the employee spouse.

Several bankruptcy cases from other jurisdictions have dealt with the effects of federal non-bankruptcy legislation in characterizing funds in a pension plan maintained for an employee-spouse. These cases dealt with debtors who were the former spouses of a pensioner-spouse, and in each case the court held that the federal statute governing these property interests had preempted the process of characterization in favor of the non-debtor spouse. Thus no interest in the non-debtor’s pension plan became part of the bankruptcy estate of the debtor-ex-spouse,⁸⁶ and that interest

80. *R.V.K. v. L.L.K.*, No. 04-01-0345-CV, 2003 Texas App. LEXIS 1770 (Tex. App.—San Antonio Feb. 28, 2002, no pet. h.).

81. *Id.* at *18.

82. *Id.* For some other factors see Charles P. Kindregan, Jr. & Patricia A. Kindregan, *Unexercised Stock Options and Marital Dissolution*, 34 SUFFOLK U. L. REV. 227 (2001); David S. Rosettenstein, *The ALI Proposals and the Distribution of Stock Options and Restricted Stock on Divorce: The Risks of Theory Meet the Theory of Risks*, 8 WM. & MARY J. WOMEN & L. 243 (2002); David S. Rosettenstein, *Exploring the Uses of the Time Rule in the Distribution of Stock Options on Divorce*, 35 FAM. L.Q. 263 (2001).

83. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (discussed in Joseph W. M^cKnight, 55 SMU L. REV. 1035, 1067 (2002)). See Comment, Jonathan Dotson, *Egelhoff v. Egelhoff: The Supreme Court’s Latest Attempt to Clarify ERISA Preemption and the Decision’s Effect on Texas State Law*, 54 BAYLOR L. REV. 503 (2002).

84. *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001).

85. *Heggy v. Am. Trading Employee Retirement Account Plan*, 56 S.W.3d 280 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

86. 11 U.S.C. § 541 (c)(2) (2000).

was not liable for the debtor-ex-spouse's bankruptcy debts. In terms of Texas law, these decisions hold by analogy that the debtor-spouse has no interest in the non-debtor spouse's retirement plan even if the debtor-spouse had no specific interest in the plan itself but has been awarded a qualified domestic relations order (QDRO) to allow disbursements from the fund. Insofar as these cases properly derive their authority from ERISA⁸⁷ and the federal Supreme Court's decisions construing it,⁸⁸ these decisions are unexceptionable.⁸⁹ But if the decisions⁹⁰ derive their authority from the Uniformed Services Former Spouse's Protection Act (USFSPA) and other federal acts similar to it, their authority is not applicable in Texas by analogy because the latter type of act allows a divorce court to apply state law in dividing an interest in the retirement plan. But the share of the non-pensioner spouse may be very difficult to compute in a bankruptcy context.

D. REIMBURSEMENT

In 2001 the Texas Legislature defined a particular type of reimbursement as arising when an "economic contribution" has been made by one marital estate to discharge a secured interest in the other marital estate.⁹¹ In *Langston v. Langston*⁹² the husband, though cited with the wife's petition, failed to answer or to appear at the trial. The husband, nevertheless, appealed when his separate realty was awarded to his wife. The decree had spelled out his interest in some detail. Prior to the marriage the husband had acquired a house, which during the marriage the couple subjected to a home equity loan. Due to a depressed real estate market at the time of the divorce, the amount of the lien on the property exceeded the value of the realty itself. The divorce court therefore awarded the house subject to the community debt to the wife and directed her to discharge the lien. In granting the husband's appeal, the Eastland Court of Appeals pointed out that the claim for economic contribution created by the community obligation cannot affect the separate *title* to the realty under the inception of title doctrine:⁹³ "A claim for economic contribution does not create an ownership interest in the property; it merely creates a claim against the property of the benefited estate which matures

87. 29 U.S.C. § 1001 (2000).

88. See *Boggs v. Boggs*, 520 U.S. 833 (1997); *Patterson v. Shumate*, 504 U.S. 753 (1992).

89. See *In re Nelson*, 274 B.R. 789 (8th Cir. B.A.P. 2002). But those cases that purport to be based on the authority of a QDRO but fall outside the scope of ERISA seem to be wrongly decided. *In re Anderson*, 269 B.R. 27 (8th Cir. B.A.P. 2001); *In re Hageman*, 260 B.R. 852 (Bankr. S.D. Ohio, 2001); *In re Johnston*, 218 B.R. 813 (Bankr. E.D. Va. 1998).

90. *Whetzal v. Alderson*, 32 F.3d 1302 (8th Cir. 1994); *In re Seddon*, 255 B.R. 815 (Bankr. W.D. N.C. 2000).

91. TEX. FAM. CODE ANN. §§ 3.401.401, 3.406.410, 7.002 (Vernon Supp. 2003). See Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1035, 1049-52 (2002).

92. *Langston v. Langston*, 82 S.W.3d 686 (Tex. App.—Eastland 2002, no pet.).

93. *Id.* at 689 (citing TEX. FAM. CODE ANN. § 3.404(a) (Vernon 2003)).

upon the termination of the marriage.”⁹⁴ The court relied specifically on the language of *Eggemeyer v. Eggemeyer* that “[i]f one spouse’s separate property may by a divorce decree be changed from the separate property of the one spouse into the separate property of the other, there is a type of separate property which is not embraced within the constitutional definition of the term.”⁹⁵

The divorce court “shall” therefore impose (that is, adjudicate the extent of) “an equitable lien,”⁹⁶ which had already arisen by operation of law. The legal lien defined by the divorce decree can then be foreclosed, and in the meantime, constructive notice of the lien can be achieved by recordation of the divorce decree.

When making a reimbursement claim on the part of the community estate, that claim must be substantiated by proof of the separate or community character of the benefit rendered and its amount. Though the court in *In re Vineyard*⁹⁷ dealt mainly with procedural matters involved in a prisoner’s rights as a party to a divorce proceeding, a comment by the court concerning reimbursement nevertheless needs clarification. The facts with regard to this point are not clear. The husband seems to have asserted a right to reimbursement for payment of some of his wife’s debts, incurred prior to marriage.⁹⁸ The time of payment, which is all-important in this instance, is not indicated. If the payment was made prior to marriage, as was presumably the case, the rules of marital reimbursement do not apply. Depending on the circumstances the payment might have created a debt or constituted a gift. On the other hand if the payment was made during marriage, there is no presumption of gift under the law of marital reimbursement, though the payment may have the same consequences of a gift if the right of reimbursement is not asserted and proved.

E. RECOVERY FOR PERSONAL INJURY AND WRONGFUL DEATH

The husband’s undifferentiated personal injury recovery was claimed by him in *Flores v. Flores*⁹⁹ as his separate property, at least in part. The husband had agreed to a lump sum settlement for his injury, with part of which he had purchased an annuity from which he received monthly payments. There was no evidence before the divorce court to show that any part of the recovery was separate property and in most cases of this kind, no such evidence can be produced. Sometimes, however, far-sighted injury-litigation-planning may be richly rewarding to the injured

94. *Id.* (citing TEX. FAM. CODE ANN. § 3.404(b) (Vernon 2003)).

95. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977).

96. TEX. FAM. CODE ANN. § 3.406 (Vernon 2003).

97. *In re Vineyard*, No. 07-01-0460-CV (Tex. App.—Amarillo June 21, 2002, pet. denied) (not designated for publication), 2002 WL 1357681 at *1.

98. *Id.* at *9.

99. *Flores v. Flores*, No. 14-00-00536-CV (Tex. App.—Houston [14th Dist] July 26, 2001, no pet.) (not designated for publication), 2001 Tex. App. LEXIS 4947.

plaintiff.¹⁰⁰

In *Trostle v. Trostle*¹⁰¹ the widow (individually and as independent executrix) and one son of the deceased husband-father had sued for the decedent's wrongful death and survival damages on their own behalf and that of the estate and testamentary trusts created by the decedent, but there was no recovery of survival damages in the absence of evidence to support that cause of action. Another son of the decedent then brought suit against the successful plaintiffs for a portion of the recovery for wrongful death and damages for his exclusion as a claimant for survival damages. The trial court rejected the plaintiff's claims and he appealed. The Amarillo appellate court affirmed the judgment of the trial court. The court concluded (as had the trial court) that the appellant had knowledge of the filing of the suit but did not choose to join in it, and therefore he had no right to complain of his non-joinder as a beneficiary of the estate.¹⁰²

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

A. MANAGEMENT OF MARITAL PROPERTY

*In re McCloy*¹⁰³ dealt with a husband's 1998 involuntary bankruptcy proceeding in which his wife asserted a claim as a creditor. Both the debtor and his wife, however, asserted that the court lacked jurisdiction over any claim against certain property belonging to the wife. In 1975 the property in issue had been bought by the husband with community funds in his own name. In 1987, the husband again acting alone, gave a lien on that property to a lender as security for a loan. In 1992, and again in 1994, the husband transferred his equity in the same property as security for further loans. In 1992 the wife had become voluntarily bankrupt and claimed the particular property as community property but did not give her husband's creditor notice as she did not regard him as a creditor. Unaware of the wife's claim to an interest in the property, the creditor foreclosed his liens on the property in 1997, and the husband sued to set aside the foreclosure. A petition for involuntary bankruptcy was then filed against the husband by another creditor. In the meantime, the husband had executed two successive leases on the land to his son, and the wife's name appeared on one of those leases. The wife and son were in possession of the land. The bankruptcy court found that the land in issue was community property but solely managed by the husband. The court then approved a settlement of the trustee with the creditor, and the husband and wife appealed to the federal Fifth Circuit Court of Appeals asserting that property in question was jointly managed community property and was therefore beyond the subject matter jurisdiction of the

100. See Joseph W. McKnight, *Family Law*, Sw. L.J. 66, 71-72 (1974).

101. *Trostle v. Trostle*, 77 S.W.3d 908 (Tex. App.—Amarillo 2002, no pet.).

102. *Id.* at 915-17.

103. *In re McCloy*, 296 F.3d 370 (5th Cir. 2002).

bankruptcy court. In finding that the property was subject to the husband's sole management, the court relied particularly on the provisions of Section 3.104(a) (clarified in 1999) that "property is presumed to be subject to the sole management, control and disposition of a spouse if it is held in that spouse's name. . . ." ¹⁰⁴ The course of conduct of the parties confirmed that conclusion and thus the bankruptcy court's exercise of jurisdiction. The federal appellate court distinguished *Williams v. Portland State Bank*, ¹⁰⁵ relied on by the couple, on the ground that in *Williams* the creditor had actual notice of the contesting spouse's lack of sole authority to manage the land, although in this instance the creditor did not have such notice. ¹⁰⁶ But even if the land had been subject to joint management of the spouses, the property would have been subject to the husband's creditors claims. In that eventuality, however, the husband's sole disposition of the property would have been ineffective except as to a creditor without notice in reliance on Section 3.104(a).

The disposition of marital property at death sometimes calls for the application of the doctrine of equitable election, the application of which is not often encountered except as between a surviving spouse and a deceased spouse's testate takers. The rule is that if a decedent disposes of the property of another (of the other spouse or someone else) by will as though owned by the testator and also makes a testamentary disposition in favor of that person, the person both benefited and deprived is forced to elect between the benefiting donation and the deprivation of the property. ¹⁰⁷ The dispute in *In re Estate of McFatter* ¹⁰⁸ dealt with a 1968 will made jointly by a husband and wife. The will provided that the survivor of them would take the full estates of both. There was no further dispositive provision in the will. After the husband's death in 1998 the widow, having the entire estate, made another will in 2001 in favor of named persons not her heirs at law. The widow's intestate heirs sought probate of the first will and the takers under the second will claimed under the later will. The trial court accepted the argument of the proponents of the first will that it was contractual in nature and therefore barred the widow as survivor from making a further effective will covering the estates of both spouses. Though the first will was, of course, contracted mutually in favoring the survivor, it went no further than vesting the entire estate in the widow. The issue between the claimants under the two wills was whether there was any element of contract dealing with the further disposition of the estate after the death of the survivor. There was none. What the proponent of the first will argued with respect to the contractual nature of the first will was beside the point, as was his argument that the widow was somehow put to an equitable election concerning the will's

104. TEX. FAM. CODE ANN. § 3.104(a) (Vernon 1998).

105. *Williams v. Portland State Bank*, 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974, writ dismissed).

106. *McCloy*, 296 F.3d at 374-75.

107. See *Wright v. Wright*, 154 Tex. 138, 274 S.W.2d 670 (1955).

108. *In re McFatter*, 94 S.W.3d 729 (Tex. App.—San Antonio 2002, no pet. h.).

terms. The terms of the first will were "absolute and unconditional" in favor of the survivor.¹⁰⁹ There was therefore nothing that might pass conditionally.¹¹⁰ The argument that an election would arise in this situation was based on the notion that in the first will the husband had purported to dispose of his wife's estate and bequeathed his estate to her, therefore putting her to an election. That argument was put to rest by the will's mutual quality and the fact that the will may be otherwise interpreted. The wife had in effect made a similar provision in favor of the husband if he should survive her. That was the end of it.¹¹¹

B. LIABILITY OF MARITAL PROPERTY

1. *Liability of a Debtor-Spouse*

Because liability of marital property is defined in terms of the management powers of the respective spouses, the definition of liability generally follows that of management. The Family Code defines liability of a spouse as falling on that spouse's separate property, his or her solely managed community property, and all of the jointly managed community property.¹¹² Disputes between spouses (or their privies) as to liability occur in one of the two contexts of dissolution of marriage: by divorce (or annulment) or by death of a spouse. In disputes between spouses on the one hand and their creditors on the other, the same question must be resolved when a creditor of one of them seeks recourse to a marital estate within the orderly confines of bankruptcy or simply by enforcement of state collection remedies. Disputes between spouses in divorce or annulment infrequently involve their creditors directly because creditors do not have notice of their dispute, but when a marriage is dissolved by death or bankruptcy, all claimants should have notice to engage in the fray.

In *In re Nahat*¹¹³ the husband had filed a Chapter 13 petition in bankruptcy court in which his wife did not join. Most of the debtor-husband's debts were incurred on credit cards issued to him, and his wife had borrowed against her § 401(k) retirement plan and from her credit union for what were said to be "community purposes."¹¹⁴ The purposes for which the credit card liabilities were incurred were not shown. The trustee in bankruptcy argued that the future income of both spouses should be pooled and that their creditors should be similarly treated in preparing the Chapter 13 plan because "allowing [the wife] to pay debts she personally incurred before dedicating the balance of her income to the Plan is unfair and inequitable."¹¹⁵ Put somewhat differently, the trustee seem-

109. *Id.* at 733.

110. *Id.*

111. The court also mentioned *City of Corpus Christi v. Coleman*, 262 S.W.2d 790 (Tex. App.—San Antonio 1953, no writ.), in relation to a will that was not contractual though jointly made and also did not provoke an election.

112. TEX. FAM. CODE ANN. § 3.202(a)-(c) (Vernon 1998).

113. *In re Nahat*, 278 B.R. 108 (Bankr. N.D. Tex. 2002).

114. *Id.* at 111.

115. *Id.*

ingly raised the question whether a non-debtor spouse's income should be considered and included in the debtor's spouse's Chapter 13 bankruptcy plan.¹¹⁶ The court put these irrelevant arguments aside. Despite substantial case law elsewhere requiring inclusion of the non-debtor-spouse's income¹¹⁷ and putting aside the student loan cases as inapposite¹¹⁸, the bankruptcy court concluded that neither bankruptcy law nor Texas law allows inclusion of the wife's debtor or post-petition earnings in the husband Chapter 13 plan.¹¹⁹ The wife's post-petition income is clearly not part of the debtor's bankruptcy estate,¹²⁰ and the Bankruptcy Code pointedly refers to the "*debtor's* projected disposable income"¹²¹ and "property that the *debtor* acquires after the commencement of the case"¹²² as included in the plan. Further, "[i]f a Chapter 13 case cannot be commenced involuntarily, it follows that it is contrary to public policy to force a debtor's spouse to participate on equal terms with the debtor in the plan."¹²³ The court also pointed out that under Texas law¹²⁴ the community property solely managed by the wife is not liable for the husband's non-tortious debts.

The same court in *In re Arturo Rodriguez*¹²⁵ considered a dispute arising out of an agreed judgment in a garnishment proceeding prior to the debtor-couple's filing for bankruptcy immediately after the garnishment writ was levied. A month before the hearing on the writ, the debtors had filed a motion to dissolve the writ of garnishment. The debtors then brought a turnover action against the garnishee asserting that the garnished funds were part of their bankruptcy estate.¹²⁶ The creditors argued that pursuant to the agreed judgment, the title to the garnished property had passed to the garnishor prior to the filing of the bankruptcy petition. Because the writ of garnishment is not self-executing and a writ of execution cannot issue until thirty days has run from the time the judgment is signed, the title to the garnished property did not pass to the garnishing creditor. The bankruptcy petition had been filed during the thirty day period and at that time the bankruptcy estate, consisting of all legal or equitable interests of the debtors, was created.¹²⁷ Thus again, the debtors had the advantage of the effect of section 522(f)(1) of the Bank-

116. *Id.*

117. *Id.* at 11-12 (citing Robert B. Chapman, *Coverture and Cooperation: The Firm, the Market, and the Substantive Consolidation of Married Debtors*, 17 BANKR. DEV. J. 105, 117 (2000)).

118. *Id.*

119. *Id.* at 112-17.

120. 11 U.S.C. § 541 (2000).

121. 11 U.S.C. § 1325(b)(1)(B) (2000) (emphasis added by the court), *Nahat*, 278 B.R. at 114.

122. 11 U.S.C. § 1306(a) (emphasis again added by the court), *Nahat*, 278 B.R. at 113.

123. *Nahat*, 278 B.R. at 115.

124. TEX. FAM. CODE ANN. § 3.102(b)(2) (Vernon 1998).

125. *In re Arturo Rodriguez*, 278 B.R. 749 (Bankr. N.D. Tex. 2002).

126. 11 U.S.C. § 541(a)(1).

127. *Arturo Rodriguez*, 278 B.R. at 753 (citing *id.*).

ruptcy Code¹²⁸ to remove any judicial lien impairing their exemption. The creditors argued that if their lien was avoided and the debtors were thereby allowed access to the funds impounded, nothing would prevent the debtors from dismissing the case under section 1307(b)¹²⁹ of the Bankruptcy Code and spending the liquid funds. The court answered this argument by saying that if the debtors should dismiss their case, the creditor's lien would be reinstated and the creditor could then proceed in a Texas court to protect the funds. The court also pointed out that once the bankruptcy proceeding was underway the debtors may expend exempt funds anyway.¹³⁰

In *Womack-Humphreys Architects, Inc. v. Barrasso*¹³¹ the Eastland appellate court concluded that an alien, non-resident husband had no homestead rights in a Texas home bought by him prior to his marriage and visited but not occupied or claimed by him as a homestead. The property was therefore subject to foreclosure of a valid lien, subject to the homestead rights of his wife who was in residence. But the wife was not entitled to an injunction to deter the foreclosure.¹³² Though the appellate court said that the wife had a homestead interest in the property,¹³³ the court did not explain how that right might survive the lien holder's foreclosure.

2. *Liability of a Surviving Spouse*

In *Patel v. Kuciemba*¹³⁴ the debtor-husband's creditors sought to enforce his liability against his widow for the payment of delinquent notes related to the decedent's business to which the widow was not a party and of which the widow was totally unaware. The creditor's contention was that the widow had given her husband authority to act for her or had ratified his acts. In rejecting the creditors' claims, the court first noted that the mere fact of marriage is insufficient evidence of spousal agency.¹³⁵ Nor was the fact that the husband had written two checks (uncashed) on the spouses' mutual ("joint") bank account any evidence of spousal agency.¹³⁶ Although the widow had worked in the stores operated by her husband, she was not in any way active in their financial operation or his other business affairs.¹³⁷ It was also beside the point of the widow's liability that her husband had made a promise to the creditor that his widow would discharge his debts from his insurance proceeds at

128. 11 U.S.C. § 522(f)(1) (2000).

129. 11 U.S.C. § 1307(b) (2000).

130. *Arturo Rodriguez*, 278 B.R. at 757.

131. *Womack-Humphreys Architects, Inc. v. Barrasso*, 83 S.W.3d 211 (Tex. App.—Eastland 2002, no pet.).

132. *Id.* at 212-13.

133. *Id.* at 213.

134. *Patel v. Kuciemba*, 82 S.W.3d 589 (Tex. App.—Corpus Christi 2002, pet. denied).

135. TEX. FAM. CODE ANN. § 3.201(c) (Vernon 1998).

136. *Patel*, 82 S.W.3d at 595.

137. *Id.* at 596.

his death.¹³⁸ The mere fact that the husband controlled all the family-finances without his wife's knowledge or interference does way show her ratification of any liability incurred.¹³⁹ Although the court did not make the point, even full knowledge of the husband's business obligations would not have obligated his wife for his debts. The facts, however, could have supported a finding (though there was none) that there was a tacit understanding between the spouses that the husband had full and independent management of family-business affairs and that he was not acting as her agent.¹⁴⁰ That the widow as the husband's independent executrix was liable for the debts incurred by the decedent cannot be questioned¹⁴¹ and as independent executrix she did not appeal.¹⁴² But she did not have personal liability arising from his debts.

C. NATURE AND EXTENT OF EXEMPT PROPERTY

1. *Homestead as Familial and Personal Protection*

The Texas homestead is defined as a protection for families and individuals.¹⁴³ The institution does not extend to fictitious legal entities such as corporations or partnerships. Thus, residential property owned by a family-partnership but occupied by members of the family cannot qualify for homestead protection. In *In re Monsivais*,¹⁴⁴ the bankruptcy court held that partners whose dwelling was located on property belonging to a family-limited partnership, all of which had passed to the bankruptcy trustee, were not able to claim that property as homestead realty.¹⁴⁵ In elementary terms the homestead claimant (there a tenant at will) cannot assert a homestead claim without the consent of the fee owner,¹⁴⁶ in that instance the trustee in bankruptcy.

Familial protection, however, does go beyond the nuclear family. Thus, in *Duran v. Henderson*¹⁴⁷ the debtor, his dependent adult daughter, and her minor son gave homestead protection to the debtor's home. The fact that the debtor transferred the exempt property to a family-trust did not, in the absence of a showing that the transfer was a sham, constitute a fraudulent transfer¹⁴⁸ under the Texas Uniform Fraudulent Transfer

138. *Id.*

139. TEX. FAM. CODE ANN. § 3.201(c) (Marriage itself does not fix personal liability on one spouse for the other's non-tortious acts.).

140. *Id.* § 3.101(b)-(c) (Spouses may agree as to terms of management of community property without any requirement of a writing.).

141. *See* TEX. PROB. CODE ANN. § 156 (Vernon 2003) (defining liability of community property for debts of a deceased spouse).

142. *Patel*, 82 S.W.3d at 593.

143. TEX. CONST. art. XVI, § 50 (as amended in 1997).

144. *In re Monsivais*, 274 B.R. 263 (Bankr. W.D. Tex. 2002).

145. *Id.* at 265.

146. *See* *Sayers v. Pyland*, 139 Tex. 57, 161 S.W.2d 769 (1942).

147. *Duran v. Henderson*, 71 S.W.3d 833, 842 (Tex. App.—Texarkana 2002, pet. denied) (citing *In re Hill*, 972 F.2d 116 (5th Cir. 1992)).

148. *Id.* at 843.

Act.¹⁴⁹

2. *Definition, Designation, and Management of a Homestead*

Under Texas law, the homestead right arises as a matter of fact that does not require recordation.¹⁵⁰ Though the 1997 amendments to the Texas Constitution¹⁵¹ disposed of prior law that had allowed certain sorts of homestead claims despite fraudulent assertions to the contrary by the owner,¹⁵² open and notorious use of premises as a family's only home is not affected by any prior record of a former location or previous use of other premises as a homestead. In *Estate of Montague v. National Loan Investors*¹⁵³ the couple had entered into an agreement to borrow money and consolidate prior loans by giving a deed of trust on realty in Bandera County, and the agreement gave the couple's address as on that realty. They declared, however, that their homestead had been since 1982 in Val Verde County. They also acknowledged an abandonment of the property in Bandera County as their residence. But they nevertheless continued to reside there. The husband died in 1988. In 1998 suit was brought on the unpaid loan and for foreclosure of the deed of trust on the Bandera County property. The lender sought to estop the borrowers from asserting the Bandera property as their homestead. At the trial the widow testified that she had never given any thought toward moving from the Bandera County property, and an officer of the lending bank testified that he had not checked to see that abandonment had occurred. Evidence also showed that the couple had never left the Bandera property without actually returning to it. As the Texas Supreme Court held in *Laster v. First Huntsville Properties Company*¹⁵⁴ in 1991, if a mortgage on a homestead is invalid when given, the mortgage is not validated by subsequent abandonment of the property as a homestead. Although the court did not address the effects of the constitutional amendment of 1997, it would not have affected the result in this case even if the amendment had been in effect in 1984 because the couple never abandoned on the Bandera County property.

In the wake of the great constriction of homestead protection by the 1997 amendments to Article XVI, section 50 of the Texas Constitution, arguments have been recently advanced for the invalidity of liens on homesteads, which would not have generated any dispute under prior (and more liberal) homestead law. In *National Loan Investors v. Tay-*

149. TEX. BUS. & COM. CODE ANN. §§ 24.002(2), (12), 24.005 (Vernon 1987 & Supp. 2003).

150. See *Coates v. Caldwell*, 8 S.W. 922 (Tex. 1888).

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

152. See, e.g., *Hughes v. Wruble*, 131 Tex. 444, 116 S.W.2d 368 (1938); *Texas Land & Loan Co. v. Blalock*, 76 Tex. 85, 13 S.W. 12 (1892).

153. *Estate of Montague v. Nat'l Loan Investors*, 70 S.W.3d 242 (Tex. App.—San Antonio 2001, pet. denied).

154. *Laster v. First Huntsville Props. Co.*, 826 S.W.2d 125, 130 (Tex. 1991).

lor,¹⁵⁵ for example, the homeowners denied the validity of a purchase money lien on their home. The facts showed that the property was indeed a homestead, but the couple could not deny the validity of the lien, which they had already admitted as valid in a prior bankruptcy proceeding. They were judicially estopped.

*In re Jesse Rodriguez*¹⁵⁶ was a bankruptcy case in which the debtor claimed a rural homestead in land subject to a creditor's lien. In 1990 the debtor and his mother's former husband gave a deed of trust on sixty acres of rural land. At the time the debtor was apparently living on the land. Sometime later the debtor's mother and her husband were divorced, and as a term of their divorce settlement the wife received her husband's interest in the property, but the lender's consent to the transfer was not obtained. In 2001 his mother conveyed her interest to the debtor. In his ensuing bankruptcy, the debtor claimed the property as his rural homestead. Guided by the analysis of the law in *In re Perry*¹⁵⁷ the bankruptcy court concluded that the lender had not met the essential requirements of Property Code section 41.002(c)(2)¹⁵⁸ to show that the whole property was rural rather than urban, and it was therefore unnecessary for the court to consider other factors for determining the rural character of the property¹⁵⁹ under *In re Bradley*.¹⁶⁰ The court went on to say that even though the violation of the due-on-sale clause in the loan agreement might give rise to recovery on contractual grounds, that clause did not affect the debtor's assertion of a homestead interest in the land.

In 1908 the Supreme Court of Texas held in *Autry v. Reasor*¹⁶¹ that with respect to the rural family home of under two hundred acres, the homestead claim might extend to non-contiguous acreage for a maximum of two hundred acres if that additional property was used directly by the claimant to support his family but not merely for the production rental income. In *In re Webb*¹⁶² a bankruptcy court applied this rule while acknowledging the controversial holding in *In re Mitchell*¹⁶³ that a rural professional might reside in the county and maintain his homestead claim there even though he is not engaged in farming or ranching or any other income producing pursuit related directly to the land.¹⁶⁴ In *Painewebber*,

155. *Nat'l Loan Investors v. Taylor*, 79 S.W.3d 633 (Tex. App.—Waco 2002, pet. denied).

156. *In re Jesse Rodriguez*, 282 B.R. 194 (Bankr. N.D. Tex. 2002).

157. *In re Perry*, 267 B.R. 759, 766-67 (Bankr. W.D. Tex. 2001) (noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1035, 1053 (2002)).

158. TEX. PROP. CODE ANN. § 41.002(c) (amended in 1999) (Vernon 2000).

159. *Arturo Rodriguez*, 282 B.R. at 199-200.

160. *In re Bradley*, 960 F.2d 502, 507 (5th Cir. 1992), cert. denied sub nom. Commonwealth Land Title Ins. Co. v. Bradley, 507 U.S. 971 (1993).

161. *Autry v. Reasor*, 102 Tex. 123, 108 S.W. 1162 (1908), rev'd on other grounds, 102 Tex. 123, 113 S.W. 748 (1908). See also *Blum v. Rogers*, 78 Tex. 530, 15 S.W. 115 (1890).

162. *In re Webb*, 263 B.R. 788 (Bankr. W.D. Tex. 2001).

163. *In re Mitchell*, 132 B.R. 553, 561 (Bankr. W.D. Tex. 1991). See also *In re McCain*, 160 B.R. 933 (Bankr. E.D. Tex. 1993).

164. The court also noted pre-*Autry* authority that farming on shares with a tenant constitutes agricultural use to support a homestead claim. *Baldeschweiler v. Ship*, 50 S.W. 644 (Tex. 1899).

Inc. v. Murray,¹⁶⁵ however, the federal District Court relied on *Mitchell* for its forthright holding that a mobile home located on rural land can constitute a homestead which may include non-contiguous plots up to a total of two hundred acres. The land merely supplied a family non-economic (but only aesthetic or recreational) enjoyment of the area.¹⁶⁶ Though the court regarded these activities as unlikely to be conducted on non-contiguous or detached tracts, the court concluded that the entire area of 147 acres in that instance was exempt as a rural homestead. It was significant nonetheless that in the past the husband had chopped some wood on the tract.¹⁶⁷ The court also sustained the debtor's contention that his riding lawn mower, tractor, and a 1993 pick-up truck were exempt agricultural vehicles or implements.¹⁶⁸

3. *Purchase from a Debtor-Homestead-Claimant*

If a seller has already seemingly abandoned the property as his homestead by moving to a new homestead or simply by moving elsewhere without acquiring a new homestead, a fact question of homestead abandonment arises even if the homeowner has left some of his possessions behind. The buyers in *Wilcox v. Marriott*¹⁶⁹ brought suit to remove a cloud on their title resulting from the filing of an abstract of judgment against the debtor-husband prior to the sale. The buyers' summary judgment was denied on the ground that there was a question of fact as to whether the property had been and continued to be the seller's homestead up to the time of the sale. Another pitfall may await the buyer even if his seller remained in possession after his closing of the sale to the buyer. It is ordinarily good advice to a purchaser of a home of a judgment debtor to close his purchase prior to the seller's vacating the property so that the seller's homestead interest in the premises wards off fixing of a judgment lien against the property prior to sale. But there are pitfalls of which the prospective buyer should be aware. In *Dallas Central Appraisal District v. Wang*,¹⁷⁰ for example, the seller had claimed a tax exemption that was unwarranted and hence a valid tax lien would have fixed on the property for delinquent taxes prior to the sale.

A far more complicated situation was presented in *The Cadle Company v. Harvey*.¹⁷¹ In 1981 a debtor purchased a house, and made the property his home. In 1988 a creditor took a judgment against the debtor and abstracted his judgment. Though the debtor continued to regard the property as his homestead, the debtor leased it temporarily to another

165. *Painewebber, Inc. v. Murray*, 260 B.R. 815 (E.D. Tex. 2001).

166. *Id.* at 828-30. The court mentioned bird-watching and picnicking, *id.* at 820, and taking a walk. *Id.* at 830.

167. *Id.* at 830-31.

168. *Id.* at 831-32.

169. *Wilcox v. Marriott*, No 04-02-00295-CV, 2003 WL 45025 (Tex. App.—San Antonio, Jan. 8, 2003, pet. filed).

170. *Dallas Cent. Appraisal Dist. v. Wang*, 82 S.W.3d 697 (Tex. App.—Dallas 2002, pet. filed).

171. *Cadle Co. v. Harvey*, 46 S.W.3d 282 (Tex. App.—Fort Worth 2001, pet. denied).

until 1991 and filed an affidavit asserting his homestead claim to the property. Later in 1991 the debtor-owner leased the property to the man who had been his grantor with an option to purchase the property, and the parties entered into an earnest money contract for the sale, but no earnest money was paid. It was also agreed that rental payments would be credited toward the purchase price. The lessee took responsibility for all burdens of ownership from the date of possession as lessee. Though the lease-buyer had taken possession of the property in 1991, the conveyance of title to him did not occur until 1996. The holder of the judgment¹⁷² then brought further suit for a summary judgment declaration of the validity of its lien against the realty and asserted that the property had ceased to be the debtor's homestead when the second lease was made and that the creditor's lien had then attached. The buyer-owner cross-claimed for a declaration removing the plaintiff's cloud from his title. The trial court granted the latter summary judgment. On the creditor's appeal, the Fort Worth court held that the lessor-buyer had acquired equitable title at the time the lease was given and that the lessor had not at that time given up his homestead. Thus there was not a non-homestead period during which the creditor's lien could have attached.

The wife in *Cummings v. Gillespie*¹⁷³ asserted that her conveyance of her separate property homestead was void because her husband did not join in the conveyance,¹⁷⁴ thus using the joinder rule for her husband's protection as an offensive weapon. The wife had agreed to sell the property to the buyer and then to lease it from the buyer with an option to repurchase. The buyer's purchase was financed by a lender of the purchase money which would pass to the seller at closing. The seller (without the formal joinder of her husband) joined the buyer in a deed of trust to the lender. When the loan became delinquent and the lender sought to foreclose his lien, the seller sought to remove the cloud on her title. The husband, on being sued for divorce, had already abandoned the property as his homestead but had previously given a written declaration to the buyer denying his homestead interest in the property. The seller's action failed because her husband not only participated actively in the transaction but gave his quitclaim deed to the property to the purchaser.¹⁷⁵ As the court also pointed out, a sale without joinder of the spouse of the grantor is not void but may become valid if and when the non-joining spouse abandons the property as a homestead. The court did not, however, distinguish between the sale of the homestead and the mortgage of it in that the seller's husband was not, strictly speaking, a party to it. Though the mortgage of a homestead without spousal joinder

172. The plaintiff was actually an assignee of the creditor who had transferred all his interest to the plaintiff.

173. *Cummings v. Gillespie*, No. 12-01-00046-CV (Tex. App.—Tyler Mar. 20, 2002, pet. denied) (not designated for publication), 2002 Tex. App. LEXIS 452285.

174. TEX. CONST. art. XVI, § 50.

175. *Cummings*, 2002 Tex. App. LEXIS at *7-9.

is void and not merely voidable,¹⁷⁶ the court appears to have treated lack of joinder in the deed of trust as cured by the husband's ratification of the sale transaction, thus interpreting the sale and mortgage as an integrated transaction.¹⁷⁷ The court thus treated the husband's involvement in the transaction as constituting joinder.

D. ENFORCEMENT OF CLAIMS AGAINST HOMESTEADS

1. *Fixing a Trust on a Homestead*

Prior to the couple's marriage in *Chrissikos v. Chrissikos*¹⁷⁸ the husband's father had purchased a home for them. The father had directed the seller to convey the house to the couple and gave his note for the purchase price. The couple then gave the father an unsecured note for most of the purchase price, and the wife paid the rest from her separate property. The couple made some payments on the note to the father, but payments were in arrears when the wife sued for divorce about three years later. The father intervened in the divorce proceeding and the court fixed a resulting trust in his favor upon the couple's homestead. In sustaining the trial court's conclusion, the Dallas Court of Appeals held that the father's position as the purchaser of the property (rather than a mere lender to the couple who themselves purchased the house)¹⁷⁹ entitled him to recover.¹⁸⁰

A somewhat similar dispute was before the San Antonio Court of Appeals in *Sahagun v. Ibarra*.¹⁸¹ There the couple lived together, and bought a house together though the man had an existing wife. Although the title to the house was taken in the woman's name, each made a payment of part of the purchase price at the closing of the transaction. After the couple had separated, the man sought and was awarded a resulting trust on the property for his share of the payments.¹⁸²

2. *Home-owners' Association's Lien*

The dispute in *Brooks v. Northglen Ass'n*¹⁸³ concerned the extent of the authority of a homeowner's association to increase maintenance fees and to foreclose liens against defaulting owners' homesteads.¹⁸⁴ The Tex-

176. *Id.* at *8-10.

177. *Id.*

178. *Chrissikos v. Chrissikos*, No. 05-00-01548-CV (Tex. App.—Dallas Mar. 6, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 1658.

179. *Id.* at *10-11 (citing *Lifemark Corp. v. Merritt*, 655 S.W. 2d 310, 317 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.), and *Atkins v. Carson*, 467 S.W.2d 495, 500 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.)).

180. With respect to the wife's leaving the residence while the divorce was pending, the appellate court held that the wife's leaving the home did not constitute her abandonment of it as her homestead. *Id.* at *5-6.

181. *Sahagun v. Ibarra*, 90 S.W.3d 860 (Tex. App.—San Antonio 2002, no pet.).

182. *Id.* at 863.

183. *Brooks v. Northglen Ass'n*, 76 S.W.3d 162 (Tex. App.—Texarkana 2002, pet. granted).

184. TEX. PROP. CODE ANN. § 204.010 (Vernon 2003).

arkana court concluded in a Harris County case that an association's assessments (within limitations authorized by restrictive covenants on homeowners' properties) can be enforced by foreclosure. New assessments and other charges imposed only by statutory authority beyond the terms of applicable restrictive covenants cannot be so enforced unless authorized by a vote of the lot-owners.¹⁸⁵ Justice Grant dissented on the applicability of particular restrictive covenants in the interpretation of statutory power of a homeowners' association to accumulate unassessed tax increases.¹⁸⁶ Prompted by such situations as this one, the Legislature in 2001 passed further legislation to curtail the power of homeowners' associations to make foreclosures.¹⁸⁷

Creditors of a spouse or ex-spouse with an interest in realty in which the debtor has no homestead interest continue to test their right to reach the debtor's interest against the other spouse or ex-spouse who asserts a homestead claim to the property. The appellate decisions produced by these disputes are thus the progeny of the Texas Supreme Court's decision in *Laster v. First Huntsville Properties Co.*¹⁸⁸ There, without dividing the community home, the divorce court had given the wife occupancy of it until the youngest child reached the age of eighteen. The ex-husband, who had presumably established a homestead elsewhere, had mortgaged his interest in the couple's prior home and later defaulted on his mortgage obligation. After the mortgagor's youngest child had reached her majority, the mortgagor was therefore allowed to reenter the property and the mortgagee was entitled to foreclose his lien.

In *Cure v. Krottinger*¹⁸⁹ after the husband had filed for bankruptcy and claimed the community homestead as exempt property, he transferred his interest in the homestead to his wife by quit-claim deed. No objection was raised as to this mode of conveyance to pass the full interest in the property.¹⁹⁰ The trustee asserted that the transfer was voidable under bankruptcy law as made from the bankruptcy estate, determined as of the date of bankruptcy and before the exempt property was set apart for the bankruptcy-debtor. The bankruptcy court nevertheless held that because exemptions are so determined at that time, the property should therefore

185. *Brooks*, 76 S.W.3d at 171-76.

186. *Id.* at 176.

187. TEX. PROP. CODE ANN. §§ 209.001-.011 (Vernon 2003). See Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing that Power*, 66 TEX. BAR J. 218 (2003).

188. *Laster v. First Huntsville Prop. Co.*, 826 S.W. 2d 125 (Tex. 1991), commented on by Joseph W. McKnight, *Family Law: Husband and Wife*, 46 SMU L. REV. 1475, 1497-98 (1993). See also Joseph W. McKnight, *Family Law: Husband and Wife*, 45 Sw. L.J. 1831, 1848-49 (1992).

189. *Cure v. Krottinger*, No. 7:00-CV-0027-R (not designated for publication), 2001 WL 258619 (N.D. Tex. March 12, 2001).

190. Such a conveyance may be interpreted as meeting all the requirements to transfer the entire property interest, but to obviate later disputes both spouses should join in the deed of gift, especially if the community homestead was subject to the spouses' joint management. See Joseph W. McKnight, *Family Law: Husband and Wife*, 49 SMU L. REV. 1015, 1029-30 (1996) (discussing *In re Morrison*, 913 S.W. 2d 689 (Tex. App.—Texarkana 1995, no pet.)).

be considered as exempt and thus capable of transfer by the bankrupt-debtor.¹⁹¹

3. *Creditor's Lien on a Homestead*

*Gant and Hathaway v. Gant*¹⁹² was a dispute of an ex-wife against her ex-husband and his fiancée in which the ex-husband had sought recourse to the bankruptcy court after he had failed to discharge a note given to the ex-wife as part of the division of property in their divorce. The ex-wife then brought an adversary proceeding in the bankruptcy court which was settled by entry of an agreed money-judgment against the ex-husband. After the ex-husband had failed to pay the judgment debt, the ex-wife brought suit in state court to recover the debt, alleging a fraudulent transfer of funds to the fiancée. The defendants entered a plea to the jurisdiction of the court on the ground that only the divorce court had jurisdiction to resolve the dispute. The Dallas Court of Appeals rejected the defendant's plea: The ex-wife's suit was not a matter "incident to the underlying divorce" but merely a suit to enforce a subsequent judgment.¹⁹³

4. *Forfeiture of a Homestead*

Seizure and forfeiture of a spouse's community interest (including exempt personalty) has already been judicially affirmed in connection with wrongdoing of the other spouse.¹⁹⁴ *Lot 39, Section C v. State*¹⁹⁵ presented the question of forfeiture of a homestead as the situs of a crime albeit seemingly the homestead of a single adult. The court's discussion was brief. Whereas the courts in some states have concluded that a homestead is protected from seizure despite the occurrence of criminal offenses there, a number of Texas courts have allowed the seizure of buildings for drug-related activities and for violation of the law relating to public nuisance. Other states have allowed the seizure of a homestead for criminal infractions committed there.¹⁹⁶ Most notably, the Texas Constitution specifically only protects the homestead from seizure by creditors. In reliance on the public nuisance case,¹⁹⁷ the Eastland court concluded that the home as the situs of the offence under the narcotics

191. *Cure*, 2001 WL 258619, at *6. .

192. *Gant and Hathaway v. Gant*, No. 05-01-00134-CV (Tex. App.—Dallas Feb. 25, 2002, no pet.) (not designated for publication), 2002 WL 257700.

193. *Id.* at *1. For a discussion of the formalities necessary for the protection of a building contractor hired to construct a new residence on a married couples homestead property, see *CVN Group, Inc. v. Delgado*, 47 S.W.3d 157 (Tex. App.—Austin 2001, no pet.).

194. See M^cKnight, *supra* note 201.

195. *Lot 39, Section C v. State*, 85 S.W.3d 429 (Tex. App.—Eastland 2002, pet. filed).

196. *Id.* at 431.

197. 1018 3rd St. v. State, 331 S.W.2d 450 (Tex. Civ. App.—Amarillo 1959, no writ) (finding a spurious history of the homestead exemption on which to rely). *Id.* at 454. For a full account of that history, see Joseph W. M^cKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 S.W. Hist. Q. (1983).

laws was subject to seizure and forfeiture.¹⁹⁸ Relying on sister-state decisions,¹⁹⁹ the Eastland Court of Appeals also pointed out that although a homestead is constitutionally protected from the claims of creditors,²⁰⁰ it is not protected from sovereign seizure and forfeiture as the situs of a crime.²⁰¹ The court nevertheless noted contrary holdings in cases from some sister-states where the homestead exemption is significantly broader²⁰² and from Oklahoma where the homestead law is similar to that of Texas.²⁰³

Since the constitutional amendment of 1997²⁰⁴ allowed home-equity loans against Texas homesteads, several disputes have given the appellate courts an opportunity to clarify the constitutional provisions and their accompanying statutory acts.²⁰⁵ In *Tarver v. Sebring Capital Credit Corp.*,²⁰⁶ the homeowner-mortgagors asserted that the term "points" as used in the parlance of lenders means "fees" and that the mortgagee had therefore charged excessive fees over the three-percent (of the loan) limitation of article XVI, section 50(a)(6). The court stated that points are calculated as a percent of the principal of the loan and that both "statutory and administrative definitions and references to 'interest' either expressly or implicitly include points."²⁰⁷ Thus, it was the court's conclusion that "points" are interest and not fees.

IV. DIVISION OF MARITAL PROPERTY ON DIVORCE

A. PROCEDURAL PRELIMINARIES

1. Prisoner's Right to Appear

In *Taylor v. Taylor*²⁰⁸ an appellate court once again sustained a prisoner's right to appear in a suit for divorce or (because his right is a qualified right) to present evidence by other means.²⁰⁹ The Waco Court of Appeals noted that there may be facts and circumstances that the judge may consider in denying a bench warrant for a personal appearance. In this instance the prisoner respondent had also made a timely request for a

198. TEX. CRIM. PRO. CODE ANN. § 59.01 (Vernon 2003).

199. *Id.* at 431 (citing *Romero v. State*, 927 S.W.2d 632 (Tex. 1996); *Bochas v. State*, 951 S.W.2d 64 (Tex. App.—Corpus Christi 1997, writ denied); *State v. One Residence*, 907 S.W.2d 644 (Tex. App.—Corpus Christi 1995, no writ); *Ex parte Camara*, 893 S.W.2d 553 (Tex. App.—Corpus Christi 1994, pet. denied); 1018-3rd St. v. State, 331 S.W.2d 450 (Tex. Civ. App.—Amarillo 1959, no writ) (closing a house for one year)).

200. Tex. Const. art. XVI, § 50.

201. *Lot 39, Section C*, 85 S.W.3d at 431.

202. *Id.*

203. *Id.* (citing *State ex rel. Means v. Ten Acres of Land*, 877 P.2d 597 (Okla. 1994)).

204. TEX. CONST. art. XVI, § 50.

205. See, e.g., *Tarver v. Sebring Capital Credit Corp.*, 69 S.W.3d 708 (Tex. App.—Waco 2002, no pet.).

206. *Id.*

207. *Id.* at 712. Explicit references to points are found in 7 TEX. ADMIN. CODE ANN. §§ 1.102(20), 1.701(b), 1.701(f) (2000).

208. *Taylor v. Taylor*, 63 S.W.3d 93 (Tex. App.—Waco 2001, no pet.).

209. *Id.* at 102; see also *M^cKnight*, *supra* note 201, at 1039-40.

jury trial which was unconstitutionally denied to him.²¹⁰ If he were entitled to a jury trial, however, and was denied it, his right to appeal cannot be denied. The husband-prisoner in *In re Seals*²¹¹ was the petitioner for divorce. Within a few days of filing his petition he advised the court by letter that he would be unable to appear in person because of his imprisonment unless the court would request his appearance through the warden of the prison. His wife responded with a general denial and a cross petition for divorce with an equitable division of property. Almost a year later the petitioner wrote another letter to the court asking for a request to the prison authorities that he appear at the trial. About four months thereafter, the clerk of the court gave the parties notice of the court's intent to dismiss the case for want of prosecution.²¹² The dismissal notice stated that the case would be dismissed "unless an attorney or pro se party appears in person and shows good cause" to the contrary.²¹³ On the day set for the dismissal hearing the petitioner filed a further paper with the court agreeing that the case could be heard without his presence and the "divorce should be granted in absentia."²¹⁴ The court nevertheless dismissed the case and the petitioner appealed. The majority of the Texarkana appellate court concluded that the petitioner's last communication to the court along with his earlier correspondence "should have been construed as requests for a bench warrant" for his appearance and an explanation for his failure to appear.²¹⁵ Within thirty days after the case was dismissed, the wife also filed her agreement that the case could be taken up without her presence. The appellate court further concluded that the trial court should not have dismissed the case for want of prosecution. In his dissent Justice Grant pointed out that the husband had not submitted affidavits to advise the court in determining the issues presented and he "had never requested a trial setting."²¹⁶ The dissenting judge finally concluded that the trial court had not acted unreasonably in not setting the case for trial in the absence of a motion to do so.²¹⁷ Though the husband's later letter as well as the wife's could have been so construed, both opinions failed to discuss how either party might have made proof of the ground for divorce as alleged.

210. *Taylor*, 63 S.W.3d at 99 (citing TEX. CONST. Art. I, § 15).

211. *In re Seals*, 83 S.W.3d 870 (Tex. App.—Texarkana 2002, no. pet.).

212. TEX. R. CIV. PROC. 165a (Vernon 2003). In *Leach v. Attorney General*, No. 14-99-01330-CV (Tex. App.—Houston [14th Dist.] Dec. 7, 2000, no pet.) (not designated for publication) 2000 WL 1785125, the court noted that a dismissal for want of prosecution is void (and thus, not subject to appeal) if the order of dismissal was signed after the trial court had lost plenary jurisdiction.

213. *Seals*, 83 S.W.3d at 873.

214. *Id.*

215. *Id.* at 874.

216. *Id.* at 876.

217. *Id.* at 877 (citing TEX. R. CIV. PROC. § 245).

2. *Disqualification of Attorney*

In *In re Taylor*²¹⁸ the Waco appellate court dealt with a matter of an attorney's disqualification on the ground of conflict of interest. Several years before a member of the attorney's firm had represented the disputing couple and another couple and had provided them advice involving estate planning and preparation of a stockholders' agreement for a business just created by the two husbands. The terms of the agreement executed by both couples set the net value of the corporation at \$200,000, which might have been an issue in the divorce proceeding. The majority of the court held that the trial court's failure to grant the wife's motion to disqualify the attorney or his firm from representing the husband was error and that her requested writ of mandamus should be granted.²¹⁹ Justice Tom Gray dissented to the conclusion that the subject matter of the stockholders' agreement was "substantially related" to the divorce²²⁰ and that the wife had waived her complaint in waiting a month to raise the issue of which she had been well aware.²²¹ Justice Gray added that the conclusion of the court's majority came "dangerously close to a mandamus review of valuation methodology issues," that it was premature for the appellate court to consider that matter on the record before the court,²²² and that the problematical determination of the issue of conflict of interest might develop as the trial proceeded.²²³

3. *Appeal of an Associate Judge's Ruling*

In *Fountain v. Knebel*,²²⁴ after an associate judge had overruled the wife's motion to compel discovery concerning the valuation of the husband's interest in his law firm and while an appeal from that ruling was pending, the trial judge overruled the wife's further motion for a continuance.²²⁵ In her post-judgment appeal from the latter ruling, the Dallas Court of Appeals relied on Family Code section 201.015(f),²²⁶ which provides that the divorce court must hold a hearing on an appeal from the associate judge's ruling within thirty days, and held that there should have been a prompt resolution of that appeal.²²⁷ Thus the trial court had abused its discretion in denying a motion for continuance while the appeal from the associate judge's ruling was pending.²²⁸

218. *In re Taylor*, 67 S.W.3d 530 (Tex. App.—Waco 2002, no pet.).

219. *Id.* at 534.

220. *Id.*

221. *Id.* at 535.

222. *Id.* at 535-36.

223. *Id.* at 535.

224. *Fountain v. Knebel*, 45 S.W.3d 736 (Tex. App.—Dallas 2001, no pet.).

225. TEX. R. CIV. PROC. 251-52 (motion for continuance).

226. TEX. FAM. CODE ANN. § 201.015(f) (Vernon 2002).

227. *Fountain*, 45 S.W.3d at 739-40 (citing *Harrell v. Harrell*, 986 S.W.2d 629 (Tex. App.—El Paso 1998, no pet.)).

228. *Id.* at 738.

*Kennedy v. Kennedy*²²⁹ was an extremely contentious divorce proceeding between a doctor and his wife of thirty years. Though the full color of their dispute cannot be briefly recounted, the proceedings were very highly charged from the outset. In the course of an early hearing the evidently “frustrated” associate judge had granted a divorce to the husband in apparent response to (and interpreted by the wife as) a sanction for the wife’s refusal to sign a check as ordered by the associate judge, who went on to award fees to the husband’s attorney based on the wife’s contempt.²³⁰ All this transpired, however, without any disposition of property, an inseparable element of any divorce decree. The trial judge signed the associate judge’s order three days later. The associate judge’s ruling was specifically challenged in the wife’s appeal from the final judgment.²³¹ The Austin Court of Appeals, however, treated this mistake of the associate judge as harmless error and remarked that the husband’s attorney’s handling of the matter was not “extreme and outrageous,” though he seemed to have been somewhat carried away by his own rhetoric at the time.²³²

B. EFFORTS TO SETTLE DISPUTES

With a variety of means available to assist couples in settling their disputes concerning division of property and the future welfare of their children,²³³ some disputes may nevertheless go on for a very long time without any resolution in spite of judicial efforts to accelerate the process.²³⁴ Despite the very heavy divorce dockets, the courts must eventually exercise their adjudicative function. In *In re Cartwright*,²³⁵ for example, the parties, with the advice of their attorneys, had entered into an agreement incident to divorce²³⁶ in which they designated a mediator to assist them in resolving continuing disputes.²³⁷ But after seven months of unsuccessful efforts, no mediation had been achieved, and the court

229. *Kennedy v. Kennedy*, No. 03-02-00025-CV (Tex. App.—Austin Dec. 5, 2002, pet. filed) (not designated for publication), 2002 WL 31718226.

230. *Id.* at *2.

231. *Id.*

232. *Id.* at *6.

233. As a means of leverage to encourage settlement of a divorce dispute petitioners sometimes join a closely held corporation or partnership in which the respondent has an interest or call the respondent’s employer as a witness for verification of the respondent’s wages. Advice to the employer in the latter instance is offered by Kelly McClure and Soja J. McGill, *Don’t Drag Me In: An Employer’s Dos and Don’ts When Family Court Calls*, 63 TEX. B. J. 982 (2000).

234. For comments on the binding effect of a mediated settlement agreement under TEX. FAM. CODE ANN. § 6.602 (Vernon 2003); see *Nurse v. Nurse*, No. 13-01-515-CV, 2002 WL 1289898 (Tex. App.—Corpus Christi June 13, 2002, no pet.).

235. *In re Cartwright*, No. 01-01-00948, 2002 WL 501595 (Tex. App.—Houston [1st Dist.] Apr. 4, 2002) *opinion withdrawn and superseded on rehearing by In re Cartwright*, No. 01-00948-CV (Tex. App.—Houston [1st Dist.] Apr. 3, 2003, no pet. h.) (not designated for publication), 2003 WL 1746647.

236. *Cartwright*, 2003 WL 1746647, at *1; see TEX. FAM. CODE ANN. § 7.006(a) (Vernon 1998).

237. *Cartwright*, 2003 WL 1746647, at *1; see TEX. FAM. CODE ANN. § 6.602 (Vernon Supp. 2003).

appointed another mediator. After further lack of success in reaching a settlement, the court changed the role of the latter mediator to that of an arbitrator.²³⁸ Both parties appealed from that exercise of judicial authority. The Houston First District Court of Appeals concluded that the trial court's appointment of the mediator to act as arbitrator without the consent of the parties was improper.²³⁹ The mediator had already received candid disclosures and confidences from both parties, and with that confidential information he was therefore not in a position to act as arbitrator in the same or a related matter.²⁴⁰ The function of the arbitrator is quasi-judicial, and without the consent of the parties after receipt of confidences of the parties he may not be able to exercise his arbitral function properly.²⁴¹

In *Welkener v. Welkener*²⁴² the parties had reached a property settlement prior to the divorce hearing. The parties had agreed that the wife would receive a specific amount of the husband's retirement pay each month and that term was included in the judgment. On appeal the wife asserted that this term of the judgment did not reflect her understanding, which was that she was entitled to a percentage amount of retirement benefits—which was the way that the agreed amount was computed. The Corpus Christi appellate court pointed out that the wife had not raised her issue of mistake until after the rendition of judgment and, thus, it could not be considered. The wife's unilateral mistake in which she sought to withdraw her consent therefore came too late in her motion for a new trial.²⁴³

In *Stine v. Stewart*²⁴⁴ a property settlement agreement had been reached that included an agreement by the husband to repay a loan made by the wife's mother toward the purchase of a home, of which the wife was given occupancy until it was sold. After several years, the ex-husband sold the house but failed to pay the debt. In reviewing the Fort Worth Court of Appeals' decision in favor of the ex-husband, the Texas Supreme Court in a per curiam opinion held that the former mother-in-law was a third party creditor-beneficiary of the agreement though she was not a party to it.²⁴⁵ The court carefully distinguished *Brown v. Ful-*

238. *Cartwright*, 2003 WL 1746647, at *3; see TEX. FAM. CODE ANN. § 6.601 (Vernon 1998).

239. *Cartwright*, 2003 WL 1746647, at *5.

240. *Id.*

241. *Id.*

242. *Welkener v. Welkener*, 71 S.W.3d 364 (Tex. App.—Corpus Christi 2001, no pet.).

243. *Id.* at 367. The court, however, reversed that part of the decree that confirmed the husband's title to particular land as his separate property. Presumably this award was not part of the settlement agreement. The appellate court found no evidence in the record to support separate ownership in the husband as was concluded at the hearing on the motion for a new trial. *Id.* at 368.

244. *Stine v. Stewart*, 80 S.W.3d 586 (Tex. 2002). For an account of the facts as presented by the Fort Worth court in *Stewart v. Stine*, 57 S.W.3d 94 (Tex. App.—Fort Worth 2001), see Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1035, 1064 (2002).

245. *Stine*, 80 S.W.3d at 590.

*lenwider*²⁴⁶ as a case in which the parties to a settlement agreement merely “allocated responsibility”²⁴⁷ for payment but had not “specifically required” the ex-husband to pay the creditor.²⁴⁸ The debt described in the agreement not only met all statutory requirements for enforcement²⁴⁹ but was also not affected by the limitation provisions of the Texas Family Code with respect to “[a] suit to enforce the division of future property not in existence at the time of the original decree.”²⁵⁰ This was simply a breach of an agreement to which the four year statute of limitation was applicable²⁵¹ and had been met.²⁵²

Despite its standing as the most capable bar anywhere in handling the intricacies of divorce, that part of the State Bar of Texas devoting its attention to familial disputes must sometimes have recourse to the advice of estate planners, accountants, and financial advisers to implement the attorney’s advice. Such professionals are well known to Texas lawyers.²⁵³ In some other jurisdictions less sophisticated than ours, resort is sometimes made to specially trained divorce planners certified through the National Association of State Boards of Accountancy.²⁵⁴ Some Texas accountants have also received this training and many have already developed talents to reach this sort of level. In many instances Texas family lawyers merely seek the assistance of tax counsel to advise them on the drafting of provisions for ex-spousal maintenance²⁵⁵ and division of investment-properties along lines with which counsel are already generally familiar.²⁵⁶

An agreed judgment was the center of dispute in *Appleton v. Appleton*.²⁵⁷ With the advice of counsel the divorcing spouses had reached an agreement concerning disposition of stock options acquired by the husband from his employer as community property.²⁵⁸ In the course of the

246. *Brown v. Fullenwider*, 52 S.W.3d 169 (Tex. 2001).

247. *Id.* at 170.

248. *Stine*, 80 S.W.3d at 591.

249. TEX. FAM. CODE ANN. § 16065 (Vernon 1997).

250. *Stine*, 80 S.W.3d at 592 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 9.003(b) (Vernon 1998)).

251. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1997)).

252. *Id.* at 592.

253. There are numerous Texas family lawyers who can also offer such advice. See, for example, the comments of a number of them on valuation matters in *The Nature of the Beast from Horses to Hedge Funds, Tips on Valuing Businesses*, 25 FAM. ADVOC. 20, 24 (royalty interests), 34 (oil and gas interests), 35 (early-stage companies).

254. For the internet website of the National Association Board of Accounting and its Institutes of Certified Divorce Planners, see <http://www.institutecdp.com>.

255. See Cindy L. Wofford, *When Alimony Isn't Alimony: How to Avoid Disallowance of the Alimony Deduction*, 4 TAX PRAC. & PROC. § 25 (Oct.-Nov. 2002).

256. See coursebooks for the Annual Marriage Dissolution Course and the Advanced Family Law Course of the Family Law Section of the State Bar of Texas, which regularly include presentations on these subjects.

257. *Appleton v. Appleton*, 76 S.W.3d 78 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

258. Applying the law of contracts to the terms of the agreed decree, the appellate court found no ambiguity in the decree and no issue of fact to preclude a summary judgment in favor of the ex-husband. *Id.* at 86 (citing *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984)).

trial, the court had awarded sanctions against the ex-wife for making a groundless claim. But the appellate court found that the ex-wife, whose failure to produce a record of the hearing had resulted in the sanctions order, had waived any finding of error on the part of the trial court.²⁵⁹

C. GROUNDS FOR INTERLOCUTORY APPEAL

Failure of the trial judge to sign an order within ten days was the ground for reversal in an interlocutory appeal taken in *In re Gary*.²⁶⁰ The wife had sought to proceed *in forma pauperis*, and the state's objection made by the court clerk was sustained. The failure of the trial judge to comply with the Code of Appellate Procedure²⁶¹ caused automatic reversal of the court's disposition of the state's special motion. In a concurring opinion, Justice Quinn made it very clear that in his view it is unnecessary to appeal specially with respect to indigence and that a single notice of appeal to put the entire case before the appellate court is sufficient.²⁶² The concurring judge was therefore of the opinion that the authorities relied on by the court were erroneous and therefore should not be followed.²⁶³

In *Bilyeu v. Bilyeu*²⁶⁴ the trial court had issued a protective order in a matter of family violence. The Austin Court of Appeals held that such an order is not subject to an interlocutory appeal.

D. RECEIVERSHIP

The unavailability of an interlocutory challenge beyond the issue of the receiver's appointment usually forecloses further concern by the parties with the court's resort to receivership.²⁶⁵ In *Waite v. Waite*,²⁶⁶ despite the fact that funds subject to the receivership were deposited in the registry of the court, the court's order dissolving a receivership was not subject to an interlocutory appeal, which may be taken only with respect to an order appointing a receiver.²⁶⁷

259. *Id.*

260. *In re Gary*, No. 07-01-0466-CV (Tex. App.—Amarillo, Aug 7, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 5749.

261. TEX. R. APP. PROC. §§ 34.5-6 (Vernon 2003).

262. *Gary*, 2002 Tex. App. LEXIS 5749, at *12.

263. *Id.*

264. *Bilyeu v. Bilyeu*, 86 S.W.3d 278 (Tex. App.—Austin 2002, no pet.).

265. See TEX. FAM. CODE ANN. § 6.502(a)(5) (Vernon Supp. 2003); see also TEX. CIV. PRAC. & REM. CODE ANN. § 64.002(c)(2) (Vernon Supp. 2003).

266. *Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

267. "The disposition of the receivership funds also may not be challenged by interlocutory appeal." *Id.* at 223 (citing *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. App. 2001)); TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon Supp. 2003); see also *Walston v. Lockhart*, No. 10-00-362-CV (Tex. App.—Waco Jan. 2, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 17. In a post-divorce partition proceeding in which a receiver has been appointed to divide property, if the receiver's sale is set aside, the receivership terminates and the court no longer has custody of the property. *Id.* at *6-7.

In *In re Edwards*²⁶⁸ the Texarkana Court of Appeals took pains to stress compliance with details of the statutory provisions concerning a receivership. The appellate court concluded, as the wife asserted, that the trial court had abused its discretion in appointing a receiver when the work of the receiver had been completed and approved.²⁶⁹ A party can protect her interest in such a situation “by requesting a stay of the order appointing a receiver pending review on appeal.”²⁷⁰ The court went on to say, however, that the particular trial court’s customary practice of appointing a receiver when the parties cannot agree on the division of community property is improper unless the divorce court is careful to follow the rule in *Hailey v. Hailey*²⁷¹ that there must be a prior determination that particular property is not capable of partition in kind.²⁷² Thus, the appointment of a receiver may be supplemental to the divorce court’s power to make an equitable division of the community estate.²⁷³

E. ADJUDICATING AND ENFORCING DIVISION OF PROPERTY INTERESTS

1. *Making the Division of Property*

In the early 1960s, one of the principal complaints toward the law at that time was that there was a discriminatory definition of adultery as a ground for divorce: a single act of adultery constituted adultery for a wife whereas a course of adultery was required for such a charge against a husband.²⁷⁴ From time to time, the argument has since been made (and some courts have so concluded) that in order to show fault as a basis for division of property on divorce, adultery or some other fault *must be pled as a ground for divorce*.²⁷⁵ Although this pleading practice is sometimes followed as a means of avoiding argument on the point, one of the principal reasons for adopting the insupportability ground for divorce was to preclude the acrimony which fault-pleading may cause.²⁷⁶ In *Phillips v. Phillips* the opinion of the Beaumont Court of Appeals seems to rely on a

268. *In re Edwards*, 79 S.W.3d 88 (Tex. App.—Texarkana 2002, no pet.).

269. *Id.* at 97.

270. *Id.*

271. *Hailey v. Hailey*, 160 Tex. 372, 376-77, 331 S.W.2d 299, 303 (1960).

272. *Id.* at 96.

273. *Johnston v. Crook*, 93 S.W.3d 263 (Tex. App.—Houston [14th Dist.] 2002, no pet.), was another milestone in the long and tortuous struggle of which *Ex parte Swate* was a prior part. *Ex parte Swate*, 922 S.W.2d 122 (Tex. 1996). The post-divorce receiver’s claim was remanded for further proceedings concerning alleged fraudulent transfers and the alleged effects of time running against attacks upon them.

274. See TEX. REV. CIV. STAT. art. 4639(3) (Vernon 1965).

275. See *Mootz v. Mootz*, 615 S.W.2d 247 (Tex. Civ. App.—Dallas 1981, no writ) (emphasis added). A decade ago a number of trial courts in Harris County took this view. For a recent case in which the court mentioned adultery of the husband as an element in determining a “just and fair” division of the community estate and without any comment as to pleading, see *Eliz v. Eliz*, No. 05-01-00085-CV (Tex. App.—Dallas Aug. 19, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 5951 at *7.

276. See Joseph W. McKnight, *Commentary on the Texas Family Code, Title 1*, 21 TEX. TECH L. REV. 911, 985 (1990).

student's comment for its legal history and disregards other sources.²⁷⁷ The real difficulty in appraising this decision, however, is in determining the nature of disagreement within the court. In this instance, a fault ground for divorce was not pled and the division of property in monetary terms certainly favored the wife, though the nature of the husband's fault, which was evidently considered in making the division, was not described. Two judges voted to affirm the decision of the court below. The opinion of the chief justice in favor of this conclusion states that if a fault ground for divorce is neither pled nor proved, the trial court can still rely on fault grounds in making a just and right division.²⁷⁸ This view conforms to standard Texas practice. The concurring judge made it very clear that in dividing the community estate a divorce court may consider "conduct causing the divorce" and not merely the ground on which the divorce was granted.²⁷⁹ Both of these judges also concluded that the divorce court did not abuse its discretion in making an unequal division of the community property. The dissenting judge began by saying that his colleagues had found that "the trial court erred on considering fault and I agree."²⁸⁰ But he disagreed that "the trial court did not abuse its discretion in the division of the community estate."²⁸¹ As to abuse of discretion by the trial court, the dissenting judge's reference to *fault* was in the sense of fault as grounds for divorce. It appears that all members of the court would have been more comfortable in support of an unequal division of community property if there had been pleading and proof of fault as a ground for divorce though it is not clear (as stated by the dissenting judge) that his colleagues had found any error (however harmless) in considering fault though unpled as a ground for divorce.

In *Martel v. Martel*²⁸² the wife's adultery was not asserted as a ground for divorce but was only a matter to be considered in the division of property. The husband nevertheless complained that the trial court erred in failing to make a finding as to the wife's adultery (which she admitted as occurring after their separation) so that he might use the finding in his proceeding to secure a canonical divorce, thus allowing a subsequent canonical marriage. The Dallas Court of Appeals forthrightly stated that

277. *Phillips v. Phillips*, 75 S.W. 3d 564, 570 (Tex. App.—Beaumont 2002, no pet.) (citing Comment, *Marriage and Divorce under the Texas Family Code*, 8 HOUS. L. REV. 100 (1970)). In determining the temper of the times and the intentions of the draftsman whose work was enacted in the 1969 legislative session, the court might also have cited Joseph W. McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH. L. REV. 281, 320 (1974); Joseph W. McKnight, *Commentary on the Texas Family Code, Title 1*, 13 TEX. TECH. L. REV. 611, 676-77 (1982). The court also failed to mention of the doctrine of comparative rectitude but pointed out that "[a]dultery was an absolute bar to a divorce where the action was brought on one of the [other] fault grounds." *Phillips*, 75 S.W.3d at 570; see also *McFadden v. McFadden*, 213 S.W.2d 71, 74 (Tex. Civ. App.—Amarillo 1948, mandamus overruled); *Marr v. Marr*, 191 S.W.2d 512, 513 (Tex. Civ. App.—Texarkana 1945).

278. *Phillips*, 75 S.W.3d at 573.

279. *Id.* at 575-76.

280. *Id.* at 576.

281. *Id.*

282. *Martel v. Martel*, No. 05-99-00177-CV (Tex. App.—Dallas Aug. 31, 2001, no pet.) (not designated for publication), 2001 Tex. App. LEXIS 6025.

the “[w]ife cannot be faulted for the breakup of the marriage on this ground where the adultery did not occur until after the separation.”²⁸³

Exercising their good judgment in making a division of community property with or without pleading of fault, trial courts often assess the wrongful conduct on the part of one of the spouses as an element in guiding its judgment.²⁸⁴ Calling such consideration a “sanction,” however, is apt to be very misleading.²⁸⁵ In the event of wrongful behavior on the part of both spouses the court can rely on the doctrine of comparative rectitude.²⁸⁶

In *O’Neal v. O’Neal*²⁸⁷ the wife, who had neither answered nor appeared at the trial, appealed to the Eastland Court of Appeals on the ground of the respondent-husband’s failure to discharge his burden of proof in support of the division of property and argued that the award to her, was an inadequate amount for the support of their child who was living with her in Australia at the time of the hearing. The appellate court concluded (from the husband’s language in the record) that the husband, as the only witness at the trial, merely affirmed the contents of the *proposed decree* which the judge apparently had before him. On the basis of that conclusion, the appellate court held that such “testimony” standing alone would not support the court’s making a just and fair division of property and its award of child support. The case was remanded to the trial court for further proceedings.²⁸⁸

In *Winger v. Winger*²⁸⁹ the divorce decree of 1999 incorporated the husband’s proposed property division, which included among the items of community property to be awarded to the wife certain realty that the wife had conveyed to her son three years before. That transfer had been made so that she and her son might procure an improvement loan on the property, but the son promised to reconvey the property to his mother. Third persons had transferred the property during the marriage and the deed recited reception of one dollar and “other good and valuable consideration.” Though the record included testimony of one of the grantors that the transfer had been intended as a gift, there was other evidence indicating its acquisition for valuable services rendered to the grantors by the wife. Elsewhere in the husband’s incorporated document the property was identified as the wife’s separate property. The division of the property as part of the community estate by the divorce court was not dis-

283. *Id.* at *7 (citing *Winkle v. Winkle*, 951 S.W.2d 80, 91 (Tex. App.—Corpus Christi 1997, writ denied)).

284. See *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998); *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1998). For a comment on the latter case by one of the wife’s counsel, see Christa Brown, *Marital Fraud: The Tort Survives with an Appellate Twist*, 63 TEX. B.J. 630 (2000).

285. See *Phillips*, 75 S.W.3d at 567.

286. See *Martel*, 2001 Tex. App. LEXIS 6025.

287. *O’Neal v. O’Neal*, 69 S.W.3d 347 (Tex. App.—Eastland 2002, no pet.)

288. *Id.* at 350.

289. *Winger v. Winger*, No. 09-01-188-CV (Tex. App.—Beaumont July 11, 2002, no pet.) (not designated for publication), Tex. App. LEXIS 4909.

turbed by the Beaumont appellate court in exercising all reasonable presumptions in favor of the divorce court as the finder of fact and in the exercise of its good judgment in making the division.²⁹⁰ If precise findings of fact and conclusions of law had been made by the trial court, however, a different conclusion might have been reached.

In *Courtney v. Courtney*²⁹¹ a disappointed husband complained that the divorce court had merely made a division of accounts in dollars rather than percentages. The appellate court politely rejected his complaint as without any supporting precedent.²⁹²

In *Miner v. Miner*²⁹³ the ex-wife brought suit to enforce a decree directing the ex-husband to distribute certain net profits from a software program when it was sold. The ex-husband responded that the asset was not sold but only a change in form had been achieved by the ex-husband's subsequent expenditures of his personal talents to the successive versions of the software program. The trial court had purported to clarify how net profits were to be computed. The ex-husband relied heavily on *Rodrigue v. Rodrigue*²⁹⁴ where the federal Fifth Circuit Court of Appeals had dealt with the preemptive effect of federal copyright law in connection with an ex-wife's lack of ownership right to the husband's artistic creations. The Corpus Christi appellate court held that the trial court's alteration of the original decree was a clarification rather than a modification.²⁹⁵

The divorce decree of December 6, 2000, dealt with in *Karp v. Karp*²⁹⁶ provided that the former spouses would continue to own their home as cotenants. Sometime more than thirty days thereafter the parties entered into an agreement under Rule 11²⁹⁷ in which they agreed that the ex-wife would continue to occupy the house, that its value would be appraised, and that the ex-wife would have until May 1, 2000 to exercise a right to purchase the ex-husband's interest in the property. If she should decide to purchase his interest, the purchase price would be divided equally between them after deducting the ex-husband's equal share of expenses paid by the ex-wife. The court then approved the agreement. An appraisal was made pursuant to the decree and the ex-wife exercised her option to buy the ex-husband's interest in the house. The ex-husband refused to comply with the agreement because he regarded the appraisal value as too low. The ex-wife then sued to enforce the agreement and the

290. *Id.*

291. *Courtney v. Courtney*, No. 14-02-01103-CV (Tex. App.—Houston [14th Dist.] 2002, no pet.) (not designated for publication), Tex. App. LEXIS 5530.

292. *Id.* at *5.

293. *Miner v. Miner*, No. 13-01-659-CV (Tex. App.—Corpus Christi Aug. 8, 2002, no pet.) (not designated for publication), 20002 Tex. App. LEXIS 5841.

294. *Rodrigue v. Rodrigue*, 218 F.3d 432, 442-43 (5th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001). See *Alsensz v. Alsensz*, 101 S.W.3d 648 (Tex. App.—Houston [1st Dist.] 2003, no pet. h.).

295. *Miner*, at *7.

296. *Karp v. Karp*, No. 14-01-00902-CV (Tex. App.—Houston [14th Dist.] Nov. 7, 2002, no pet.) (not designated for publication), Tex. App. LEXIS 8014.

297. TEX. R. CIV. P. 11.

ex-husband contested the court's jurisdiction to enforce the agreement because it amounted to a modification of the decree. The Houston Fourteenth District Court of Appeals sustained the trial court's enforcement of the agreement as a contract independent of the decree under *Ex parte Gorena*.²⁹⁸ The court went on to say that the agreement approved by the court had become a part of the judgment subject to the court's power to enforce its own order. Though the court cited *Allen v. Allen*²⁹⁹ in support of this conclusion, the court's reasoning seems to misconstrue those two decisions of the Texas Supreme Court.

2. Error in Characterization

It is clearly error on the part of a divorce court to award separate property of one spouse to the other.³⁰⁰ In the evident interest of saving time and expense of further proceedings, it has been concluded that if the trial court's mischaracterizes separate property as community property, the matter should not be remanded for a new division if the error produced is *de minimis*.³⁰¹ But what constitutes that amount in any particular case appears to rest on the appellate court's good judgment. *Simmons v. Dobbs*³⁰² provides an example. The ex-wife appealed the divorce court's division of the community property and the matter was remanded by the appellate court to the trial court. During the pendency of the appeal the ex-husband had bought a travel-trailer for just over \$36,000. On remand the trial court recognized that trailer as the ex-husband's separate property and went on to award it to him as his share of the community estate, which the trial court had divided in favor of the ex-wife by fifty-five to forty-five percent. The ex-husband appealed that decision. The Dallas court found that inclusion of the value of the trailer in the community estate caused an error of over five percent of the court's predetermined ratio for division which the appellate court held was more than a mere *de minimis* error.³⁰³ In reaching this conclusion, the court used the purchase price of the trailer in its computation though no mention was made of a purchase money lien upon it for an unstated amount³⁰⁴ that the ex-husband was committed to pay.

298. *Ex Parte Gorena*, 595 S.W.2d 921, 923 (Tex. 1979).

299. *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986).

300. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) (realty); *Cameron v. Cameron*, 641 S.W.2d 210, 213-19 (Tex. 1982) (personalty); *Eliz v. Eliz*, No. 05-01-00085-CV (Tex. Aug. 19, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS, at *708 (holding that future earnings are husband's separate property and should not be used in valuing his medical practice at divorce.).

301. *Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985); see *Hunt v. Hunt*, 952 S.W.2d 564, 568 (Tex. App.—Eastland 1997, no writ); *McElwee v. McElwee*, 911 S.W.2d 182, 189 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

302. *Simmons v. Dobbs*, No. 05-02-00122-CV (Tex. App.—Dallas Oct. 31, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 7808.

303. *Id.* at *4 (citing *McElwee*, 911 S.W.2d at 190 (resting on *Jacob v. Jacob*, 687 S.W.2d 731 (Tex. 1985))).

304. *Simmons*, 2002 Tex. App. LEXIS, at *7.

F. EX-SPOUSAL MAINTENANCE

Ex-spousal maintenance is not to be used as a substitute for division of community property when property can be divided. In *O'Carolan v. Hopper*³⁰⁵ the Austin Court of Appeals concluded that the evidence did not support an unequal division of the community estate in favor of the husband. On the contrary, the husband's greater earning capacity and better health and the wife's lack of a separate estate supported disproportionate division in favor of the wife.³⁰⁶ Nor was divestiture of the wife's community interest in the family home warranted as a means of providing a home for the almost adult child whose custody was awarded to the husband.³⁰⁷ The legislative purpose in providing ex-spousal maintenance³⁰⁸ was not that it should be used as a device "as if it were property . . . [but rather] to provide temporary and rehabilitative support for a spouse whose ability for self-support is lacking or has deteriorated over time while engaged in homemaking activities and whose capital assets are insufficient to provide support."³⁰⁹ The appellate court did not allude to the wife's remarriage while the case was on appeal, a fact regarded as an inappropriate consideration.³¹⁰

In *Amos v. Amos*³¹¹ the Corpus Christi Court of Appeals did not mention community property and presumably what little there might have been was amicably divided by the parties, who also agreed on conservatorship and support of the minor children to extend for more than a decade. The only question before the court was the proper extent of the award of ex-spousal maintenance: for a period of three years and for a monthly amount of the lesser of twenty percent of the husband's average gross monthly income or \$2,500.³¹² The appellate court concluded that in light of the wife's serious physical disability, her limited earning power, and the very modest extent of her financial resources, the trial court had acted reasonably in providing the maximum of ex-spousal maintenance to meet the wife's "reasonable minimum needs."³¹³

In *Carlin v. Carlin*³¹⁴ the divorce court ordered the husband to pay his incapacitated wife a specific amount monthly for three years *unless* she was able to resume her self-support prior to that time. Just after the end of the three years' term during which the ex-husband had fulfilled his

305. *O'Carolan v. Hopper*, 71 S.W.3d 529 (Tex. App.—Austin 2002, no pet.).

306. *Id.* at 533.

307. *Id.*

308. TEX. FAM. CODE ANN. §§ 8.055-.057 (Vernon 2003).

309. *O'Carolan*, 71 S.W.3d at 533.

310. The extent to which the (professionally generally unwanted) alimony standard of common law states may eventually creep into the Texas practice in fixing ex-spousal maintenance remains to be seen. See, e.g., Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23 (2001).

311. *Amos v. Amos*, 79 S.W.3d 747 (Tex. App.—Corpus Christi 2002, no pet.).

312. *Id.* at 751 (citing TEX. FAM. CODE ANN. § 8.055 (Vernon Supp. 2002)).

313. *Id.* (citing TEX. FAM. CODE ANN. § 8.054 (Vernon Supp. 2002)).

314. *Carlin v. Carlin*, 92 S.W.3d 902 (Tex. App.—Beaumont 2002, no pet.).

obligation, the ex-wife moved for continuation of the prior order and alleged that, on account of her continuing incapacity with rheumatoid arthritis, the ex-husband should continue the support payments. The Beaumont Court of Appeals held that the divorce decree anticipated judicial review after three years. After its own long review of the evidence, the court differed with the trial court's order to extend the ex-husband's duty of support because the ex-wife had not shown that she was unable to work full-time as a result of devoting herself to the care of her mother. The order was therefore remanded to the court below.³¹⁵ The appellate court nevertheless suggested that continuation of the order would not be a "modification" of the original order which by the court's interpretation of its terms seemed to have been anticipated by the parties' agreed order in the divorce proceeding.³¹⁶

In the general context of divorce decrees applicable to awards of future ex-spousal maintenance as well as other situations, the court said in *Zorilla v. Wahid*³¹⁷ that when the terms of a divorce decree are expressly applicable to the discharge of all "further liabilities . . . imposed by the temporary orders," arrears of temporary support are not thereby discharged as "further liabilities."³¹⁸ Still more specificity might have been desired in the trial court's final order.

G. APPEAL

Although the voluntary acceptance of benefits of the trial court's judgment is a bar to an appeal by the benefited party,³¹⁹ a right of appeal is allowed when the appellant has *not voluntarily* accepted benefits of the decree.³²⁰ There is a further narrow exception to this rule barring the right of appeal. The Supreme Court of Texas pointed out in *Texas State Bank v. Amaro*³²¹ that if the appellee concedes or is found to concede that which the appellant accepts, an appeal is not barred. Although this was not fundamentally a divorce case or even a marital dispute, the principle would be applicable in a divorce context as it was in this instance related to a divorce. In *Amaro* the trial court had created a trust of the tortious damages recovered by an incapacitated husband. The court maintained continuing jurisdiction over the trust. Another district court had subsequently determined that the ex-husband-beneficiary was competent in an uncontested divorce case.³²² But in that situation the trust was still subsisting until the court that created it decreed its termina-

315. *Id.* at 911.

316. *Id.* at 904-05.

317. *Zorilla v. Wahid*, 83 S.W.3d 247 (Tex. App.—Fort Worth 2002, no pet.).

318. *Id.* at 256 (citing *Ex parte Shaver*, 597 S.W.2d 498, 500 (Tex. Civ. App.—Dallas 1980, orig. proceeding)).

319. *Carle v. Carle*, 149 Tex. 469, 472-79, 23 S.W.2d 1002, 1004 (1950).

320. For other exceptions, see Joseph W. McKnight, *Family Law: Husband and Wife*, 52 SMU L. REV. 1143, 1181 (1999).

321. *Tex. State Bank v. Amaro*, 87 S.W.3d 538, 544 (Tex. 2002) (opinion reported at 74 S.W.3d 392 withdrawn).

322. *Id.* at 540.

tion.³²³ Both former spouses agreed that the capacity of the ex-husband had been regained by the finding of the divorce court and as a result the trust terminated. The ex-husband, however, contested the jurisdiction of the court creating the trust to approve the trustee's final account and thus to rule on the trustee's potential liability for breach of trust. To that end he had brought another action against the trustee in yet another court. The trial court that had created the trust nevertheless proceeded to terminate the trust and to approve the trustee's final accounting. The ex-husband appealed, and the court of appeals reversed the conclusion of the trial court.³²⁴ The trustee sought review by the Texas Supreme Court. The court concluded that the first trial court had properly retained jurisdiction over the trust in accordance with its right to terminate the trust as provided by that court in creating the trust. Although the supreme court sustained the trial court's approval of the trustee's final account, the supreme court held that such approval did not constitute an exoneration of the trustee for breach of trust with respect to impropriety of investments and other breaches of fiduciary duty complained by the ex-husband. The trustee had argued that the ex-husband's acceptance of trust funds had not amounted to enjoyment of benefits of the judgment so that an appeal would be barred.³²⁵ Thus, the court concluded that mere acceptance of the such trust funds was an exception to the rule against voluntary acceptance of benefits as a bar to appeal.³²⁶

The legislative requirement of 1999 that a divorce court shall provide findings of fact and conclusions of law on request of a party was amplified in 2001.³²⁷ These provisions have already eased the appellate process for family law cases, particularly those involving divorces.

H. EFFECT OF BANKRUPTCY

A suit for divorce is sometimes responded to with a suit for bankruptcy in order to snarl the proceeding at the start. Others file for bankruptcy immediately after judgment in the hope that the magic of the Bankruptcy Code will wipe away duties of support. The latter objective is, of course, a delusion.³²⁸ In any case, it is good practice for the successful divorce-litigant with the right to receive realty to give immediate constructive notice of the divorce decree by recordation. Thus, if the other party later files for bankruptcy and the bankruptcy trustee asserts a right to the real property interest held by the successful divorce-litigant, the prior filing would not violate the automatic-stay provision of the Bankruptcy

323. Under section 142.005(d), (e) of the Texas Property Code, a statutory accounting of the trustee constitutes the basis for winding up the trust and distributing what is due to the beneficiary under the trust. TEX. PROP. CODE ANN. § 142.005(d), (e) (Vernon 2003).

324. *Amaro v. Tex. State Bank*, 28 S.W.3d 789, 796 (Tex. App.—Corpus Christi 2002, pet.).

325. *Amaro*, 87 S.W.3d at 544.

326. *Id.*

327. TEX. FAM. CODE ANN. § 6.711 (Vernon 2003).

328. 11 U.S.C. § 522 (a)(5) (2000).

Code.³²⁹

In *In re Thornburg*³³⁰ the dispute involved an already snarled situation after entry of the divorce decree in 1995. The parties had entered into a property settlement agreement and this settlement was incorporated in the divorce decree. In 1997 the ex-husband-debtor filed a petition in bankruptcy in which he listed his former wife as a creditor. After confirmation of the debtor's Chapter 13 plan, for the narrow object of allowing the ex-wife a hearing in state court, the automatic stay was lifted by agreement with respect to particular realty. Later in 1997 the ex-wife filed an abstract of a judgment secured in a post-divorce enforcement proceeding in order to fix a lien on that real property. The ex-husband responded with a motion to the bankruptcy court to hold his ex-wife in contempt for violating the automatic-stay provision of the Bankruptcy Code.³³¹ The bankruptcy court concluded that the subsequent abstraction of judgment constituted a violation of the automatic stay and that the ex-wife's prior *lis pendens* filing constituted a violation³³² in that it went further than the narrow cause for which the stay had been lifted.³³³ The court added that this filing affected property of the bankruptcy estate "regardless of the exempt or non-exempt status of the property involved."³³⁴ Because the ex-wife's voidable acts had been declared void, however, she could not until then be held in contempt of the bankruptcy court.³³⁵ Once the court had acted, the ex-wife was in contempt though the court awarded no sanctions against her in *Thornburg* in light of "the blatant disregard of both of these parties for the . . . court system."³³⁶ The court was nevertheless careful to observe that the orders of the state court were not intended to be attacked or invalidated.³³⁷

In the far less rancorous setting of *In re Nelson*³³⁸ it was pointed out

329. 11 U.S.C. § 362 (2000). In a non-bankruptcy case, *Burrows v. Quintanilla*, No. 13-01-134-CV (Tex. App.—Corpus Christi, July 25, 2002, pet. denied) (not designated for publication), 2002 Tex. App. LEXIS 5544, the divorce court had awarded the homestead to the wife but the ex-husband did not obey the court's order to transfer the property to her but transferred it to his father who had allegedly bought the land initially. The Internal Revenue Service then foreclosed its lien against the father on the property. The property was sold but the wife successfully sued the purchaser to remove the cloud from her title.

330. *In re Thornburg*, 277 B.R. 719 (Bankr. E.D. Tex. 2002).

331. 11 U.S.C. § 362 (2000).

332. *In re Thornburg*, 277 B.R. at 730.

333. *Id.* In *FDIC v. Walker*, 815 F. Supp. 987, 990 (N.D. Tex. 1993), the court said that a Texas *lis pendens* filing in relation to a bankruptcy proceeding is the "functional equivalent to an involuntary lien," though the federal Fifth Circuit Court of Appeals over thirty years before the filing of that *lis pendens* notice had said that it "is simply a notice of pending litigation." See *Allstate Fin. Co. v. Zimmerman*, 272 F.2d 323 (5th Cir. 1959). Although the *lis pendens* filing does not fix a lien on property in issue in litigation, it is (as the bankruptcy court said) "constraining" on the debtor and makes it very difficult to negotiate a sale or mortgage on the property in issue. *In re Thornburg*, 277 B.R. at 729.

334. *In re Thornburg*, 277 B.R. at 729.

335. *Id.* at 731.

336. *Id.*

337. *Id.*

338. *In re Nelson*, 274 B.R. 789 (8th Cir. B.A.P. 2002) (relying on *Boggs v. Boggs*, 520 U.S. 833 (1997); *Patterson v. Shumate*, 504 U.S. 753 (1992); *In re Anderson*, 269 B.R. 27 (8th Cir. B.A.P. 2001)).

by the federal Ninth Circuit Bankruptcy Appeals Court that a California debtor's interest in his former wife's ERISA-qualified retirement plan was not property of the debtor's bankruptcy estate. An interest in the plan had nevertheless been awarded to the debtor by a qualified domestic relations order of the California divorce court. One wonders whether an "if and when" order of a Texas divorce court³³⁹ affecting the other spouse's retirement benefits would be similarly construed.

*Gant and Hathaway v. Gant*³⁴⁰ involved a dispute between an ex-wife and her ex-husband and his fiancée, in which the ex-husband had sought recourse to the bankruptcy court after he had failed to discharge a note given to the ex-wife as part of the division of property in their divorce. The ex-wife then brought an adversary proceeding in the bankruptcy court, which was settled by entry of an agreed money-judgment against the ex-husband. After the ex-husband had failed to pay the judgment debt, the ex-wife brought suit in a different state court to recover the debt, alleging a fraudulent transfer of funds to the fiancée. The defendants entered a plea to the jurisdiction of the court on the ground that only the divorce court had jurisdiction to resolve the dispute. The Dallas Court of Appeals rejected the defendant's plea: The ex-wife's suit was not a matter "incident to the underlying divorce" but merely a suit to enforce a subsequent judgment.³⁴¹

I. ENFORCEMENT AND CLARIFICATION

Protective orders made in the course of divorce proceedings may be kept in effect by the terms of the order for up to two years.³⁴² After one year has passed, a protective order is subject to being vacated on motion of a party.³⁴³ If the order affects someone in confinement at the date the order expires, the order is effective for another year after confinement ceases.³⁴⁴ Whether such orders are appealable is in dispute,³⁴⁵ but the majority of reported cases hold that they are appealable. The Dallas Court of Appeals in *Cooke v. Cooke*³⁴⁶ followed those authorities, allowing an appeal despite its earlier unpublished opinion to the contrary:³⁴⁷ "[t]he disposition of the parties and issues, not the retention of jurisdiction [to modify the order], determines the status of an order [A] protective order rendered pursuant to the family code is a final, ap-

339. See *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976).

340. *Hathaway v. Gant*, No. 05-01-00134-CV (Tex. App.—Dallas Feb. 25, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 1436.

341. *Id.* at *3.

342. TEX. FAM. CODE ANN. § 85.025(a)(1) (Vernon 2002).

343. *Id.* § 85.025(b).

344. *Id.* § 85.025(c).

345. *James v. Hubbard*, 985 S.W.2d 516, 517-18 (Tex. App.—San Antonio 1998, no pet.). There the court held that such orders are appealable whereas the Waco appellate court had held that they are not appealable. *Norman v. Fox*, 940 S.W.2d 401, 404 (Tex. App.—Waco 1997, no writ). For other reported cases see *Cooke*, 65 S.W.3d 785, 787 (Tex. App.—Dallas 2001, no pet.).

346. *Cooke*, 65 S.W.3d at 785.

347. *Id.* at 788 n.1.

pealable order as long as it disposes of all parties and all issues.”³⁴⁸

As in *Zeolla v. Zeolla*,³⁴⁹ the resolution of the ambiguity in the parties’ settlement agreement in *Ansley v. Ansley*³⁵⁰ arose out of an event that did not occur as had been anticipated and agreed. In *Zeolla* the divorcing couple had agreed to the consequences of the husband’s retirement at sixty-five, whereas he then retired at fifty-seven. In *Ansley* the parties’ written agreement merely provided for a division of property. The divorce decree, which was rendered seven months later, defined the parties’ right as of the date of the settlement without references to assets which might have been acquired after that date. The Austin Court of Appeals concluded that an ambiguity existed in the decree and that its clarification was therefore required so that the assets in existence at division were divided in accordance with the parties’ agreement seven months before.³⁵¹

Years after the judgment for divorce was entered in *Bishop v. Bishop*,³⁵² the ex-husband sought a post-divorce division of an undivided interest in the property that had been the community family home. In the divorce decree, the wife had been given occupancy of the home and the husband was ordered to make monthly payments on the indebtedness against the property. The ex-wife had later moved to Missouri and had since leased the house to another. The ex-husband asserted that the extent of the ex-wife’s time of residence had not been fixed in the decree and therefore needed clarification, or the former community property that had become a tenancy in common should be partitioned. The decree provided that the mortgage payments should be paid by the ex-husband through May 20, 2002 and thereafter by the ex-wife, that the property could be sold by mutual agreement, and that all maintenance of the property and insurance on it should be paid by the ex-spouses equally. The trial court had also decreed how the ultimate sale price should be divided. The San Antonio Court of Appeals concluded that the decree had disposed of all interest in the house and was not ambiguous.³⁵³ The appellate court therefore sustained the trial court’s dismissal of the case to divide the property for lack of jurisdiction but allowed severance of the suit for clarification. It appears that no effort was made on the ex-husband’s part to show a need for partition. The need for clarification in this respect was therefore apparently in order.³⁵⁴

348. *Id.* at 788.

349. *Zeolla v. Zeolla*, 15 S.W.3d 239 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). For commentary, see Joseph W. McKnight, *Family Law: Husband and Wife*, 53 SMU L. REV. 995, 1051 (2000).

350. *Ansley v. Ansley*, No. 03-01-00241-CV (Tex. App.—Austin Aug. 30, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 6364.

351. *Id.* at *23-24.

352. *Bishop v. Bishop*, 74 S.W.3d 877 (Tex. App.—San Antonio 2002, no pet.).

353. *Id.* at 880.

354. In *Marshall v. Priess*, No. 14-00-01399-CV (Tex. App.—Houston [14th Dist.] Jan. 31, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 648, an effort to clarify a post-divorce order acceptable for processing as a qualified domestic relations order (QDRO) dealing with retirement benefits failed as an effort to make substantial

*In re Sims*³⁵⁵ dealt with jurisdiction of a court to deal with a dispute concerning enforcement of an agreement incident to divorce entered into in Bexar County. The agreement had provided in some detail for the disposition of the proceeds of the ex-husband's principal business interest when that interest should be sold. On learning of its subsequent sale, the ex-wife brought suit in Bexar County to enforce the agreement. Soon afterward however, the ex-husband died in Medina County and a proceeding to settle his estate was brought in the probate court there. The corporate independent executor of the estate then brought suit against the ex-wife in the probate court for a declaration defining its duties to her under the divorce agreement. In the Bexar County suit, the ex-wife asserted the jurisdiction of that court, which was denied. The ex-wife then brought a mandamus proceeding in the San Antonio Court of Appeals. The appellate court concluded that jurisdiction should lie in the court of Bexar County by applying the rule that when a suit might be proper in two counties, jurisdiction should lie where it was first filed as the court of dominant jurisdiction.³⁵⁶

The dispute in *Adams v. Bell*³⁵⁷ arose from an ex-husband's periodic failure to see that his former wife receive her share of his military retirement benefits adjudged to her in 1980. An order holding him in contempt had been issued in 1984 for the ex-husband's failure to direct disbursements to his ex-wife as ordered by the court. But confinement of the ex-husband was suspended on the condition that he would pay all arrears on a monthly basis. In 2001 the court again held the ex-husband in contempt for failure to comply with the court's orders but again did not issue a confinement order. The ex-husband appealed. The Eastland Court of Appeals dismissed his appeal, pointing out that seeking a writ of mandamus was his only remedy. Seeking a writ of habeas corpus, on the other hand, is the only means of relief from an order of contempt but that relief is foreclosed if there is no confinement.³⁵⁸

J. POST-DIVORCE DIVISION OF UNDIVIDED COMMUNITY PROPERTY

In *Doyle v. Schultz*³⁵⁹ the court undertook to review of a post-divorce division of community property left undivided on divorce by applying the same standard but not the same facts as the those used for division the community property on divorce. Instead, the trial court founded its division on facts arising after the divorce and on the condition of the parties

changes in the prior court order. In another QDRO- case brought by the ex-wife against her deceased ex-husband's heir failed as a collateral attack on an unambiguous QDRO. *Purvis v. Wallace*, No. 05-01-00235-CV (Tex. App.—Dallas Apr. 4, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 2399.

355. *In re Sims*, 88 S.W.3d 297 (Tex. App.—San Antonio 2002, no pet.).

356. *Id.* at 303-04.

357. *Adams v. Bell*, 94 S.W.3d 759 (Tex. App.—Eastland 2002, no pet.).

358. *Id.* at 760 (citing *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999)); *Rosser v. Squier*, 902 S.W.2d 962 (Tex. 1995).

359. *Doyle v. Schultz*, No.05-01-00563-CV (Tex. App.—Dallas Jan. 9, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 108.

at the time of the post-divorce hearing. The division of the pre-divorce community pension interest wholly favored the ex-wife. Because the ex-wife, who had brought the suit, had not shown the relative condition of the parties and had improperly relied on evidence of the husband's wrongful acts prior to divorce, the appellate court held in effect that the ex-wife had not discharged her burden of proof to establish entitlement to the whole interest.³⁶⁰

In *Kadlecek v. Kadlecek*³⁶¹ the ex-wife brought suit fifteen years after divorce. The parties had entered into a property settlement explicitly apportioning the husband's federal civil-service retirement benefits between them but left unmentioned the surviving spouse's annuity. The divorce decree had divided the retirement benefits to be received by the ex-husband and had provided that any community property not awarded should be the property of the spouse in "possession or control" of that property. Thus, the ex-wife might be said to have sought a clarification of the divorce decree on a division of an undisposed community property interest. The Austin Court of Appeals held that the language of the decree did not award the wife an interest in the survivor's annuity.³⁶² The court went on to say, however, that the "possession and control" language referring to any undisposed community interest has been interpreted as dealing with physical control³⁶³ and the survivor's annuity was left unmentioned in the decree.³⁶⁴ The appellate court held that the order of the district court awarding the ex-wife a right to the survivor's annuity would stand as a partition as an undisposed community property interest, but that the district court's order that the ex-wife's interest should pass to her children went beyond the divorce decree and therefore amounted to a forbidden modification of the divorce decree.³⁶⁵

360. *Id.* at *11.

361. *Kadlecek v. Kadlecek*, 93 S.W.3d 903 (Tex. App.—Austin 2002, no pet.).

362. *Id.* at 907.

363. *Id.* at 908.

364. In so holding the court referred to *Carreon v. Morales*, 698 S.W.2d 241, 242 (Tex. App.—El Paso 1985, no writ).

365. *Kadlecek*, 93 S.W.3d at 909-10.

