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FAMILY LAW: HUSBAND AND WIFE

Joseph W. McKnight*

I. STATUS

A. NON-MARITAL RELATIONSHIPS

1. Same-Sex Unions

THE avalanche of professional and lay literature continued mostly in support of recognition of same-sex unions as marital ones.¹ The United States Congress responded negatively in 2003 by enacting the Defense of Marriage Act (DOMA)² and the Act has begun to produce some reported responses from the courts. In *In re Kandou*,³ for example, a bankruptcy court in a sister community property state examined a joint filing for bankruptcy by a same-sex couple joined by a civil union in Canada. The court concluded that in the context of a joint petition for bankruptcy, DOMA really does nothing more than define a *spouse* as a member of the heterosexual union and thus did not allow a joint filing of a same-sex couple in bankruptcy. Nor was the principle of comity of any assistance to the petitioners. In effect the court treated DOMA as purely federal in this context and thus not requiring any reference to state law. All told the trial court's conclusion that the woman's claims were "frivolous and groundless" was certainly near the mark, if not altogether on target.

2. Parental Contract

*In re Sullivan*⁴ involved what may be somewhat inelegantly termed a fertilization contract by which an unmarried woman entered into an agreement with an unmarried man to provide sperm for her artificial insemination. The parties agreed by what they called a "coparenting agreement" that the woman's conception was their joint decision and each agreed that the child conceived would belong to both of them as though they were married at the time of conception, that the man would be named as father on its birth certificate, and that they would share custody of the child. Before the child's birth, however, disagreement arose

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1. See Jill Schachner Chanen, *The Changing Face of Gay Legal Issues*, 90 A.B.A. J. 47 (July 2004); EVAN GERSTMANN, *SAME SEX MARRIAGE AND THE CONSTITUTION* (2003).

2. 1 U.S.C. § 7 (1996).

3. 315 B.R. 123 (Bankr. W.D. Wash. 2004).

4. 157 S.W.3d 911 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

between the prospective parents and soon after the child's birth the man petitioned the district court to adjudicate his rights to the child. In affirming the trial court's refusal to deny a writ of mandamus in response to the woman's plea to the jurisdiction of the trial court to entertain the man's petition, the Houston Fourteenth Court of Appeals denied the writ and held that in absence of any statutory authority⁵ or allegation of fraud in seeking the court's jurisdiction⁶ to the contrary, the man had standing to seek adjudication of his rights under the contract. The court went on to say that the man's status as a sperm-donor would be determined at the litigation stage of the proceeding rather than at the threshold of this suit concerning paternity. Thus the question of applicability of section 160.602 of the Family Code⁷ with respect to the fact of the man's being the sperm-donor⁸ was postponed.

B. MARRIAGE

1. Incremental Legal Change

Without very much notice by the lay public or the legal profession, the legal significance of the institution of marriage and its significance in law have undergone very gradual but remarkable dilution in the United States over the last century.⁹ Ironically the much publicized attempt to extend the institution to couples of the same sex and thus to make it more pervasive by expanding its adherents also provides some notable changes, if minor, adjustment in Texas law. Over the last three decades, in addition to the occasional significance of disputes between unmarried cohabitants, the marital state was explicitly and accurately defined as a heterosexual institution in 1975¹⁰ and liability for criminal conversation,¹¹ which by judicial interpretation includes rape, was abolished.¹² The availability of marriage was nevertheless expanded by the repeal of antiquated statutes prohibiting entry into miscegenous marriage in the late sixties and the memory of such strictures has faded away. Though the action for breach of promise of marriage is still intact, section 1.108¹³ requires a writing for an enforceable promise or agreement made on consideration of marriage or "non-marital conjugal cohabitation."

5. *Id.* at 921 (majority op.), 922 (Hedges, C.J. concurring).

6. *Id.* at 914.

7. TEX. FAM. CODE ANN. § 160.602 (Vernon 1998).

8. *Sullivan*, 157 S.W.3d at 920.

9. See Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Relation of Marriage*, 63 LA. L. REV. 243 (2003).

10. See Joseph W. McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH. L. REV. 281 (1974) (Commentary to section 1.01, replaced by TEX. FAM. CODE ANN. § 2.001 (Vernon 1998) in terms of those to whom a marriage license may be issued). *Id.* Section 2.401, enacted in 1997, also provides that informal marriage may be entered into only by a heterosexual couple.

11. NOW TEX. FAM. CODE ANN. § 1.106 (Vernon 2005).

12. *Id.* §§ 1.106, 1.107 (Vernon 2005).

13. *Id.* § 1.108 (Vernon 1998).

Despite all the discussion over the recognition of the institution of same-sex unions, there has been little discussion of the legal consequences of dealing with breakdown of such unions, except insofar as the consequences may be covered by contract, partnership, agency, or trust law.¹⁴ A series of statutory provisions have been enacted without any ultimate change of law to allow means of automatic termination of an unrecorded informal marriage. The final version of that series of acts is section 2.401 of the Family Code, which allows dissolution of any such nascent informal union two years after the couple's separation without any action taken to assert existence of the union.¹⁵

2. Informal Marriage

The dispute in *Nichols v. Lightle*¹⁶ arose out of a conveyance of the grantor's one-half interest in purported community interest in land acquired by the grantor's alleged wife during an alleged informal marriage. After a judgment creditor of the grantee levied execution on the grantee's interest, the grantor's alleged wife brought suit to clear the cloud from her title. The land was acquired by the petitioner after her divorce from the grantor. The woman testified that she had not remarried the man but that she sometimes provided him with food and allowed him to stay in her home from time to time. Though the man asserted that an informal marriage had arisen between him and his former wife, the trial court concluded that there was insufficient evidence of the elements that constitute an informal marriage. The Amarillo Court of Appeals affirmed that conclusion.¹⁷

In *Ball v. Smith*¹⁸ a woman sued her estranged male companion to establish an informal marriage and a partition of assets accumulated during their time together. The trial court granted the man's summary judgment motion and the woman appealed. After a brief courtship the couple had become engaged to marry, but after awhile they decided against a formal union but continued to live in the man's residence on which the woman asserted that she had made costly expenditures. Proof of these payments, however, was not forthcoming, and the court also rejected her claims that the couple had established an informal marriage or to meet the definition of a partnership. The trial court awarded the man his attorney's fees. In her appeal, the woman did not press the issue of informal marriage.

14. See, e.g., *Zaremba v. Cliburn*, 949 S.W.2d 822 (Tex. App.—Fort Worth 1997, no writ); *Small v. Harper*, 638 S.W.2d 24 (Tex. App.—Houston [1st Dist.] 1982, no writ).

15. TEX. FAM. CODE ANN. § 2.401 (Vernon 1998). This course of legislation got underway in response to a proposal to abolish the institution of informal marriage. The enactment of three successive acts (1989, 1995, and 1997) has brought the law back to the point of departure. See Joseph W. McKnight, *Family Law: Husband and Wife*, 44 Sw. L. J. 1 (1990); Joseph W. McKnight, *Family Law: Husband and Wife*, 49 SMU L. REV. 1015, 1016-17 (1996).

16. 153 S.W.3d 563 (Tex. App.—Amarillo 2004, pet. denied).

17. *Id.* at 571.

18. 150 S.W.3d 889 (Tex. App.—Dallas 2003, no pet.).

Her partnership argument was rejected¹⁹ along with her claims for money had and received (which she termed “reimbursement and partition”).²⁰ An apparent argument as to a resulting trust was not raised in her pleading.²¹ The appellate court also rejected the woman’s argument that the amount of attorney’s fees amounted to a sanction.²²

3. *Marriage Licencing*

In an opinion concerning the marriage licensing process, the Attorney General addressed a county clerk’s question whether a license to marry may be granted when both applicants do not appear before the county clerk.²³ As enacted in 1997, the Family Code in section 2.002 provides that in applying for a marriage license “[e]xcept as provided by Section 2.006, each person applying . . . must appear before the county clerk.”²⁴ Section 2.006²⁵ then provides that

- (a) If an applicant is unable to appear personally before the county clerk to apply for a marriage license, any adult person or the other applicant may apply on behalf of the absent applicant.
- (b) The person applying on behalf of an absent applicant shall provide to the clerk:
 - (1) the affidavits of the absent applicant . . . [supplying certain enumerated facts]

. . . .

The quandary presented to the county clerk was whether *both* applicants, who were then imprisoned, could appear by proxy before the clerk. The county clerk manual of 1998 states categorically that they cannot.²⁶ The Attorney General’s opinion pointed out, however, that those instructions seem to have been based on the statute of 1973,²⁷ which made it clear that the licensing process was available only when one applicant could appear and “any adult person or the other applicant” could appear for the one absent. The language of the section 2.006 enacted in 1997 differed from that of the similar statute of 1973. But the bill analysis of 1997 as presented to the Senate Committee on Jurisprudence stated that the “bill makes no substantive changes and recodifies Title 1 of the Texas Family Code” as required of any bill offered as a non-substantive statutory revision under the ongoing process of the statutory revision plan of 1963.²⁸ A non-substantive revision under the 1963 act allows for modernized language of an existing body of law and as such it is not subject to

19. *Id.* at 895.

20. *Id.* at 895-96.

21. *Id.* at 896.

22. *Id.*

23. Tex. Att’y Gen. Op. GA-0024 (Feb. 19, 2003).

24. TEX. FAM. CODE ANN. § 2.002 (Vernon 1998).

25. *Id.* § 2.006.

26. OFFICE OF COURT ADMIN., COURT CLERK PROCEDURE MANUAL § (c)(4) VIII-6 (1998).

27. TEX. FAM. CODE ANN. §§ 1.02, 1.05 (1973).

28. See Code Construction Act, TEX. GOV’T CODE ANN. § 323.007(b) (Vernon 2005).

amendment in the process of enactment. The 1973 act stated in section 1.05 that, "If *only one* of the applicants is able to appear personally before the county clerk to apply for a marriage license, any adult person or the other applicant may apply on behalf of the absent applicant."

The Attorney General's opinion states that this 1997 language allows that if "*two* absent applicants [may] apply for a marriage license provided they each have an adult person to apply for the license on their [sic] behalf." The writer of the opinion not only disregarded the previous statute which the 1997 statute was meant to replicate but also concluded that the language of section 2.006(a) that if "an applicant is unable to appear personally . . . any adult person or the other applicant may apply on behalf of the absent applicant." That language is as plain as that of 1973 but in ordinary usage "an applicant" means only *one applicant* not *both applicants*. In effect, the opinion acknowledges that the 1997 statute changed the effect of the provision of 1973. As authority for the opinion's conclusion that a new rule applies, the Attorney General cited the decision of the Texas Supreme Court in *Fleming Foods of Texas, Inc. v. Rylander*²⁹ that plain language of a nonsubstantive legislative revision of prior law need not honestly reflect what went before if the plain language of the new act provides a contrary rule. The Attorney General's opinion then went on to say that the language of section 2.006 of 1997 plainly "allows absent applicants to apply for a marriage license," provided that they each have a person apply for the license "and that each submit the information requested by statute." But contrary to the Attorney General's conclusion, section 2.006 is ambiguous and should be interpreted as the Code Construction Act directs.³⁰ When the statute was amended in 1973 a special exemption was allowed for only one applicant when out of state or for some other similar reason unable to appear in person. The exception in favor of *only one* applicant was made after careful consideration. It was thought by the draftsmen that allowing a license to be acquired by both absent applicants is an invitation to fraud by same-sex applicants. In light of these circumstances it is suggested that a special exception should be provided for prisoners of different sexes and such persons absent on public service.

This instance, and like cases, seem to reach the conclusion that continuing the plan of code revision under the 1963 act constitutes, at best, a misleading subterfuge. In light of the intervention of ten legislators as amici curiae in *Fleming Foods* and the court's evident concern for the administration of the state's sales tax system which it involved, it must be agreed that as a matter of law the recodification plan of 1963 has been put aside by the Texas Supreme Court. Thus some other scheme for statutory revision should be provided. A series of bills to deal with this and other past inadvertent changes in non-substantive revisions is very much

29. 6 S.W.3d 278 (Tex. 1999).

30. See TEX. GOV'T CODE ANN. §§ 311.001 - 311.032 (Vernon 2005).

needed.³¹

4. *Ceremonial Marriage*

Those who have missed the post-divorce litigation of the Sutherlands³² will be pleased to see that the Waites are back.³³ The Waites were married in 1968 and had four children. In 1991, both sued the husband's employer for defamation and the dispute was settled for over \$3,000,000. After many arguments over the ownership of the settlement proceeds and some physical injury of the wife by the husband, the couple separated in 2000, and the wife brought suit for divorce in Texas on the ground of insupportability. As the Texas divorce case proceeded, the husband brought suit in Alabama in late 2001 against his alleged wife to attack the validity of the wife's 1960 divorce from her former husband. The plaintiff asserted the Alabama divorce-court's lack of jurisdiction as a consequence of the parties' failure to meet durational residence requirements. In that case, judgment was rendered in favor of the wife and affirmed by the Alabama Supreme Court.³⁴ The husband then filed a second suit for a declaratory judgment in 2003 with both parties to the prior divorce as defendants. The trial judge rendered judgment *sua sponte* for the defendants. The husband's appeal to the Alabama Court of Civil Appeals was granted because the manner of the court's dismissal was improper.³⁵ Meanwhile, in Texas, the husband brought two unsuccessful appeals in the Texas proceeding concerning the appointment of a receiver and five mandamus petitions.³⁶ The trial court finally awarded about two-thirds of the couple's community assets to the wife and the rest to the husband. The husband appealed on the ground that there was no cognizable dispute before the court in that their union was wholly religious in nature and that treating it as a matter of state concern violated all manner of rights guaranteed by the United States and Texas Constitutions.³⁷ Though there seem to have been ample facts to support the conclusion that theirs was a valid informal marriage in addition to being a valid cere-

31. A far greater change was made by what was said to be a non-substantive statutory revision affecting the purchasers of debtors' property at a judicial sale. Prior to its non-substantive revision in 1985 the statute, now identified as TEX. CIV. PRAC. & REM. CODE ANN. § 34.046 (Vernon 1997), provided that a purchaser at a judicial sale takes as a bona-fide purchaser from the debtor *except* for the creditor provoking the sale. In 1985 when the section was reenacted the exception was omitted. The Houston First District appellate court has since held that no purchaser at a constable's sale taking a quitclaim deed can take as a bona-fide purchaser with respect to flaws in the debtor's title. *Diversified, Inc. v. Hall*, 23 S.W.3d 403, 405 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

32. See Joseph W. McKnight, *Family Law: Husband and Wife*, 47 SMU L. REV. 1161, 1192 n.290 (1994).

33. See *Waite v. Waite*, 150 S.W.3d 797 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

34. *Waite v. Helmondollar*, 881 So. 2d 546 (Ala. 2003).

35. *Waite v. Waite & Helmondollar*, No. 2030017, 2004 WL 758394 (Ala. Civ. App. Apr. 9, 2004).

36. See *Waite*, 150 S.W.3d at 800 n.3.

37. See *id.* at 801. See Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1035, 1039 (2002).

monial one, it was with respect to the latter that the principal argument was directed. In response to the husband's appeal, the Houston Fourteenth District Court rejected the husband's constitutional arguments and affirmed the decision of the trial court with a dissent on one point involving Texas constitutional law.³⁸ The husband filed a motion for rehearing. Despite the appellant's repeated proffer of his constitutional arguments, the Houston court rejected his appeal.³⁹

In the divorce proceeding, the husband's counsel intervened to recover attorney's fees and expenses, and the trial court severed the intervention, presumably to deflect any objection to the propriety of the intervention.⁴⁰ The husband and his counsel settled their dispute with a Rule 11 agreement.⁴¹ The husband-client thereupon tendered his check for the agreed amount but declined to execute a release of all future claims. Though the language of the proposed release is not quoted in the opinion of the appellate court that affirmed the trial court's grant of summary judgment to the attorney, it appears that the agreement was meant to cover no more than fees for past services and prior expenses. In reversing the judgment of the trial court in favor of the attorney, the appellate court held that the attorney's motion for summary judgment did not give fair notice for summary judgment under Rule 166a(c) and (i).⁴²

C. STATE EMPLOYMENT

The Texas Attorney General rendered an opinion⁴³ concerning the effect of the specific provisions of the Tax Code⁴⁴ that prohibit the hiring of a relative within the first degree (including a spouse or a child) of a person already in the position of an employer by an appraisal district. In this instance, the proposed appointee as a chief appraiser was a son of an employee of the district for fifteen years. The question was put in terms of the present employee's having to give up her position in order to make way for her son's appointment as a chief appraiser and thus a member of the board of the appraisal district. Thus the resulting appointment would cause too close a relationship between an existing employee and a prospective employer rather than the reverse, which more commonly arises in such proposed hirings. Although the general provisions for hiring and

38. *Waite v. Waite*, 64 S.W.3d 217 (Tex. App.—Houston [14th Dist.] 2001, no pet.), noted in Joseph W. McKnight, *op. cit. supra* note 37, and *Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, no pet.), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, 56 SMU L. REV. 1659, 1692 (2003).

39. *Waite*, 150 S.W.3d at 801-02.

40. The Ethics Committee of the State Bar of Texas has made it clear that it is improper for a lawyer to secure a judgment for legal fees against his client in the same suit as that in which he is representing his client. Texas Ethics Committee Opinion 374, 37 TEX. B.J. 1085 (1974). See *Kimsey v. Kimsey*, 965 S.W.2d 690, 694 (Tex. App.—El Paso 1998, no pet.).

41. See TEX. R. CIV. P. 11; *Waite v. Woodard, Hall & Primm*, 137 S.W.2d 277 (Tex. App.—Houston [1st Dist.] 2004, no pet. h.); TEX. R. CIV. P. 11.

42. See TEX. R. CIV. P. 166a(c), (i).

43. Tex. Att'y Gen. Op. GA-0187 (May 12, 2004).

44. See TEX. TAX CODE ANN. § 6.05(F) (Vernon 2001).

employment in the Government Code⁴⁵ allow no exception to the general nepotism rule in this particular instance, the Attorney General applied the specific rule of the Tax Code. It was pointed out in the opinion that the provision of the Tax Code enacted in 1989, though specifically made subject to other identical provisions of the Government Code, was not meant to be subject to the particular exception to the nepotism rule in the Government Code.⁴⁶

In another opinion, the Attorney General addressed a question with respect to a county commissioner's access to county records in making an investigation of the activity of a former commissioner and his wife concerning their involvement in certain criminal acts.⁴⁷ The Attorney General concluded that, as a general rule, a commissioner's court may conduct such an inquiry but not those involving an individual commissioner in most, but not all, circumstances.⁴⁸ In this instance, the investigation concerned medical records of the former commissioner and his wife in relation to claims by them to medical benefits provided by the county. After discussion of a number of situations involving breach of primary rules that may be involved in some investigations, the Attorney General declined to express an opinion on investigations of particular documents that might be related to a full investigation.⁴⁹

II. CHARACTERIZATION OF MARITAL PROPERTY

A. COMMUNITY PRESUMPTION

In two cases the Fort Worth Court of Appeals imposed a very strong evidentiary showing to satisfy the burden of proof necessary to overcome the presumption that all marital acquisitions are community property. The first of these decisions, on which the court relies in the second, is the more striking. In 1997 the Texas Legislature enunciated that a clear and convincing standard of evidence is required to overcome the community presumption.⁵⁰ In *Boyd v. Boyd*⁵¹ the divorce court dealt with the husband's claim for economic contribution of his separate funds used to discharge a mortgage on community property under section 3.403.⁵² On appeal from the decision of the divorce court that had accepted the husband's evidence to sustain his claim, the wife stated that the husband had merely asserted the use of separate funds without proving their separate source. On appeal the wife argued that at the time of the trial at which she was present but at a time that she was undergoing psychiatric treat-

45. See TEX. GOV'T CODE ANN. § 573.062 (Vernon 1994).

46. See Tex. Att'y Gen. Op. GA-0187 at 5 (May 12, 2004). The opinion goes on at great length to make these simple points.

47. Tex. Att'y Gen. Op. GA-0138 (Jan. 21, 2004).

48. *Id.* at 2.

49. *Id.* at 10.

50. See TEX. FAM. CODE ANN. § 3.003 (Vernon 1998).

51. 131 S.W.3d 605 (Tex. App.—Fort Worth 2004, no pet.). This was the Boyds' third trip to the Fort Worth appellate court.

52. TEX. FAM. CODE ANN. § 3.403 (Vernon Supp. 2005).

ment. The husband put on his evidence of separate property contribution and asked his wife (who was without counsel) whether she had any questions. She responded that she had questions but would forego asking them.⁵³ The appellate court noted further that in her presentation of her own case the wife attempted to offer evidence of an appraisal of the community property in issue, but the court sustained the husband's objection to her evidence on the ground that she had failed to respond to his interrogatories. After the trial court had made its division of community property, the wife filed a motion for a new trial on the basis of her incompetence at the trial as a result of being under the influence of psychiatric drugs.⁵⁴ The court denied her motion and on that denial the wife took her appeal which was particularly directed to her husband's failure to prove the alleged separate character of property he used to discharge the mortgage on community property. Without any discussion of the procedure or rules of evidence followed at the trial, the appellate court concluded that the husband had failed to trace his alleged separate funds from a separate source in order to meet the clear and convincing standard of this burden of proof. In putting aside the husband's reliance on *Newland v. Newland*,⁵⁵ the court pointed out that the husband's testimony in that case was corroborated by records and other documentary evidence whereas his testimony in this instance was uncorroborated⁵⁶ and would produce a "grossly undervalued" community estate.⁵⁷

In *Irvin v. Parker*⁵⁸ the Fort Worth court reiterated its stand in *Boyd* on the clear and convincing evidence rule in another tracing case. The property in issue was an annuity claimed by the deceased wife's estate as her separate property. Again the procedural posture of the case was unusual but not commented on by the court. The jury found that the wife had purchased the annuity with her separate funds but that she did not agree to her husband's ownership of the annuity as shown by the contract itself negotiated with the husband's participation. On appeal her surviving husband asserted that the decedent's administrator's evidence had failed to meet the clear and convincing standard set forth by section 3.003. In supporting the estate's claim of separate character of the annuity and its proceeds, the trial court found in favor of the ownership of the annuity as the wife's separate property. The wife's estate relied on the husband's failure to object to the wife's administrator's inventory of the separate estate including the annuity.⁵⁹ In an abandoned pleading the husband admitted that the source of the payment for the annuity appeared to have been "Noma's [the wife's] money" and that admission was admitted into

53. *Boyd*, 131 S.W.3d at 609.

54. *Id.* at 610.

55. 529 S.W.2d 105, 107-08 (Tex. Civ. App.—Fort Worth 1975, writ dismissed).

56. *Boyd*, 131 S.W.3d at 614-17.

57. *Id.* at 618. For what may have amounted to a significantly overvalued community estate, see *Wilson v. Wilson*, 132 S.W.3d 533 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

58. 139 S.W.3d 703 (Tex. App.—Fort Worth 2004, no pet.).

59. *Id.* at 709-11.

evidence by the trial court. On the basis that testimony to the effect that the annuity was paid for with money from the wife's bank account,⁶⁰ and the hypothesis that the money used by the wife was her separate property inherited from her deceased husband, the trial court assumed that there was no other source from whence the payment might have come. The wife's administrator nevertheless failed to corroborate the husband's remark as to the separate source of the property used to pay for the annuity policy. The appellate court held that the estate's evidence failed to meet the clear and convincing standard.⁶¹ In light of the peculiar facts and the apparent odd state of the trial records in both cases, the conclusions in both cases may be acceptable but their standing as authorities for the burden of proof under section 3.003 seems dubious.

The character of the husband's interest in patents existing or applied for during a marriage was in issue in *Sheshtawy v. Sheshtawy*.⁶² In response to the husband's reliance on the doctrine of federal preemption of the subject the San Antonio Court of Appeals relied on the federal appeals court's decision in *Rodrique v. Rodrique*⁶³ that there was no indication of the intent of Congress to preempt applicable state law. In this instance, therefore, the failure to prove the husband's separate ownership of the patents required remand for redivision of the community property.

B. REIMBURSEMENT

In *Sheshtawy v. Sheshtawy*,⁶⁴ the trial court sought to shift liability for a loan made to both spouses (with a lien on the wife's separate property) to the husband alone and to put a lien on the husband's separate realty to secure his obligation thus imposed. Without any showing that the husband's separate realty had benefited from the liability, the court held that fixing a lien on the property was not justifiable.⁶⁵

In *Ginsburg v. Chernoff*⁶⁶ the issue before the court, though not clearly enunciated, was whether a claim for any right of reimbursement might be successfully asserted against a third person with whom a divorcing spouse sought to hide community property. The facts of the case were therefore similar to those in *Schlueter v. Schlueter*,⁶⁷ though in that case the trial court's judgment against the third party recipient was not appealed by him. The court in this instance relied on the Texas Supreme Court's factually-closer 1960 decision in *Cohrs v. Scott*⁶⁸ in which the court denied recovery for reimbursement against the transferee after the divorcing

60. "It was Norma's money" was his actual statement. *Id.* at 709.

61. *Id.* at 712.

62. 150 S.W.3d 772 (Tex. App.—San Antonio 2004, no pet.).

63. 218 F.3d 432 (5th Cir. 2000); see also *Alsenz v. Alsenz*, 101 S.W.3d 648, 653 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); John A. Thomas, *Who Owns the Invention?*, 62 TEX. B.J. 996, 1002 (1999).

64. *Sheshtawy*, 150 S.W.3d at 779.

65. *Id.*

66. 137 S.W.3d 231 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

67. 975 S.W.2d 584 (Tex. 1998).

68. 228 S.W.2d 127 (Tex. 1960).

spouses entered into an agreement settling all their differences with respect to division of the community estate. In *Ginsburg*, the wife admitted in her deposition that through her presumably solely owned company she had made a fraudulent transfer of community funds to the corporate defendant for the purpose of hiding the property during the divorce proceeding. Unlike the facts in *Schlueter* but “strikingly similar”⁶⁹ to those in *Cohrs*, the husband and wife had later reached a mediated settlement of their differences and provided for an agreed division of the marital estate.⁷⁰ In *Ginsburg*, the trial court granted the transferee’s motion for summary judgment and the husband appealed. Though the property settlement agreement preserved the husband’s rights against the transferee just as the agreement in *Cohrs* had preserved the plaintiff’s rights against the transferee in that instance, the appellate court concluded in *Ginsburg* that as a matter of law the husband’s rights were foreclosed by the spouses’ settlement agreement which therefore amounted to an implied third party beneficiary contract though not so termed by the court.⁷¹ It is worthy of note that in the course of its opinion the court quoted the decision in *Cohrs* “that the fraud having herein been initiated and carried out mainly by the husband [in *Cohrs*] the wife must look primarily to him and his property to right the wrong.”⁷² In *Carnes v. Meador*,⁷³ the court also stated that a defrauded spouse should first seek recovery against the transferring spouse before proceeding against the transferee. But in *Ginsburg* further proceeding against the transferee was precluded by the agreement with the transferor-spouse, which as a matter of law precluded any claim against the transferee despite the independent claim for conversion against the transferee that was provided at common law.

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

A. MANAGEMENT AND LIABILITY

The principal issue before the bankruptcy court in *In re Chesnut*⁷⁴ was whether certain realty was part of the husband’s bankruptcy estate.⁷⁵ The property had been acquired by the wife without any apparent participation of her husband in the transaction. The deed to the property recited that it was conveyed as to the wife as her separate property and that she had given her note for at least some of the purchase money and title policy. In her husband’s Chapter 13 bankruptcy proceeding, in the course of the pending divorce, he nevertheless claimed a community property interest in the realty and gave notice of that assertion to the holder of the

69. *Ginsburg*, 137 S.W.3d at 237.

70. *Id.* at 234.

71. *Id.* at 237.

72. *Id.* at 236 (quoting *Cohrs*, 228 S.W.2d at 133).

73. 533 S.W.2d 365, 371 (Tex. Civ. App.—Dallas 1975, writ ref’d. n.r.e.).

74. 311 B.R. 446 (N.D. Tex. 2004).

75. See 11 U.S.C. § 541 (1994).

wife's note who had brought a proceeding against his wife to foreclose her delinquent note. The note-holder nevertheless pursued foreclosure on the assumption that the property was the wife's separate property, and the debtor-husband filed an adversary proceeding against the note-holder alleging a breach of the automatic stay by the note-holder's proceeding under the Bankruptcy Code.⁷⁶ The bankruptcy court thereupon sanctioned the note-holder. In his appeal to the district judge the note-holder asserted that the bankrupt had no interest in the property and that there was therefore no violation of the automatic stay. Although the federal judge suggested that the debtor-husband might have had a claim for "economic contribution,"⁷⁷ the opinion was devoid of any intimation of any right of reimbursement or suggestion of community discharge of any lien on the property.⁷⁸ Nor is there any apparent reference in the opinion to the possible use of community property solely or jointly managed by the husband to make any payment for the purchase of the land. Without any assertion of such an interest, there was no violation of the automatic stay because there was no interest of the debtor that was violated. In the court's view, mere failure to overcome the community presumption was not enough to trigger the automatic stay; that result could have been achieved only by a showing that the community property used to purchase the realty was solely or jointly managed by the husband.⁷⁹ The property in issue was seemingly subject to the sole management of the wife and not subject to liability for the husband's debts. But the awkward fact was that the property was not proved to be subject to the wife's sole management. The recital in the deed does not show that the property was her separate property. Nor was it stated that the seller had looked only to the wife's separate property for payment and the husband was apparently not a party to the transaction so that he would be estopped in denying the wife's separate title.⁸⁰ Nor was it asserted that the lender had looked solely to the wife's separate property for repayment of the loan to her. Even if the note had been a non-recourse note the truth of the recital was still in question.⁸¹

The property was, of course, presumptively community property if acquired during the marriage. The court seems to have assumed that the recital of the wife's separate ownership rebutted that presumption. Though such a recital scares away many such potential claimants such as the husband and his creditors, the recital is not controlling if the husband was not a party to the transaction and a separate source of the purchase

76. See 11 U.S.C. § 362(a) (1998).

77. *Chesnut*, 311 B.R. at 450.

78. The judge was evidently using the phrase as a reference to possible use of community property in making the purchase (a community ownership interest) rather than a term of art under section 3.403.

79. See 11 U.S.C. § 541(a) (1994).

80. See *Gleich v. Bongio*, 99 S.W.2d 881 (1937); *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1967).

81. See *Heidenheimer Bros. v. McKeen*, 63 Tex. 229 (1885).

money is not proved.⁸² If the husband is not so estopped to assert a claim, it may be shown that the recital is false in whole or in part.⁸³ Or he may show that even if the land is community property, it is actually subject to his joint management and thus subject to his debts.⁸⁴ But if the land is community property and can be shown to be subject to the wife's sole management, it is still subject to the husband's tortious liabilities.⁸⁵

The bankruptcy proceeding under Chapter 13 dealt with in *In re Powell*⁸⁶ was filed while the wife's divorce proceeding was underway. In her bankruptcy the wife found it advisable to hire special counsel prior to filing for bankruptcy, and it was in connection with approval of the attorney's fees (both before and after her filing) that the bankruptcy court dealt. The husband filed an objection to all the fees and expenses as an administrative (first priority) expense. Though the court disapproved some elements of the fees as claims,⁸⁷ it approved the amount of the fee (about \$200 an hour) as reasonable and allowed the claims for the pre-petition fees as a claim against the bankruptcy estate and the post-bankruptcy fees as administrative expense.⁸⁸

C. EXEMPT PROPERTY

1. Definition of a Homestead

In *Kendall Builders, Inc. v. Chessa*,⁸⁹ the Austin Court of Appeals considered the acquisition of a Texas homestead by a husband and wife and their large family who had previously made their home in California for several years. Transferred to Austin by his employer, the husband moved to Texas in 2000, and both spouses thereafter established their voting rights, acquired Texas driver's licenses, registered a car, and opened a joint checking account in Austin. They also bought a house, which they began to renovate for the family's occupancy. During much of the period of renovation the husband occupied the garage apartment on the property while most of his family remained in California. Several months after the work began, a dispute arose between the homeowner and the builder who filed a mechanic's and materialman's lien on the property for his work, though the lien filed was not one which would reach homestead property as the appellate court concluded. The court relied on the testimony of both the husband and the wife that their primary residence was in Austin, and the California authorities were left to recover the value, if

82. See *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1967).

83. See JOSEPH W. MCKNIGHT & WILLIAM J. REPPY, JR., TEXAS MATRIMONIAL PROPERTY LAW 80 n.3 (7th ed. 2003), where the authorities are set out and discussed.

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

85. *Id.* § 3.202(d).

86. 314 B.R. 567 (Bankr. N.D. Tex. 2004). Although the matter was ultimately converted to a Chapter 11 case, the court pointed out that court-authorization is not required for a bankrupt's hiring of special counsel in a Chapter 13 case, and the opinion of the court addresses all of the fee requests as in connection with Chapter 13 matters. *Id.* at 569.

87. *Id.* at 571-72.

88. *Id.* at 572.

89. 149 S.W.3d 796 (Tex. App.—Austin 2004, no pet.).

any, of their continuing enjoyment of their California homestead. The court held that the evidence was factually and legally sufficient to support the trial court's holding that the landowners established a homestead.

In *Snyder v. Zaylor*⁹⁰ a homeowner who conveyed her home by a warranty deed to her children nine months prior to her filing for bankruptcy. She continued to live there before and after her petition was filed. The question was whether she could maintain her homestead claim. In her petition she had claimed an "equitable interest" in the property as her homestead where she continued to live. That the property was the owner's homestead initially was not questioned – only the matter of continued occupancy. The trustee in bankruptcy brought suit against the grantee-children to set aside the transfer as a fraud on creditors. The children failed to respond and the trustee took a judgment against them by default. The bankruptcy court thereupon granted the trustee's motion for a turnover order against the children and denied the bankrupt's claim to a homestead in the property. The bankrupt appealed to the district judge, who found for the homestead claimant in reliance on the dubious authority of *In re Moody*.⁹¹ The district court held (1) that the claimant might challenge the proceeding against the children although she was not a party to the proceeding against them and (2) that the transfer was a sham and therefore void and without any effect as a basis for an assertion of abandonment. The trustee was therefore barred from contesting the homestead claim because of his initial failure to make a timely objection.⁹²

In *Cullers & Henry v. James*,⁹³ the Supreme Court of Texas held in 1886 that a moveable structure for a family's occupancy and not intended to adhere to a lessor's realty on which it is placed retains its character as personalty though used as a family's residence. In 1948 in *Gann v. Montgomery*,⁹⁴ the Fort Worth Court of Civil Appeals considered another form of livable personalty, a house trailer on the property of a family member and connected to utilities there. The court intimated that as long as the trailer was resting on land to which the owner had a right of occupancy, the trailer would be treated as exempt from seizure by the owner's creditor, but if the trailer were moved to a place where the owner had no interest, the property lost whatever exempt status it had acquired. In 1969 the Austin Court of Civil Appeals held in *Capitol Aggregates v. Walker*⁹⁵ that a modern mobile home moored in a space in a mobile-home-park rented by the owner would be exempt to the homeowner as long as the structure remained moored to the land to which the owner

90. 309 B.R. 272 (E.D. Tex. 2004).

91. *Id.* at 276 (citing *In re Moody*, 862 F.2d 1194 (5th Cir. 1989), *commented on in* Joseph W. McKnight, *Family Law: Husband and Wife*, 43 Sw. L.J. 1 at 21 (1989)).

92. 11 U.S.C. § 522(l) (2000) (within 30 days following the creditors' meeting under 11 U.S.C. § 341 (1994)).

93. 1 S.W. 314 (Tex. 1886).

94. 210 S.W.2d 255 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.).

95. 448 S.W.2d 830 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

thereby had an interest. In that instance, the court stated that a month to month tenancy was a sufficient interest in the land to support the owner's claim of exemption. *Capitol Aggregates* has since been accepted as giving a homestead right to the property when so moored but with the clear implication that if the mobile home is taken from its mooring, as for example when it is on the road, it is subject to a creditor's seizure for an unsecured debt.⁹⁶

In *In re Morris*⁹⁷ a bankrupt owner of a very luxurious four bedroom houseboat, where he made his residence when not staying with relatives ashore, claimed it as exempt property. After discussing *Cullers & Henry* at great length⁹⁸ but merely citing *Capitol Aggregates*, Judge Rodriquez of the San Antonio Division of the federal district court went on to discuss bankruptcy cases from Connecticut, North Dakota, Alabama, Kentucky and Florida.⁹⁹ In every one of the cases the boat was treated under local law as exempt property by the bankruptcy court. The court nevertheless denied the exempt character of the houseboat under Texas law. But if the houseboat was moored rightfully when the bankruptcy petition was filed, the houseboat would seem to be property exempt as a part of the leased or rented mooring.¹⁰⁰ It nevertheless follows from Texas law that if at any time a houseboat or yacht is cast from its moorings for a cruise on the water, during the duration of the cruise it is subject to seizure by a secured creditor. But such a seizure after filing of the petition can be stayed by the bankruptcy court.

2. Liens on Homestead Property

In 1992 prior to his marriage, the husband procured a loan secured by a lien on unimproved land. The lender-bank assigned the note to the defendant bank. The note was repaid in 1996 and the lien was released. The couple, however, married in 1998. During the following year the husband obtained a further loan from the defendant bank and the loan instrument was drawn as a renewal and extension of the earlier lien. The husband and wife joined in executing a deed of trust lien on their homestead to secure that loan. After the husband's death the widow in possession brought suit to invalidate the deed of trust. In sustaining the judgment of the trial court the Eastland Court of Appeals in *Chase Manhattan Mortgage Corporation v. Cook*¹⁰¹ held that the lien was void because a lien against a homestead cannot be created by a renewal of a

96. *Id.* at 832, 835.

97. 316 B.R. 246 (W.D. Tex. 2004).

98. *Id.* at 249-50.

99. *Id.* at 250-51.

100. It is also worthy of mention that a "boat" is listed among tools of trade in TEX. PROP. CODE ANN. § 42.002(a)(4) (Vernon 2000) and that the reference was meant to embody inclusion of a ferry boat in the prior statute. Hence if a houseboat is used as a tool of trade, it qualifies as exempt property even if unmoored in a rented space.

101. 141 S.W.3d 709 (Tex. App.—Eastland 2004, no pet.).

prior lien that has been dissolved of payment.¹⁰²

Holding proceeds of homestead property in the registry of a court is not the same as imposing a lien on that property but it may temporarily have that effect. In *In re Garza*,¹⁰³ the divorce court awarded the husband the community homestead and ordered him to pay his wife the value of her interest in the property. Each spouse was ordered to pay his or her own attorney's fees. At the husband's behest, the trial court provided further that if the wife's appeal to the characterization and division of property should be granted on appeal, the husband's appellate attorney's fees of \$25,000 would be paid out of the sum on deposit to pay for the wife's interest in the home.¹⁰⁴ The wife brought a suit for a writ of mandamus to vacate the court's order.

The appellate court to which the writ of mandamus was directed concluded that it was necessary to order the husband to deposit funds for the wife's payment into the court's registry. But considering the scope of the wife's appeal, the court concluded that the amount of the ultimate award to the wife (including the value of the homestead) could not be presently determined. Further, in light of the wife's assertion that she would need some of the impounded funds for her living expenses pending appeal and the court's fear that such funds might be exhausted if they were presently distributed to her and later recharacterized, the impounded funds could not then be effectively redivided.¹⁰⁵ The appellate court observed further that if the wife's appeal was unsuccessful, the husband's attorney's fees for the protection of the homestead property for which the husband was primarily responsible and the support of the minor children awarded to him might have to be paid from those funds.¹⁰⁶ The court was careful to point out, however, that the husband's attorney's fees should not be imposed *only* on the wife's share of the homestead and for that reason also they should be held in the registry of the court.¹⁰⁷

The facts underlying the dispute in *In re Jay*¹⁰⁸ related to situations existing prior to the amendment to the Article XVI, section 51 of the Texas Constitution in late 1999.¹⁰⁹ That amendment provided that a busi-

102. *Id.* at 714 (citing *Southland Life Inc. Co. v. Barrett*, 172 S.W.2d 997, 1000 (Tex. Civ. App.—Fort Worth 1943, writ ref'd w.o.m.)).

103. 153 S.W.3d 97 (Tex. App.—San Antonio 2004, no pet.).

104. *Id.* at 100.

105. *Id.* at 100-01.

106. *Id.* at 101.

107. *Id.* at 102-03.

108. 308 B.R. 251 (Bankr. N.D. Tex. 2003).

109. The proposed constitutional amendment cited here was initially presented by S.J.R. No. 22 at the regular legislative session of 1999 for the voter's consideration on November 2, 1999. Pursuant to provisions set forth in Article XVII, § I of the Texas Constitution then and thereafter in effect, such amendments do not become effective until the election returns show that "a majority of the votes cast have been in favor of the amendment." S.J.R. No. 22 did not prescribe an effective date for the adoption of the amendment, but Tex. Gen. Laws ch. 1510, § 7(a), enacting statutes implementing the amendment when adopted, gave January 1, 2000 as the effective date of the amendment to Tex. Prop. Code Ann. § 41.002 if the amendment "is approved by the voters." At the very latest, constitutional amendments are considered duly effective when the current Governor can-

ness homestead must be contiguous to the residential homestead of the claimant. In this instance the homeowners also owned a .85 acre tract of land nearby but not contiguous to the tract where their home was located. Their business building was located on the .85 acre tract. The location of the residential homestead was not mentioned but it was clearly in the same urban community as non-contiguous business premises and both pieces of realty together must have amounted to about one acre. Prior to the adoption of the 1999 constitutional amendment, that business tract was claimed as the debtor's business homestead, which they sought to renovate. In November, 1999 the landowners (later Chapter 13 debtors) negotiated with a lender to finance improvement of the property on which the owner had never lived but maintained a business there. The lender agreed to build the new facility and lease it to the landowners-borrowers. The first written instrument between them was the lease agreement of December 15, 1999 giving the borrower's a lease for a term of twenty years beginning on April 1, 2000. The lender had told the landowners that conveyance the business tract was necessary to the transaction but the landowners' conveyance of the realty to the lender-builder (later a Chapter 11 debtor in Oklahoma) as security for the loan did not occur until January 15, 2000. As a result of the borrower's failure to make payments on the loan, a justice court awarded possession of the business tract to the builder. The borrowers filed a Chapter 13 petition. The lender then filed his Chapter 11 proceeding in Oklahoma in which the couple filed a claim as unsecured creditors. The couple did not, however, file any objection to confirmation of the lender's plan and it was confirmed in 2003.

In their Chapter 13 proceeding the debtors claimed the business tract as their homestead which they asserted had been transferred to the lender as a mere pretended sale. The basis of the homestead claim to the business tract was the language of section 51 prior to the 1999 amendment at which time it was not required that the home and business premises had to be contiguous. The borrower-claimant argued that the date of the transaction with the lender occurred on December 15, 1999 whereas the lender placed the transaction at the date of conveyance in mid-January, 2000. The court held that the title to property dated from the execution and delivery of the deed but subject to the relation-back doctrine.¹¹⁰ It had been said in *Cain v. Texas* in 1994 that the relation-back doctrine "enables the court to arrive at conclusions that will effectuate justice while maintaining simultaneously the appearance of logical consistency."¹¹¹ The doctrine is applied to many sorts of real property transactions,¹¹² and the court interpreted this contract of sale as relating back to

vasses the document containing the proposed changes (usually three calendar weeks after the date of the vote).

110. *Jay*, 308 B.R. at 265 (citing *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974)).

111. *Id.* (quoting *Cain v. Texas*, 882 S.W.2d 515, 518 (Tex. App.—Austin 1994, no writ)).

112. *Id.*

a time prior to delivery of the deed.¹¹³ In this instance, the landowners and the lender had reached their agreement for the transfer well before the deed was executed and delivered.¹¹⁴ Negotiations between them must have preceded the December 15, 1999 date when they entered into a retail-store-lease of the premises.¹¹⁵ The need for the conveyance of mid-January, 2000 was to provide title to the lender so that the lender might lease the facilities back to the debtors as part of the transaction to which they had already agreed. Thus from the borrower's position the property transferred was the debtors' business homestead when they effectively negotiated to transfer it and the transfer thus related back to a time before the effective date of the constitutional amendment and thus the borrowers would prevail. In comments on the court's construction of the amendment the court seemed to say that under the amendment the homestead claimant must live *on* the tract where the business premises are located. An interpretation more consistent with the present language of section 51 is that the place of business is located on a tract merely *contiguous to* that where the home is located.¹¹⁶

It was argued by the debtors that the constitutional amendment did not have real effect until its statutory implementation by Property Code section 41.002(a)¹¹⁷ of which the effective date was January 1, 2000.¹¹⁸ The court rejected that argument in that the constitutional amendment was self-executing.¹¹⁹ The court's conclusion was that the constitutional amendment was effective as of December 15, 1999,¹²⁰ but the nature of the homestead claim already established was not affected.¹²¹ Section 41.002(a) provides that the new definition of a business homestead applies to all homesteads in the state whenever created. As of December 15, 1999, the old definition continued to apply, hence on January 1, 2000 when the statute became effective the tract had already become a homestead.¹²² The overt acts of using the property for their business activities demonstrated its business homestead character and its need for that pur-

113. *Id.* at 265-66.

114. *Id.* at 266-67.

115. *Jay*, 308 B.R. at 269.

116. *Id.* at 274.

117. TEX. PROP. CODE ANN. § 41.002(a) (Vernon 2002).

118. The prior language of section 51 stated: "If used for the purpose of an urban home or as a place to exercise a calling or business, the [urban] homestead . . . shall consist of not more than one acre." That provision makes it clear that the urban and residential homesteads were not generally expected to be on adjacent tracts at that time.

119. *Jay*, 308 B.R. at 272-73.

120. *Id.* at 274.

121. See *Valley Bank of Nevada v. Skeen*, 401 F. Supp. 139 (N.D. Tex. 1975), *aff'd*, 532 F.2d 185 (5th Cir. 1976); *In re John Taylor Co.*, 935 F.2d 75, 78 (5th Cir. 1991). But see *Dallas Power & Light Co. v. Loomis*, 672 S.W.2d 309, 310 (Tex. App.—Dallas 1984, writ *ref'd n.r.e.*), discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, 39 Sw. L. J. 1, 17-18 (1985). But a constitutional provision may actually provide for its retrospective effect. *In re Starns*, 52 B.R. 405, 413 (S.D. Tex. 1985), discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, 40 Sw. L.J. 1, 17-18 (1986).

122. *Jay*, 308 B.R. at 276-77.

pose.¹²³ It was therefore unnecessary that a particular intent on the part of the owners in that respect to be independently demonstrated.¹²⁴

The terms by which the debtors transfer their homestead property to lenders are interpreted in light of Property Code section 41.006,¹²⁵ which provides that a purported sale of a homestead is void if the purchase price is less than the fair market price and the seller takes a lease from the buyer for lease payments that exceed the fair rental value of the property as payment for a loan. Such a transaction is therefore treated as a loan, and all payments made in excess of a fair sale price are to be returned to the transferor along with interest in favor of the transferor.¹²⁶ The taking of such a deed is also considered a deceptive trade practice. Hence the sale is void, and no lien attaches to the homestead.¹²⁷ In response to the lender's argument in *Jay* that the debtors failed to prove all relevant facts, the court responded that section 41.006 does not provide an exclusive remedy in such cases. "Texas courts employ equity to look past the literal language of a deed to ascertain the true intention of the parties . . . to . . . be a mortgage."¹²⁸ The Property Code thus supplies a statutory remedy in addition to that at common law.¹²⁹ The intent of the parties is of particular importance in construing such a transaction as an actual sale or a pretended sale and the testimony of the parties is therefore especially important.¹³⁰ The court reviewed the evidence and showed that the parties did not intend a genuine sale "but intended to disguise a constitutionally prohibited mortgage."¹³¹ What the owners had in fact agreed to as consideration "was not purchase money, but a construction loan, to be repaid over twenty years with the .85 acre tract serving as security."¹³² The court set aside the deed and lease of the business homestead property and denied the existence of any lien on the homestead property.¹³³ The court further pointed out that because the pretended sale was void, the business tract was not part of the builder's Chapter 11 estate and thus would not pass to the purported good-faith purchaser from the Chapter 11 trustee.¹³⁴ In this case, the purchaser had not offered evidence of his bona fides.¹³⁵

123. *Id.* at 277-78.

124. *Id.* at 279-80.

125. TEX. PROP. CODE ANN. § 41.006 (Vernon 2002).

126. *Id.* § 41.006(a).

127. *Id.* § 41.006(b).

128. *Jay*, 308 B.R. at 280 (citing *Johnson v. Cherry*, 726 S.W.2d 4 (Tex. 1987), which the provisions of § 41.006(b) enacted in 1987, seem to codify); see Phillip D. Weller, *Real Property*, 42 Sw. L.J. 295, 310 (1988).

129. *Jay*, 308 B.R. at 281-82 (citing *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000)); *Coppedge v. Colonial Sav. & Loan Ass'n*, 721 S.W.2d 933, 938 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

130. *Jay*, 308 B.R. at 284-89.

131. *Id.* at 289.

132. *Id.* at 290.

133. *Id.* at 291.

134. The court anticipated a damages hearing to determine the builder's claim.

135. *Jay*, 308 B.R. at 291.

It is striking that the same lender was twice a party to appellate litigation involving the same sort of question within a very short period of time. In the first of these cases, *Doody v. Ameriquest Mortgage Co.*,¹³⁶ the Supreme Court of Texas reviewed the constitutional requirements of a validly secured home-equity loan and concluded that the loan must not only be made without personal recourse against the borrower-owner but also that the loan must meet further requirements enumerated in the Texas Constitution¹³⁷ or else the loan is void and the lender is without recourse. But once the lender's failure to include those protections for the borrower is realized, the lender is allowed to cure those omissions.

Doody came to the Texas Supreme Court by a certified question from the Fifth Circuit Court of Appeals. The court held that a violation of the rules for a home-equity loan under section 50(a)(6)(E) (overcharge of fees) did not invalidate the lender's lien if the overcharge was refunded when revealed.¹³⁸ Compliance with the curative provision of the section 50(a)(6)(Q)(x) saves the validity of the loan and its lien.¹³⁹ The court rejected the argument that reliance on the "cure mechanism" might cause lenders to disregard the protection of homeowner-borrowers given by the Constitution by saying that "a lender's unlawful business activities may subject it to liability under federal and state laws. . . ." Moreover, as the *Doody* case explains, a lender has little business incentive not to comply with the lender-requirements, because the lender's business's success depends largely on customer's satisfaction and the lender's reputation in the community.¹⁴⁰

For a century and a quarter,¹⁴¹ the Texas Constitution allowed a homestead to be given *only* for securing purchase-money loans, repair and improvement loans, and state taxes on the property.¹⁴² In response to persistent demands of lenders to expand their loan revenues, a constitutional amendment was approved in 1997 to allow home-equity loans for any purpose, but with some protection for homeowners. After *Doody* revealed shortcomings of the constitutional provisions, new provisions to "clarify" the Constitution were proposed and adopted in the further interest of lenders in 2003.

The facts underlying the dispute in the second case, *Adams v. Ameriquest Mortgage Co. (In re Adams)*,¹⁴³ arose while the amendment of 2003 was being prepared. In the purchase of their home in 1996, the homeowners gave a purchase money lien for that part of the purchase money

136. 49 S.W.3d 342 (Tex. 2001).

137. TEX. CONST. art. XVI, § 50(a)(6)(c).

138. *Doody*, 49 S.W.3d at 342-43.

139. *Id.* at 345-46.

140. *Id.* at 346-47.

141. See Joseph W. McKnight, *Family Law: Husband and Wife*, 51 SMU. L. REV. 1047, 1065 (1998).

142. The liability of Texas homesteads and other property exempt from creditors' claims under state law had, of course, been subject to federal taxation under the United States Constitution.

143. 307 B.R. 549 (Bankr. N.D. Tex. 2004).

owed. In 2000, after compliance of the requisites for a home-equity loan, the owners refinanced the loan and also acquired additional funds. In 2002, the couple refinanced their 2000 loan with a different lender, recently engaged in the *Doody* litigation. The new loan was not handled as a home-equity loan but simply as a refinancing of a purchase money note and lien, and the loan documents specifically stated that the loan was *not* an extension of credit as defined by section 50(a)(6), which contains the provisions a loan must meet to be characterized as a home-equity loan. If the lien is invalid, the homestead loan is unsecured.¹⁴⁴ Section 50(f) provides that a refinancing of a loan secured by a homestead must meet the requirements of section 50(a)(6). After the filing of the debtors' motion for relief against the lenders in their bankruptcy proceedings, the lender sent the borrowers a letter seeking to cure the defects of its loan because a valid refinancing of a home-equity loan must meet the home-equity-loan standards. Though in this instance the mortgage specifically provided that "the note is not an extension of credit under sections 50(a)(6) . . . article XVI, section 50 of the Texas Constitution,"¹⁴⁵ enumerated in sections 50(a)(6)(A)-(Q).¹⁴⁶ The objective was to ensure the validity of its lien. The bankrupt debtors filed an adversary proceeding in the bankruptcy court against the creditor denying the validity of the loan, thus to deprive the creditor of his principal and interest and having to return any amount already paid on the note with interest.¹⁴⁷ The creditor sought to cure the defects of which the debtor complained.

After reviewing the holding of the Texas Supreme Court in *Doody*, the bankruptcy court pointed out that it was simply in the position of prophesying how the Texas court would treat the question before it in the light of *Doody*. The court thereupon rejected all arguments of the borrowers in favor of the lender.¹⁴⁸ In a case like *Adams*, the borrower should nevertheless rely on a United States Supreme Court case very familiar to Texas family lawyers, *Yiatchos v. Yiatchos*.¹⁴⁹ There the Court refused to follow an earlier Texas case before the Court¹⁵⁰ by saying that the constitutionally authorized congressional act relied on in the earlier case could not control the later result when used as an instrument of fraud.¹⁵¹

3. Personal Property Exemptions

Two cases in the bankruptcy courts dealt with federal personal property exemptions chosen under section 522(d)¹⁵² in lieu of state exemptions. In

144. *Id.* at 551.

145. TEX. CONST. art. XVI, § 50(a)(6).

146. *Id.* at § 50(a)(6)(A)-(Q).

147. *Adams*, 307 B.R. at 553 (citing *Thomison v. Long Bench Mortgage Co.*, 176 F. Supp. 2d 714, 718 (W.D. Tex. 2001), vacated by 2002 WL 32138252 (W.D. Tex. 2002)).

148. *Id.* at 557-60.

149. 376 U.S. 306 (1964).

150. *Free v. Bland*, 369 U.S. 663 (1962).

151. *Yiatchos*, 376 U.S. at 309.

152. 11 U.S.C. § 522(d) (2000).

both instances the husband and wife filed a joint petition in bankruptcy.

The spouses in *In re Bippert*¹⁵³ filed jointly for bankruptcy under Chapter 13 as provided in section 302 of the Bankruptcy Code.¹⁵⁴ They claimed a joint exemption¹⁵⁵ of \$30,000 as combined loss for the personal injury due to the wife—a sort of claim for which there is no exemption under Texas law, though the marital property character of such a loss is controlled by Texas law. The trustee took the position that the husband who was uninjured had no interest in the claim beyond \$17,425, the amount of community loss of the wife's earning power claimable at the time when the petition was filed under section 522(d)(11)(D).¹⁵⁶ The husband responded that both he and his wife were entitled to an interest in the whole amount of \$30,000 under section 522(d)(11)(D) "(1) as the debtor and (2) as an individual to whom the debtor is a dependent,"¹⁵⁷ thus constituting a "stacking of their claims."¹⁵⁸ The trustee's position was that the property must belong to the husband's estate in order for him to claim an exemption of it from his estate and that in this case only the wife could claim loss because she alone was injured. The debtors asserted in turn that unless the husband can make a claim in this instance the provisions of section 522(d)(1)(D) are superfluous. Judge Leif Clark concluded that as a general rule "property of the estate" under section 522(b) in a joint case means the combined property of each. Thus "[t]he filing of a joint petition [by spouses] does not result in the automatic substantive consolidation of the two debtors' estates."¹⁵⁹ Because the categories of property listed in section 522(d) must be within the debtors' estates under section 522(b),¹⁶⁰ the categories of section 522(d) "do not furnish the debtor an independent source of entitlements."¹⁶¹ Thus, the husband individually can claim only "that portion defined in section 522(b) as his property, in this instance his loss of consortium."¹⁶² The wife's estate is entitled to claim as *her* separate property recovery, in this instance, for pain and suffering and disfigurement, as the court put it.¹⁶³ Under section 541(a)(2)(A), each estate is also entitled to a property interest in the community category of recovery. But the wife's estate (that of the injured spouse here) is not to exceed \$17,425 under section 522(d)(11)(D), and that claim cannot include any amount recovered for

153. 311 B.R. 456 (Bankr. W.D. Tex. 2004).

154. See 11 U.S.C. § 302 (1978).

155. See 11 U.S.C. § 522(d)(11)(D) (2000).

156. *Id.*

157. *Bippert*, 311 B.R. at 461. "Dependent" under § 522(a)(1) includes a "spouse whether or not actually dependent." *Id.*

158. *Id.* The court pointed out that "doubling" more precisely expresses this duplicating of claims from a single incident rather than the common term "stacking" which before the Bankruptcy Code amendments of 1984 was used to refer to one spouse's choice of a state exemption and the other's choice of a federal exemption. *Id.* at 460 n.2.

159. *Id.* at 464 (quoting *Reider v. FDIC*, 31 F.3d 1102, 1109 (11th Cir. 1994)).

160. *Id.* at 465.

161. *Id.* at 466.

162. *Id.* at 466-68.

163. *Id.* at 468.

“actual pecuniary loss” that is compensation for community loss of earning power.¹⁶⁴ The husband’s estate’s exemption can include the same amount for the community loss. “This [entitlement] puts the selfsame community property that was in [the wife’s] estate into his estate as well (i.e., they overlap).”¹⁶⁵ The total of the husband’s estate’s exemption claim is subject to the same “dollar cap” as that of the wife’s estate.¹⁶⁶ The result is to allow “stacking” from the same source by each spouse’s estate.¹⁶⁷

In *In re Comeaux*,¹⁶⁸ a bankruptcy court dealt with another aspect of federal personal property exemptions. The debtors claimed exemptions for three unrelated *personal injury* claims of uncertain amounts for loss of future personal earnings and their trustee asserted their entitlement to a single claim for an aggregate *monetary cap* amount of \$17,425. Despite the ambiguous language of the Bankruptcy Code,¹⁶⁹ the court concluded that “a payment on . . . account of personal bodily injury” refers to any payment that may be received, and the couple could therefore assert all three claims for injury as exempt from their bankruptcy estates.¹⁷⁰

In a decree of divorce the wife in *Jones v. American Airlines, Inc.*¹⁷¹ was awarded a part of her husband’s pension fund, and a QDRO was sent to his employer’s pension trust which evidently mistakenly overpaid the ex-wife. The ex-wife then deposited the funds into her individual retirement account which she claimed as exempt property under section 42.0021 of the Property Code.¹⁷² The ex-husband then sued in federal court for the mistaken payment of his interest and received a judgment against the trust and his former wife,¹⁷³ but the federal court declined to proceed in the ex-husband’s efforts for collection. The pension trust paid the ex-husband for its mistake and sought a turnover order from a state court for the overpayment from the ex-wife. The ex-wife asserted that the pension trust sought funds that were exempt as a pension interest or its proceeds. The Fort Worth Court of Appeals affirmed the trial court’s turnover order against the ex-wife. The ex-wife was not allowed to protect funds that were not rightfully hers¹⁷⁴ by placing them in a protected account. Thus the court adopted the same conclusion already reached in

164. *Id.* at 469 (citing 11 U.S.C. § 522(d)(11)(E) (2000)). But that section “may” nevertheless allow an exemption for loss of future earnings if that exemption has not already been used. *Id.* at 469 n.23.

165. *Id.* at 470.

166. *Id.* at 471.

167. *Id.* at 471-72. The court furnishes an explanatory hypothetical example at 472-73.

168. 305 B.R. 802 (Bankr. E.D. Tex. 2003).

169. *Id.* at 806.

170. *Id.* at 806-07.

171. 131 S.W.3d 261 (Tex. App.—Fort Worth 2004, no pet.).

172. See TEX. PROP. CODE ANN. § 42.0021 (Vernon 1998).

173. The federal court said casually that the pension fund was entitled to “equitable reimbursement.” What it meant was that money wrongfully received was subject to recovery.

174. *Jones*, 131 S.W.3d at 270.

similar situations involving a homestead exemption asserted as a fraud.¹⁷⁵

IV. DIVISION OF MARITAL PROPERTY ON DIVORCE

A. PROCEEDINGS FOR DIVORCE

1. Jurisdiction

A recital of jurisdiction and venue in the respondent counter-petitioner's pleading was said in *Barnard v. Barnard*¹⁷⁶ to be a sufficient admission of those facts to dispose of his argument that the court may have lacked jurisdiction and venue. Though jurisdiction cannot be established by consent, there was no real question in that case that the petitioner had properly alleged jurisdiction by commencing her suit for divorce in the county of her domicile, and as for venue she alleged that the county was her residence for the time required. The respondent's allegation of his domicile and residence in the same county and the parties' proceeding on that basis had put the marital res before the court. The husband's real complaint was that both had failed to offer evidence in support of their allegations of jurisdiction.¹⁷⁷ In responding to this argument, the Fort Worth Court of Appeals concluded that the trial court's satisfaction with the allegations and conduct of the parties was a sufficient proof of jurisdiction.

The jurisdictional frame of the trial for divorce is defined by section 6.301(1).¹⁷⁸ The point to which jurisdiction extends is marked by Rule 329b:¹⁷⁹ for thirty days after granting the divorce the court may act on a petition by either party or on its own motion to vary the decree. After that time the court loses its power to act unless the case is remanded by a higher court. In *Johnson v. Ventling*,¹⁸⁰ a divorce court unsuccessfully purported to vacate a 1995 divorce in 2001. After cohabitating together for thirteen years (since 1982) the couple apparently decided to conclude their relationship. The man was advised, or understood that he was advised, that the relationship was an informal marriage and that the only means available for its termination was a divorce. The childless couple negotiated a settlement agreement to divide the property accumulated by them and their liabilities and agreed that contractual alimony would be paid to the woman. These terms were expressed in the decree of divorce which was signed by the parties and entered by the court in early 1995. Over the years thereafter, the parties continued to dispute their rights

175. Ill-gotten funds cannot be sheltered from seizure by investment in homestead property. See *Branson v. Standard Hardware, Inc.*, 874 S.W.2d 919 (Tex. App.—Fort Worth 1994, no writ); *Pace v. McEwen*, 617 S.W.2d 816 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Baucum v. Texam Oil Corp.*, 423 S.W.2d 434 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.). But see *Curtis Sharp Custom Homes, Inc. v. Glover*, 701 S.W.2d 24 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

176. 133 S.W.3d 782 (Tex. App.—Fort Worth 2004, no pet.).

177. *Id.* at 785.

178. TEX. FAM. CODE ANN. § 6.301(1) (Vernon 1998).

179. TEX. R. CIV. P. 329b.

180. 132 S.W.3d 173 (Tex. App.—Corpus Christi 2004, no pet.).

and brought motions before the court for enforcement – as they had in late 1995, again in late 1997, when the man sought to vacate the decree on the ground that the parties had never been married, and yet again in 1999. The earliest dispute was reconciled and in later ones the court denied relief. In late 2000, the woman again asserted her rights under the decree, and finally in mid-2001 the court concluded that the decree of 1995 was merely interlocutory and granted the man's non-suit in the proceeding commenced seven years before. The woman asserted in her appeal from that decree that the trial court's jurisdiction had long since expired under Rule 329b.¹⁸¹ The Corpus Christi appellate court concluded that a final order had indeed been entered in the matter in 1995 and not having been directly attacked was not subject to later collateral attack.¹⁸² The trial court was thus without jurisdiction to vacate the 1995 judgment in 2001.¹⁸³

2. *Proceeding in forma pauperis*

In *Boulden v. Boulden*,¹⁸⁴ the petitioner was a prisoner, and his petition of indigence (in compliance with Rule 45¹⁸⁵) was in the form of a self-sworn affidavit allowed for a prisoner.¹⁸⁶ The clerk, however, overlooked issuance of notice to the respondent, who might have contested the plea of indigence, though it is unlikely that the respondent would have had that concern for the county treasury.¹⁸⁷ The only record of process in the case was a subsequent letter by the clerk to the petitioning prisoner that the case would be dismissed for want of prosecution unless good cause was shown to maintain the case on the docket.¹⁸⁸ Having been instructed by the clerk's notice that a reply in writing or by telephone would be an unacceptable response, the petitioner filed a bench warrant to make a personal appearance at the hearing or to participate in the hearing through a conference call by telephone. He also sought appointment of an attorney ad litem and filed a motion for leave to appeal *in forma pauperis*. No action seems to have been taken by the trial court in response to these requests,¹⁸⁹ though it has been suggested that a court might utilize telephone contact and that a statute specifically authorizing

181. *Id.* at 177-78.

182. *Id.* at 178-79.

183. The court wound up its opinion with a mild rebuke to the parties for "playing fast and loose" with the courts to suit their own purposes, *id.* at 179, and went on to supply a brief history of the legal usage of that phrase back to a 1949 decision of the Superior Court of New Jersey in *Stretch v. Watson*, 69 A.2d 596, 603 (N.J. 1949), *rev'd in part on other grounds* (but without comment on the phrase) 5 N.J. 268, 74 A.2d 597 (N.J. 1950).

184. 133 S.W.3d 884 (Tex. App.—Dallas 2004, no pet.).

185. TEX. R. CIV. P. 145(1).

186. TEX. CIV. PRAC. & REM. CODE ANN. §§ 132.001-.003 (Vernon 2002).

187. TEX. R. CIV. P. 145(1). Filing fees are deposited in the county treasury. In earlier times, an Assistant District Attorney appeared as a matter of course in Dallas County to object to all paupers' oaths of indigency, but that concern of county government has long since passed, and the matter is simply left to the judge to whom the oath is presented.

188. TEX. R. CIV. P. 165a.

189. *Boulden*, 133 S.W.3d at 885.

that sort of procedure should be enacted.¹⁹⁰ Though in this matter, the Dallas Court of Appeals had already issued an order that the district clerk should supplement the record with the petitioner's affidavit of indigence, the record contained no reference to a contest of the affidavit for appellate costs or any action taken by the court in response to the contest. Apart from issuing the order as directed, nothing else was apparently done by the clerk in these regards. The Dallas Court of Appeals thereupon suspended the time limit for filing an affidavit of indigence¹⁹¹ and accepted the petitioner's motion for leave to appeal. In reliance on *In re Buster*,¹⁹² the appellate court concluded that the trial court should allow the prisoner to proceed "by affidavit, deposition, telephone or other effective means."¹⁹³ In effect, the appellate court rebuked the trial court for dismissing the matter for want of prosecution¹⁹⁴ but noted that "a trial court does not have an independent duty to identify and evaluate the relevant facts for determining whether to grant an inmate's pro se application for a bench warrant" to appear personally.¹⁹⁵

3. Notice of Trial

In *In re Rodriguez*,¹⁹⁶ the respondent husband was again a prisoner in the county jail. He had answered the wife's petition but her attorney was evidently remiss in giving him the full forty-five days required notice of trial. That oversight of a mandatory requirement demanded reversal.¹⁹⁷

4. Interim Attorney's Fees

In *In re Bielefeld*,¹⁹⁸ the ex-husband sought a writ of habeas corpus from a commitment to jail for failure to pay his former wife's interim attorney's fees. In their divorce proceeding, the husband and wife agreed to an order that the husband pay temporary spousal support, to make payments for various purposes, and to pay \$3,000 to the wife's attorney. The husband indicated that he might be able to borrow that sum from his business, which he claimed as separate property, or from his parents. The attorney then requested \$50,000 for additional fees and expenses that would be entailed for investigation of the separate character of the business. After two hearings the court entered an order that the husband comply with this request.¹⁹⁹ The order stated that it was based on "the needs of the applicant as weighed against the ability of the [husband] to

190. See Joseph W. M'Knight, *Family Law: Husband and Wife*, 57 SMU L. REV. 991, 1021 (2004).

191. TEX. R. CIV. P. 201.

192. 115 S.W.3d 141 (Tex. App.—Texarkana 2003, no pet.).

193. *Boulden*, 133 S.W.3d at 887.

194. *Id.*

195. *Id.* (citing *In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003)).

196. 149 S.W.3d 858 (Tex. App.—Amarillo 2004, no pet.).

197. *Id.* at 859-60.

198. 143 S.W.3d 924 (Tex. App.—Fort Worth 2004, no pet.).

199. *Id.* at 925.

pay.”²⁰⁰ Seven months later the attorney filed a motion for enforcement of the order and after a hearing the court held the contemnor in both civil and criminal contempt for failure to pay the ordered amount as “additional spouse support” and ordered him to jail for thirty days and until the ordered amount would be paid into the registry of the court.²⁰¹ The contemnor thereupon filed his petition for a writ of habeas corpus. After a divided panel of the appellate court denied the writ, the court sitting en banc granted the writ because the commitment order was at most for “conduct violating an implied or inferred order never reduced to writing”²⁰² nor had the written order for an advance for interim attorney’s fees specifically “characteriz[ed] those fees and expenses as spousal support.”²⁰³

5. *Temporary Order Pending Appeal*

In *In re Garza*,²⁰⁴ the husband was awarded the family home, and he was ordered to pay his wife community funds for her equity interest of almost \$74,000 in the property. The wife appealed the order, and both parties moved for temporary orders pending appeal. The court ordered the husband to make his payment into the registry of the court until completion of the appeal, but if the wife’s appeal should be unsuccessful he would be awarded appellate attorney’s fees of \$25,000 from that sum. In her appeal, the wife challenged that order by a writ of mandamus. The court held that ordering the husband to deposit his payment to the wife into the registry was appropriate for its safe-keeping.²⁰⁵ In that the wife testified that she had need for some of those funds for her support pending appeal, all the funds would not then be available for redivision in the event of the wife’s successful appeal.²⁰⁶ With respect to the payment of the husband’s attorney’s fees from the fund, however, the court held that the order in effect impermissibly encumbered the wife equity interest in the homestead with a lien for payment of the husband’s “contingent attorney’s fees.”²⁰⁷

B. DIVISION OF MARITAL PROPERTY ON DIVORCE

1. *Property Settlement Agreement*

In *Miller v. Ludeman*,²⁰⁸ the husband and wife decided to end their marriage and hired a lawyer to prepare a property settlement for them to

200. *Id.*

201. *Id.* at 926-27.

202. *Id.* at 931.

203. *Id.*

204. 153 S.W.3d 97 (Tex. App.—San Antonio 2004, no pet.).

205. *Id.* at 100.

206. *Id.*

207. *Id.* at 102-03. The court also held that it lacked authority to issue an injunction or prohibition to protect all the property pending appeal as those powers could only be exercised to enforce the court’s jurisdiction. *Id.* at 103.

208. 150 S.W.3d 592 (Tex. App.—Austin 2004, no pet.).

divide their accumulated community property as they had agreed. The agreement was signed by both parties. The husband's wish to renegotiate the settlement was denied by the wife, and the husband said that he would leave that matter to the court. In their continuing discussions the wife told her husband that on the basis of what her attorney told her about community property rules she had drawn up a list of property that should be her share and the couple then drafted and executed a substitute-property-settlement-agreement on the basis of which the divorce court divided the property and ordered the husband to pay the wife \$52,000. After entry of the decree, however, the ex-husband did not pay the sum ordered, and the ex-wife brought suit for the ordered anticipated payment. The ex-husband countered with a bill of review based on allegations of the ex-wife's extrinsic fraud. The attorney denied speaking to either party about division of the property or the definition of community property. The trial court granted summary judgment to the ex-wife and denied the bill of review. In affirming these conclusions, the Austin Court of Appeals pointed out that at the time they negotiated the couple no longer owed any fiduciary duty to each other and that even if there had been such a duty the husband failed to investigate his wife's equivocal statements concerning marital property law and to make a contrary assertion of his rights.²⁰⁹

2. *Making the Division*

It is a responsibility of parties to a divorce, with assistance of their lawyers, to inform the court of facts relating to the character of property as separate or community. In *Barnard v. Barnard*,²¹⁰ the parties each presented an inventory of property claimed as appropriate to be divided in his or her favor. The trial court evidently expected more information or argument from the parties after receipt of the husband's draft decree but got none. The court, nevertheless, failed to identify the separate property of each party. As to the community property, the commercial rental property was divided by a ratio of 55/45 and the rest 60/40 in favor of the wife, who had been the victim of some familial violence.²¹¹ The court also granted her a protective order. But the record gave no suggestion of any other evidence adduced to support a reasonable basis for the division of the community property. The trial court's judgment as to the property division was reversed and remanded for a new division.

In a somewhat similar case with a more complete trial record, the majority of the Waco appellate court reached much the same result in *Smith v. Smith*.²¹² In this instance, the division was disproportionate in favor of the husband who was awarded custody of the couple's three minor children, and the divorce court heard evidence that the wife's acts destroyed

209. *Id.* at 597.

210. 133 S.W.3d 782 (Tex. App.—Fort Worth 2004, no pet.).

211. *Id.* at 785.

212. 143 S.W.3d 206 (Tex. App.—Waco 2004, no pet.).

the marriage. The husband was awarded all of the community property except for \$6,000 awarded to the wife, and she was ordered to pay some support for the children. The husband offered proof of the separate property awarded to him but the wife offered no evidence of her separate property and none was set aside to her. All of these properties were of modest value. The equity in the family home awarded to the husband was appraised at \$47,800 with a \$27,000 mortgage still owed.²¹³ With respect to debts, the court allocated to the wife three charge-account debts of unspecified amount held in her name, the indebtedness on her automobile, and the rest to the husband. The husband was not in particularly good health but earned a better salary than the wife who was able to work at a lower wage and suffered from a back injury. The majority of the court found that the disproportionate division of the community estate was without a reasonable basis.²¹⁴ Chief Justice Gray strongly disagreed with this analysis of the divorce court's exercise of its good judgment. "When the parties do not have much, the fact that one spouse does not get much is not an abuse of discretion."²¹⁵ By the Chief Justice's computation, the husband got ninety-one percent of the net assets but this division resulted in his getting just short of \$10,000 more than the wife. As to the debts, eighty-eight percent were allocated to the husband and twelve percent to the wife. "Just because the majority would have divided the community estate differently does not establish an abuse of discretion by the trial court."²¹⁶ The case was nevertheless reversed and remanded for a redivision of the community estate.

In the divorce court's division of property in *Naguib v. Naguib*,²¹⁷ the wife was awarded fifty-five percent of the present value of the Canadian pension plans of both spouses. The division of the rest of the property was apparently equal. The wife appealed. Her complaint concerning the division of her pension-plan-interest was based on a basic misconception of the way that such interests are divided on divorce. Because she had not reached retirement age and was not at the time employed in Canada, she anticipated that she might return to Canada and be reemployed by the same company. She imagined that a part of future possible additions to her pension interest had already been divided in favor of her husband. For the purpose of the division, both plans were valued at the date of divorce and only that value was divided.²¹⁸ In rejecting her argument, the Dallas appellate court pointed out that "the fact that the value of the pension plan could increase in the future is not the same as the trial court[s] miscalculating the value of the pension plan."²¹⁹ The division

213. *Id.* at 212.

214. *Id.* at 214.

215. *Id.* at 218-19.

216. *Id.* at 219.

217. 137 S.W.3d 367 (Tex. App.—Dallas 2004, no pet.).

218. *Id.* at 374-76. The court supplied the formula for the calculation. *Id.* at 375 n.3.

219. *Id.* at 376.

had in fact been made on the basis of the valuation offered by the wife.²²⁰ Further, the wife's mere showing of dissatisfaction with the division did not demonstrate its unfairness.²²¹

In some respects the problem of the future income of the husband in *Loaiza v. Loaiza*²²² was similar to the possible future income of the wife in *Naguib*. In *Loaiza*, the baseball-player-husband and his wife had married in 1998 though he had already become enamored of another woman prior to the wedding. During the marriage, the husband's affair with the other woman accelerated and in March of 2001 their child was born. By that time the husband had brought suit for divorce and the couple had separated. In early 2001, the husband had also entered into a contract with a baseball club for compensation of \$4,000,000 in 2001, \$5,000,000 in 2002, and certain miscellaneous benefits including a signing bonus of \$500,000. During this time and later the husband made generous gifts (a car for his mother and a gift of a Rolex watch to each of his teammates), partial payment on a house for him and his wife, a car for himself, expenses for care of the baby, and payment for a home for the baby's mother. All these expenditures amounted to well over three quarters of a million dollars. The divorce court awarded the wife almost eighty percent of the community estate apparently including that share of the community right of reimbursement for the husband's expenditures. In response to the husband's complaint as to the division, oddly there was very little discussion of the reasonableness of any of the payments for the benefit of those other than his wife²²³ in light of his very large income.²²⁴ Only the expenditures in favor of his paramour received the attention of the appellate court.²²⁵ The divorce court divided the wages under the contract before they were due, sixty percent to the husband and forty percent to the wife. This conclusion of the divorce court is apparently explained by the trial court's assumption that past as well as future payments under the contract belonged to the community estate. In response to the husband's appeal, the appellate court also considered the husband's claim to an award of his post-divorce earnings as the 2002 baseball season was not completed at the time of the divorce. The court considered the terms of his contract, and noting the provision that he was required to perform all services before payment the court awarded him those payments of post-divorce earning.²²⁶

*Kent v. Holmes*²²⁷ involved a dispute arising out of a divorce in that the court awarded all interest in the wife's retirement benefits to her though

220. *Id.* at 378.

221. *Id.* at 379.

222. 130 S.W.3d 894 (Tex. App.—Fort Worth 2004, no pet.).

223. The matter is alluded to only in relation to the size of the remaining community estate.*Id.* 900-02.

224. See *Horlock v. Horlock*, 533 S.W.2d 52, 55-56 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ *dism'd*).

225. *Loaiza*, 130 S.W.3d at 901-02.

226. *Id.* at 904-09.

227. 139 S.W.3d 120 (Tex. App.—Texarkana 2004, no pet.).

the husband remained as designed beneficiary of optional annuity benefits under the wife's Texas Teacher Retirement System's retirement plan.²²⁸ Prior to the divorce the wife designated her son and his wife as beneficiaries of a lump sum payment from her retirement account at her death, but she was informed by the trustee of the account that her husband could not be removed as a beneficiary of the optional annuity without his consent or a judicial order. When the couple divorced in 1999, the wife had already retired as a teacher. In the divorce decree both parties were directed to execute all documents necessary to carry out the court's decree. The trustee of the pension fund again informed the ex-wife that the decree of divorce did not change the beneficiary-designation of the annuity and that a new designation in writing was required. The ex-wife failed to execute the instrument requested, but a short time before her death she designated her son and his wife as the residuary beneficiaries under her will, which designation she may have thought would suffice as a beneficiary designation for the annuity. After her death, her son and his wife received a lump sum payment to which they were entitled under the 1998 designation, but the ex-husband began to receive the annuity benefits. The testamentary beneficiaries sued the ex-husband for the annuity benefits and the attempted designates of the ex-wife appealed. The trial court held that the beneficiary of the ex-wife's plan-account had been left unaltered. The appellate court instructed the trial court to impose a constructive trust on the annuity funds in favor of the son and his wife if it were determined that after the divorce the ex-wife had not intended that the ex-husband would have the annuity benefits after her death.²²⁹ Leaving such a matter to a general finding of intent under the facts of this case amounted to treating the trial court's order that the parties should execute all documents to carry out the court's decree as having the equitable affect of the husband's compliance with the order thus revoking the designation of the husband as taker of the annuity.

In *Wilson v. Wilson*,²³⁰ the husband, who had been properly served with process, neither answered nor appeared at the trial. The wife was the only witness and her testimony was very sparse and inconsistent. The record was consequentially very thin as to the extent and value of the community estate. Having failed to file a motion for a new trial, the husband took a restricted appeal for review of the evidence as sufficient to support the judgment which included a money judgment of \$275,000 against the husband in favor of the wife. This award was apparently to equalize shares in the division of the community property though it was made without any proof of the extent of the community estate apart from the wife's factually unsupported estimate of its value as \$1,200,000. In short the appellate court found that there was insufficient evidence to

228. For another discussion of Teacher Retirement System benefits see *In re Jones*, 154 S.W.3d 225 (Tex. App.—Texarkana 2005, no pet. h.).

229. *Kent*, 139 S.W.3d at 133.

230. 132 S.W.3d 533 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

support the division of the estate.²³¹ In reviewing the judgment, the appellate court relied principally on the provision of section 6.701 that a petition is not taken as confessed if the respondent fails to answer.²³² An appraised inventory of the community estate should have gone some distance toward avoiding the success of this appeal.

*Freeman v. Freeman*²³³ illustrates the outcome of a very protracted divorce of the wife from her airman husband. The suit for divorce was filed in the latter part of 1998. The trial on division of property was held two years later, and the final decree was not signed until late 2002. The wife was awarded almost one-half of the husband's Air Force disposable retired pay as well as all subsequent increases to it, and the wife was to be survivor-beneficiary of the husband's military benefits on his death as the couple had agreed. On the husband's appeal, the decree was affirmed as to these elements. As to the divorce court's order that the husband was prohibited from converting his military benefits to any other form of veterans' benefits, the trial court's judgment was reversed as beyond the power of the court either under Texas or federal law.²³⁴

In her appeal from the trial court's summary judgment in response to her ex-husband's defense to her bill of review in *Nelson v. Williams*,²³⁵ the ex-wife complained that the court granted her lawyer-ex-husband's motion without allowing her relevant discovery as well as other matters with respect to the decree based on a property settlement agreement. The appellate court concluded that all the claims of the ex-wife concerned the value of the community estate prior to division and that her complaint could have been satisfied at the trial for divorce and were therefore *res judicata* to the bill of review.²³⁶ As to her points concerning discovery, the Waco appellate court ruled that they were not relevant to the fundamental issues of the ex-wife's complaint.²³⁷ The court was satisfied that the evidence conclusively established that the ex-wife failed to exercise due diligence in the trial for divorce.²³⁸ Chief Justice Gray delivered a strongly worded dissent. In his view the case fell entirely within the holding in *Rathmell v. Morrison*,²³⁹ which would have been a controlling precedent had the case not been heard on appeal under a docket equalization order, and thus that controlling precedent should apply.²⁴⁰ The Chief Justice also observed that in order for her to show that a just and right division of community property had not been achieved, the ex-wife

231. *Id.* at 538.

232. *Id.*

233. 133 S.W.3d 277 (Tex. App.—San Antonio 2003, no pet.).

234. *Id.* at 280.

235. 135 S.W.3d 202 (Tex. App.—Waco 2004, no pet.).

236. *Id.* at 206.

237. *Id.*

238. *Id.*

239. 732 S.W.2d 6 (Tex. App.—Houston [14th Dist.] 1987, no writ). Gray also cited two cases from the Waco court supporting the same conclusion. *Nelson*, 135 S.W.3d at 207 (Gray, C.J. dissenting).

240. *Nelson*, 135 S.W.3d at 207.

needed the discovery which she had requested in order to show the full value of the community estate.²⁴¹

3. Attorney's Fees

It is well understood that an award of attorney's fees by a divorce court is an element in the division of property. In *In re Alsenz*,²⁴² the Houston First District Court of Appeals reversed the trial court's order for divorce, remanded the case for further proceedings for redivision of the community estate and ordered release to the appellant-husband of his cash deposit in lieu of a supersedeas bond. The wife then sought a turnover order directing the husband that on receipt of the funds released to him, he would discharge the fees of her trial and appellate lawyers. Another district judge (other than the trial judge) signed the order. The husband promptly filed a writ of mandamus to the Houston First District Court of Appeals to stay the turnover order as no final judgment supporting the order had been entered. The writ was conditionally granted.²⁴³ The court held that the district judge should not have ordered that the funds be released on condition that the husband pay the wife's attorneys' fees and noted that the proper judge as respondent for the writ of mandamus was the judge who signed the order.²⁴⁴ In the course of its opinion, the appellate court also pointed out that filing a writ of mandamus was the proper course for the husband to follow in this instance rather than filing an appeal. If he had complied with the order to receive the refund of his deposit, he would have had no adequate remedy by appeal.²⁴⁵ The court reached the further conclusion that naming the attorneys as takers of the distribution was in itself improper because they were not named parties to the suit.²⁴⁶

C. CLARIFICATION AND ENFORCEMENT

The 1987 agreed judgment for divorce that was in dispute in *Cox v. Carter*²⁴⁷ provided that the wife should be paid one-half the benefits of any retirement plan to which the husband was entitled "calculated as of the date of the decree [of divorce]."²⁴⁸ Neither party appealed. In 1992, what the appellate court called a modification to the decree was made at the behest of the ex-wife in order to meet the husband's federal Civil Service Retirement Plan and thus "to meet the requirements for a 'quali-

241. *Id.*

242. 152 S.W.3d 617 (Tex. App.—Houston [1st Dist.] 2004, no pet.); see *Alsenz v. Alsenz*, 115 S.W.3d 648 (Tex. App.—Houston [1st Dist.] 2003, pet. denied), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 57 SMU L. REV. 991, 1006 (character of income from a patent), 1011 (contention of fraud) (2004).

243. *Alsenz*, 152 S.W.3d at 622.

244. *Id.*

245. *Id.* at 621.

246. *Id.* at 622.

247. 145 S.W.3d 361 (Tex. App.—Dallas 2004, no pet.).

248. *Id.* at 363.

fied domestic relation order,'”²⁴⁹ as the court stated. But, as the appellate court added, “the [unquoted] modification did not change the division of [the ex-husband’s] retirement benefits” and stated that the ex-wife’s portion of the benefits “shall be paid out as specified” in the divorce court’s decree.²⁵⁰ Ten years later, the ex-husband, who had retired in 2002, moved to clarify prior court orders asserting that the modification as agreed by the parties had provided for “a disproportionate share of benefits to [the ex-wife] beyond the authority of the divorce decree.”²⁵¹ A clarifying order for the ex-husband was entered in 2003 and the ex-wife appealed. The ex-wife argued that her share of the benefit was to be calculated based on the husband’s benefits *at the time of retirement*, thus making her benefits reflect post-divorce increases in the ex-husband’s wages and therefore a larger payment for the ex-wife than that specified in the divorce decree.²⁵² As the Dallas appellate court pointed out, however, this reading of the divorce decree would change what the decree plainly said.²⁵³ The appellate court went on to say that the divorce decree was not ambiguous and thus in need of clarification but that the 2003 order was “a permissible clarification nonetheless.”²⁵⁴ The court added: “That the applicable [federal] regulations may have provided otherwise at the time does not alter our duty to enforce the decree as written.”²⁵⁵

In an instance of unwarranted attempted clarification two years after the agreed judgment of divorce was entered, the ex-wife brought a clarification proceeding with the consequence of the rendition of a clarifying order by the trial court. The former husband in *M^cKnight v. Trogdon-M^cKnight*²⁵⁶ successfully appealed that order as making substantive changes in the unambiguous contractual terms of the divorce decree, unnecessary alterations in the two qualified domestic relations orders, a further change unsupported by the petitioner’s pleading, and unjustified attorney’s fees.

The principal points at issue in *Mladenka v. Mladenka*²⁵⁷ were (1) an ex-husband standing to appeal a judgment of his ex-wife rendered against him and his brother to set aside an alleged fraudulent transfer of realty by the ex-husband to his brother, and (2) the applicable statute of limitation to sue in such an instance. In the divorce of the spouses the court divided the community property and rendered a judgment against the husband in favor of the wife for just over \$100,000. The ex-husband promptly transferred non-exempt realty to his brother without “reasonably equivalent

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 364-65.

253. *Id.* at 366.

254. *Id.* (citing TEX. FAM. CODE ANN. § 9.006(a), (b) (Vernon 1998)).

255. *Id.* at 366-67 (citing *Shanks v. Treadway*, 110 S.W.3d 444, 449 (Tex. 2003)).

256. 132 S.W.3d 126 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

257. 130 S.W.3d 397 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

value.”²⁵⁸ Over two years (but less than four years) later, in order to levy execution on the transferred property, the ex-wife sued the ex-husband and his brother to set aside the conveyance. The court found that the ex-wife had shown that the transfer was fraudulent under section 24.005(a)(1) of the Business and Commerce Code as a transfer with actual intent to hinder, delay or defraud his creditor by a transfer of non-exempt property to an insider without “reasonably equivalent value.”²⁵⁹ The husband appealed to assert that his ex-wife failed to bring her action within the time allowed for a spouse to sue. As to his right to appeal, the Houston Fourteenth District appellate court held that the ex-husband had standing to appeal as a defendant named in the action and owner of the property as a consequence of the judgment.²⁶⁰ With respect to the ex-husband’s argument that his ex-spouse was his “spouse” for the purpose of the *two years statute of limitation* because her cause of action “emanated from her status” as his spouse,²⁶¹ the court held that she was clearly not his spouse when she brought this action²⁶² under section 24.010(a) of the Business and Commerce Code.²⁶³ The four years statute of limitation was therefore clearly applicable to the dispute.

*In re Zvara*²⁶⁴ dealt with enforcement of an unappealed divorce decree. The ex-husband asserted that in response to his ex-wife’s suit the trial court made substantive changes in the original decree. The ex-wife had sought enforcement of a mediated settlement agreement. The trial court ordered the ex-husband to turn over to his ex-wife the monetary value of forty-nine percent of a particular account on the date of the agreement. In arriving at its enforcement order, however, the court below used the wrong multiplier (as fifty instead of forty-nine percent of the agreed value of the account) and thus had arrived at the incorrect product. The appellate court therefore modified the orders to correct the computation without any need for remand and let other orders stand as supported by sufficient evidence below.²⁶⁵ There was one further troublesome point in the lower court’s order because it had a proprietary overtone with respect to avoided or payable commissions. The divorce court’s order stated that the ex-husband would list the couple’s home for sale with any broker. He had undertaken this assignment himself. The court below changed the language of the order to direct him to list with any broker other than himself and the ex-husband objected to this change. The appellate court let the change stand because there was evidence before the trial court from which it might have been concluded that the ex-husband “was making no effective effort to sell the property.” The appellate court added

258. See TEX. BUS. & COM. CODE ANN. § 24.005(a)(1) (Vernon 2002).

259. *Mladenka*, 130 S.W.3d at 409.

260. *Id.* at 401.

261. *Id.* at 403 n.9.

262. *Id.* at 403-04.

263. TEX. BUS. & COM. CODE ANN. § 24.010(a) (Vernon 2002).

264. 131 S.W.3d 566 (Tex. App.—Texarkana 2004, no pet.)

265. *Id.* at 568-70.

that the ex-husband's "argument disregards the fact that this clarification proceeding was also an enforcement and contempt proceeding."²⁶⁶

D. EX-SPOUSAL MAINTENANCE

In the English legal system of the seventeenth and eighteenth centuries as transported to English North America the husband was required to support his wife and she was entitled to a life estate in one-third of his lands on his death as that might be enhanced by his testamentary provisions. Though the surviving husband's benefits from the wife's property were proportionately greater, the likelihood of her having significant property was small. If an English couple were allowed to separate, an ecclesiastical court would order the husband to pay for *the wife's support* (*alimentum* or alimony). As civil divorce *a vinculo* became available (but not widely practiced) in well-to-do English society, the husband was also ordered to pay alimony as though the couple was merely still married. Thus the English usage (originally ecclesiastical) was transplanted to English America and as divorce became more common in the twentieth century an award of alimony tended to become a common practice in most American jurisdictions. In nineteenth and twentieth century Texas, where the principle of Spanish law was maintained that the surviving spouse was entitled to one-half the subsisting profits of marriage, the same sort of division was provided on divorce with some discretion in the court to provide unequal shares. While other states that preserved the Hispanic rules of survivorship in dealing with spouses tended to adopt the alimony concept of English law, in Texas the notion of very restricted ex-spousal maintenance on divorce was instituted in 1997 and is now codified in Chapter 8 of the Family Code.²⁶⁷ To qualify for an award of future maintenance, a spouse must show that the marriage is of at least ten years' duration, a lack of "sufficient property, including property distributed" on divorce "to provide for . . . minimum reasonable needs," an inability to provide self-support "through appropriate employment because of an incapacitating physical or mental disability," or a clear lack of "earning ability in the labor market adequate to provide self-support for . . . minimum reasonable needs, as limited by section 8.054."²⁶⁸ The rules of ex-spousal maintenance laid down there are not an alternative to the division of the community estate but are to be used for "temporary and rehabilitative support for a spouse whose ability for self-support is lacking."²⁶⁹

In making an award of ex-spousal maintenance, a divorce court must therefore give particular attention to the ability of the petitioning spouse to provide it personally. This fundamental rule was applied strictly in

266. *Id.* at 571.

267. TEX. FAM. CODE ANN. §§ 8.001 - 8.305 (Vernon 1998 & Supp. 2005).

268. TEX. FAM. CODE ANN. § 8.051 (Vernon Supp. 2005).

269. See O'Carolan v. Hopper, 71 S.W.3d 529, 533 (Tex. App.—Austin 2002, no pet.), discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, 56 SMU L. REV. 1659, 1698 (2003).

*Sheshtawy v. Sheshtawy*²⁷⁰ where the wife's failure to introduce any evidence of her diligence in seeking employment or developing skills for employment precluded an award for ex-spousal maintenance because she had thereby failed to overcome the presumption of section 8.053(a);²⁷¹

That maintenance is not warranted unless the spouse seeking maintenance has exercised due diligence in:

- (1) seeking suitable maintenance; or
- (2) developing the necessary skills to become self-supporting during the period of separation and during the time the suit for dissolution of marriage is pending.²⁷²

The court went on to say that “[t]his section does not apply to a spouse who is not able to satisfy the presumption . . . because of an incapacitating physical or mental disability.”²⁷³ This was the San Antonio Court of Appeals’ second effort to dispose of this case. After the entry of the decree of divorce the ex-wife instituted a proceeding for enforcement of the maintenance provisions of the decree. The trial court had granted the ex-wife’s motions for both civil and criminal contempt for her ex-husband’s failure to comply with the judgment to pay maintenance and the ex-wife’s attorney’s fees. The ex-husband’s efforts to stay enforcement pending further appeal were denied by the appeals court that also denied his writ of habeas corpus. His application for a writ of habeas corpus to the Texas Supreme Court followed. While that writ was pending, the intermediate appellate court rendered its second judgment reversing and rendering the award of spousal maintenance. Though the Texas Supreme Court then denied a petition for review by each of the parties, that court nevertheless granted the ex-husband’s writ of habeas corpus from civil commitment.²⁷⁴ Because there was no longer any order with which he was not in compliance, the Texas Supreme Court also vacated the criminal contempt order for refusal to pay the ex-spousal maintenance and his ex-wife’s attorney’s fees.²⁷⁵

*Yarborough v. Yarborough*²⁷⁶ illustrates the sort of situation that warrants ex-spousal maintenance in compliance with the rule requiring significant efforts toward self-support under existing circumstances. In this instance, the couple had two children, one of whom was disabled. The trial court awarded child support to the wife as managing conservator in an amount that may be awarded when the excess of net monthly resources of the supporting parent exceeds \$6,000 a month.²⁷⁷ The wife demonstrated that her “minimum reasonable needs” were not met by her

270. 150 S.W.3d 772 (Tex. App.—San Antonio 2004, no pet.).

271. TEX. FAM. CODE ANN. § 8.053(a) (Vernon Supp. 2005).

272. *Sheshtawy*, 150 S.W.3d at 777 (quoting TEX. FAM. CODE ANN. § 8.053(a) (Vernon 2005)).

273. *Id.* (quoting TEX. FAM. CODE ANN. § 8.053(b) (Vernon Supp. 2005)).

274. *In re Sheshtawy*, 154 S.W.3d 114, 126 (Tex. 2004).

275. *Id.*

276. 151 S.W.3d 687 (Tex. App.—Waco 2004, no pet.).

277. *See* TEX. FAM. CODE ANN. § 154.126(a), (b) (Vernon 2005).

earning power under the circumstances. The wife was recovering from an operation and was only able to find employment every other week at \$108 a week, that is, "the best job available" under circumstances that would allow her to give the children sufficient care. The appellate court concluded that she met the statutory test for need of ex-spousal maintenance of about \$1,350 a month for one year in addition to child support payments.²⁷⁸

In *Smith v. Smith*,²⁷⁹ the divorcing couple, each of whom had children of a prior marriage, married in 1984. At that time the husband had a cerebral aneurism, which made his right hand unusable, and he suffered from severe headaches. During the marriage the husband did housework and took care of the children but did not work outside the home except in keeping books for his lodge at \$1,800 a year. He also received about \$17,000 of social security for his disability. The wife's salary as a nurse amounted to over \$75,000 a year. The couple agreed to a division of their community property which the divorce court approved. On the basis of this evidence, the court awarded the husband future maintenance of \$300 a month until he reached the age of sixty-two when he would become eligible to receive social security retirement payments on December 1, 2010 because of his "incapacitating physical disability," and that order was affirmed.²⁸⁰

The ex-spouses before the bankruptcy court in *In re Skaja*²⁸¹ were divorced in 2002. The divorce court divided certain financial interests equally and awarded the wife over \$23,000 as part of her share of the community property along with over \$43,000 in attorney's fees.²⁸² The wife was also awarded ex-spousal maintenance of \$2,500 a month for three years, the maximum amount in the absence of a showing of special need.²⁸³ Shortly thereafter, the ex-husband filed for bankruptcy. The bankruptcy judge granted the husband a discharge but excepted from discharge the husband's obligation under the divorce decree to pay his ex-wife's attorney's fees and ex-spousal maintenance. As to the attorney's fees, the husband had relied on the Texas rule that a grant of attorney's fees is an element in the division of the community estate and thus was a matter of *res judicata* under the divorce decree. The bankruptcy judge pointed out, however, that liability for attorney's fees in relation to the terms of section 523(a)(5) has been a matter of federal definition of the terms "alimony," "maintenance," and "support" as used in section 523(a)(5) in relation to dischargability as determined by the Fifth Circuit Court of Appeals.²⁸⁴ The bankrupt ex-husband had also argued that attorney's fees are owed ultimately to an attorney rather than to the

278. *Yarborough*, 151 S.W.3d at 690-92.

279. 115 S.W.3d 303 (Tex. App.—Corpus Christi 2003, no pet.).

280. *Id.* at 309-10.

281. 313 B.R. 198 (Bankr. W.D. Tex. 2004).

282. *Id.* at 201.

283. See TEX. FAM. CODE ANN. § 8.051 (Vernon Supp. 2005).

284. See *In re Dennis*, 25 F.3d 274 (5th Cir. 1994).

spouse. But the underlying reason for the exception of attorney's fees from discharge is that professional assistance is necessary toward achieving the maintenance order in the divorce proceeding. Texas law controls liability and the client-spouse will, of course, be liable for his or her contractual obligations, but the other spouse may also be personally liable under the Texas necessities doctrine. The court, however, simply held that the ex-wife's attorney's fees were part of the alimony owed by the ex-husband as a matter of bankruptcy law.²⁸⁵ The attorney may enforce the fee against his client and bankruptcy law rather than Texas law defines what is not subject to discharge as a form of alimony under section 523(a)(5).²⁸⁶ The bankrupt debtor offered a further argument: that section 523(a)(15) was intended by Congress to mean that "the assessment of the debt obligation under (a)(5) should be controlled by what a state court determines is alimony, maintenance, and support."²⁸⁷ In response, the district court explained that "Congress did not add (a)(15) to abrogate the judiciary's understanding of dischargeability under (a)(5)."²⁸⁸

The husband's bankruptcy filing occurred about three years before the wife's 1998 filing for divorce in *In re Surgent*.²⁸⁹ The automatic stay under the Bankruptcy Code²⁹⁰ was lifted by the husband's discharge about seven months after the divorce-suit was begun. The trial court, perhaps initially unaware of the bankruptcy case in progress, proceeded with the divorce case, and the appellate court treated the trial court as having jurisdiction to consider all matters except those concerning payment from the bankruptcy estate.²⁹¹ The husband, who appears to have been a medical doctor, was particularly noncompliant with the divorce court's orders of spousal support. A year and a half after the beginning of the divorce proceeding, the husband was confined for his intransigence in complying with the court's order after the divorce became final. The appellate court held that the first two months of the husband's confinement was a punishment, that is, for criminal contempt.²⁹² Petitions for habeas corpus were thrice denied before the couple entered into a mediated property settlement agreement in early 2000. Over the whole time that the divorce suit was in progress, the husband seems to have been jailed for another forty-

285. "In essence, the attorney's fees are a support to [the ex-wife] because she is responsible for payment if [the ex-husband] is permitted to discharge them." *Skaja*, 313 B.R. at 203 (emphasis added).

286. *Id.*

287. This was the court's precis of the husband's argument. *See id.* at 204.

288. Then the court added: "Rather, Congress was attempting to fill a 'crack' since many divorce obligations were being discharged under the (a)(5) analysis." The reference to a "crack" is borrowed from the comment in *In re Whittaker*, 225 B.R. 131, 142 (Bankr. E.D. La. 1998), that "Congress made the addition 'in an attempt to lessen the chance that a divorce obligee's claim [under (a)(5)] might slip through the § 523(a)(5)'s cracks and be discharged unjustly.'" *Skaja*, 313 B.R. at 204 (citing *Whittaker*, 225 B.R. at 142 (emphasis added)).

289. 133 S.W.3d 744, 749 (Tex. App.—Corpus Christi 2003, no pet.).

290. *See* 11 U.S.C. § 362(c) (1998).

291. *Surgent*, 133 S.W.3d at 748-50.

292. *Id.* at 750.

two months for civil contempt before he filed his petition for habeas corpus. Section 21.002(b), added to the Government Code in mid 2003, provides that confinement for civil contempt shall be limited to eighteen months.²⁹³ The ex-husband was therefore required to be released in late 2003, though it is not clear from the report when the divorce became final.

E. RECOVERY OF AN ATTORNEY'S FEE AGAINST THE ATTORNEY'S OWN CLIENT

In 1994, the client retained an attorney to represent him in a divorce proceeding and agreed to pay legal fees as well as expenses of the suit. After the suit was settled six months later, the attorney rendered his statement of fees and expenses to the client, but the client failed to pay. After the client's persistence in refusal to pay, the attorney brought suit against his former client in 1997. This suit was filed as a motion to enforce the decree of divorce that the attorney had defended on the part of his client asserting that as attorney for his client he stood as an affected party in the suit for divorce. The attorney prevailed in the trial court and the Beaumont Court of Appeals but his judgment was reversed by the Texas Supreme Court in *Brown v. Fullenweider*²⁹⁴ on the ground that the court lacked jurisdiction to hear the suit as appended to the divorce proceeding because he was not a party to the prior proceeding. Within sixty days of the judgment of the Texas Supreme Court, the attorney brought another suit against his former client to collect his fees and expenses asserting section 16.064(a) of the Texas Civil Practice and Remedies Code, which provides that the passage of time to bar a suit is tolled if the prior suit was brought in "a different court" within sixty days after dismissal for lack of jurisdiction by the court where the case was first filed.²⁹⁵ Applying the tolling statute liberally,²⁹⁶ a majority of the Texarkana Court of Appeals held that the statute of limitation had been tolled and therefore the attorney's suit was timely filed: because the claimant had first filed in a court without jurisdiction, and that was the situation to which the statute was addressed.

The dissenting judge was puzzled as to why the suit was not filed as a separate suit in the district court that decided the suit for a divorce.²⁹⁷ That judge concluded that the attorney should not be allowed to rely on section 16.064 to toll the limitation period for his action.²⁹⁸ The trial court, he asserted, "did not lack jurisdiction because [the attorney] filed

293. TEX. GOV'T CODE ANN. § 21.002(b) (Vernon Supp. 2005).

294. 52 S.W.3d 169 (Tex. 2001) (per curiam), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 56 SMU L. REV. 1659 (2003).

295. TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a) (Vernon 1997).

296. *Brown v. Fullenweider*, 135 S.W.3d 340, 344 (Tex. App.—Texarkana 2004, pet. denied).

297. *Id.* at 347.

298. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 2002) (four year statute of limitation).

in the wrong court, but because he filed it in a case in which the judgment was already final and in a proceeding designed only to divide the marital estate.”²⁹⁹ Further, the attorney “did not bring his suit ‘mistakenly’ . . . but apparently for strategic reasons, in a procedurally incorrect manner. Therefore, [the suit] is likewise beyond the scope and purpose of the tolling provision at issue.”³⁰⁰ The dissenting judge was, perhaps, conjecturing, but while doing so he might have indicated the tactical advantage that the attorney sought to gain in trying to recover his fee.

299. *Brown*, 135 S.W.3d at 348.

300. *Id.*

