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# FAMILY LAW: HUSBAND AND WIFE

Joseph W. McKnight\*

## I. STATUS

### A. NON-MARITAL RELATIONSHIPS

#### 1. Same-Sex Unions

THE academic literature on same-sex unions continues but at a somewhat reduced rate,<sup>1</sup> and a new wave of academic writing has moved toward a bolder inquiry: whether marriage is a proper sub-

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1. See, e.g., Jonathan Brophy, Comment, *Death Is Certain, Are Taxes? Another Argument for Equality for Same-Sex Couples under the Code*, 34 SW. U. L. REV. 635 (2005); Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633 (2005); Symposium, *Same-Sex Couples: Defining Marriage in the Twenty-First Century*, 16 STAN. L. & POL'Y REV. 1 (2005); Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005); Nadine A. Gartner, *Restructuring the Marital Bedroom: The Role of the Privacy Doctrine in Advocating the Legalization of Same-Sex Marriage*, 11 MICH. J. GENDER & L. 1 (2004); Scott T. Fitzgibbon, *The Formless City of Plato's Republic: How the Legal and Social Promotion of Divorce & Same-Sex Marriage Contravenes the Principles and Undermines the Projects of the Universal Declaration of Human Rights*, ISSUES IN LEGAL SCHOLARSHIP (2005), available at <http://www.bepress.com/ils/iss5/art5>. To put all this in historical perspective, see STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE* (Viking 2005); Ezra Hasson, *Wedded to 'Fault': the Legal Regulation of Divorce and Relationship Breakdown*, 26 LEGAL STUD. 267 (2006). The United Kingdom adopted the concept of no-fault-based divorce in 1857, somewhat relaxed that attitude in 1971, and in 1973 the no-fault notice came to occupy the field. When the principle of "civil partnership" came into effect in 2005, the fault-based cause for dissolution came with it. See Rachel Duffy Lorenz, Comment, *Transgender Immigration: Legal Same Sex Marriages and Their Implications for the Defense of Marriage Act*, 53 UCLA L. REV. 523 (2005). See also Tobin A. Sparling, Symposium, *Judicial Bias Claims of Homosexual Persons in the Wake of Lawrence v. Texas*, 46 S. TEX. L. REV. 255 (Nov. 2, 2004); Adrienne Butcher, Comment, *Selective Constitutional Analysis in Lawrence v. Texas: An Exercise in Judicial Restraint or a Willingness to Reconsider Equal Protection Classification of Homosexuals?*, 41 HOUS. L. REV. 1407 (2004); Leslie J. Harris, *Same-Sex Unions Around the World*, 19 PROB. & PROP. 31 (Sept.-Oct. 2005); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195 (2005); Shannon Pare, *Legalization of Same-Sex Marriage in the United States and Canada: The Unequal Application of Equal Protection*, 11 SW. J.L. & TRADE AM. 363 (2005); Erin Stefanec, Comment, *Mimicking Marriage: As the Evolution of the Legal Recognition of Same-Sex Marriage Progresses, Civil Unions Currently Represent the Best Alternative to Marriage*, 30 U. DAYTON L. REV. 119 (2004); Gloria Bluestone, Note, *Going to the Chapel and We're Going to Get Married: But Will the State Recognize the Marriage? The Constitutionality of State Marriage Laws after Lawrence v. Texas*, 10 TEX. J. C.L. & C.R. 189 (2005); William N. Eskridge, *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011 (2005); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005).

ject of state-definition and control.<sup>2</sup> It seems unlikely that the new topic is any more likely to find expression in statutes and judicial decisions than the earlier line of argument. In the 2005 general election, the people of Texas expressed a very negative attitude toward these matters in adopting a constitutional amendment stating that “(a) Marriage in this state shall consist only of the union of one man and one woman; (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”<sup>3</sup>

## B. INFORMAL MARRIAGE

The dispute with respect to an alleged informal marriage in *Lewis v. Anderson*<sup>4</sup> was largely a factual one, as is usually the case in informal-marriage cases. The couple had been ceremonially married in 1974, but about two and a half years later, the doctor-husband “determined that divorce was absolutely necessary because he would not allow his financial situation to be jeopardized by [his nurse-wife’s] emotional state.”<sup>5</sup> One of the husband’s principal complaints was his wife’s reluctance to sign documents concerning financial matters. A divorce followed. Except for a few days in 1978 when the husband locked the wife out of the house, they lived together until 1998, when the woman brought suit for divorce. The alleged husband denied that there was any marriage to dissolve.<sup>6</sup>

The petitioner showed that, after a few weeks of separation following the divorce, the couple lived together, represented to others that they were husband and wife, and both used the husband’s name. They joined a church together as a married couple and were so regarded there. They adopted two children as a married couple. Evidence of their being married was far more copious than is often encountered in such cases. However, the only date to which the woman could testify as the date of the marriage was the date of the ceremonial marriage in 1974. She testified that they had never discussed the fact that they were informally married.

A California bankruptcy court held in *In re Rabin*, 336 B.R. 459, 461 (Bankr. N.D. Cal. 2005), that “registered domestic partners” in bankruptcy, like married persons under California law, may claim a homestead in the property that they own and share. The court pointed out, however, that such persons are treated as individuals for California income-tax purposes in filing returns and computation of earned income. They are entitled together to only one homestead exemption. *Id.*

2. The Cardozo Law Review has devoted most of an issue to the subject: Daniel A. Crane, *A Judeo-Christian Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221 (2006); Nancy J. Krauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261 (2006); Charles J. Reid, Jr., *And the State Makes Three: Should the State Retain a Role in Recognizing Marriage?* 27 CARDOZO L. REV. 1277 (2006); Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311 (2006); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006).

3. TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2005).

4. *Lewis v. Anderson*, 173 S.W.3d 556 (Tex. App.—Dallas 2005, pet. denied). For an instance of informal marriage in relation to federal income-tax liability, see Rinehart v. Comm’r, 85 T.C.M. (CCH) 1172 (2003).

5. *Lewis*, 173 S.W.3d at 558.

6. *Id.* at 557-58.

The man also testified that there was no other date of marriage than that of their ceremonial marriage. They had celebrated that wedding anniversary every year. The woman seemed to have forgotten about the divorce, and the man told her from time to time that they were married. There was not only some evidence of an implied agreement to be married, but also evidence of an express agreement to be married after the divorce. The man testified that in 1994 he had made arrangements to remarry the petitioner, but she had declined. He also testified that he had contacted the Internal Revenue Service in 1997 to say that the joint income tax return that they had filed was a mistake. Relying on *Russell v. Russell*<sup>7</sup> and distinguishing the facts of the case before them from those in *Gary v. Gary*,<sup>8</sup> the Dallas Court of Appeals sustained the finding of the trial court and jury that there was a subsisting informal marriage. The appellate court relied heavily on the jury's verdict and rejected the man's assertion that the trial court's instructions to the jury were improper.<sup>9</sup>

Despite periodic anxiety of some within and outside the legislative process that Texas' minimum age of ceremonial marriage is either too high or too low, the minimum age has tended upward from 1837, when it stood at fourteen for males and twelve for females, to 1966, when those minimum ages were moved up to sixteen and fourteen respectively, to 1969, when the age was set uniformly for both at sixteen for licensed marriages, with the requirement of parental or judicial consent for those aged fourteen to sixteen.<sup>10</sup> In the early 1970s, one of the draftsmen of what would become the Family Code observed that a minimum age of fifteen would best suit the mores of the rural folk in his neighborhood. After long discussion, however, the drafting committee concluded that the age of sixteen was then more appropriate to modern needs, however inconvenient it might be for those who their colleague identified as the "cedar-choppers" of his region. The minimum age of sixteen was fixed in 1975 but moved up to eighteen (not requiring either parental or judicial consent) in 1997.<sup>11</sup> Similar minimum ages have also been prescribed for recordation of informal marriages since 1969.<sup>12</sup> As the minimum age was seventeen, a plea of non-age was rarely heard.<sup>13</sup>

In 2005 the minimum age for parental consent to a ceremonial marriage of a minor was moved upward from fourteen to sixteen,<sup>14</sup> though judicial consent might be given for a younger petitioner if in the peti-

7. 865 S.W.2d 929 (Tex. 1993).

8. 490 S.W.2d 929 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.).

9. *Lewis*, 173 S.W.3d at 559-62.

10. See Joseph W. McKnight, *Commentary to the Texas Family Code, Title 1*, 13 TEX. TECH. L. REV. 611, 634-37 (1982).

11. *Id.* at 635-39.

12. See, e.g., *id.* at 648-51.

13. See Rosanne Piatt, *Overcorrecting the Purported Problem of Taking Child Brides in Polygam[ous] Marriages: The Texas Legislature Unconstitutionally Voids All Marriages by Texans Younger than Sixteen and Criminalizes Parental Consent*, 37 ST. MARY'S L.J. 753 (2006).

14. TEX. FAM. CODE ANN. § 2.102 (Vernon Supp. 2006).

tioner's best interest.<sup>15</sup> The minimum age for registration of an informal marriage was set at eighteen in 1997.<sup>16</sup>

In *Creel v. Martinez*,<sup>17</sup> the validity of an informal marriage between a young woman and a man several years older was in issue. The jury found that an informal marriage occurred on July 24, 1997, when the woman was seventeen. At that time, the statute<sup>18</sup> provided that such a marriage was valid though voidable, if lacking parental consent, until the woman reached the age of eighteen or died in the meantime.<sup>19</sup> On September 1, 1997, section 2.401(f), which changed the minimum age to eighteen for informal marriages, became effective. The effect of the new law on prior law was in issue.

In *Creel*, the surviving husband of his alleged marriage had brought suit on behalf of his infant child against the defendant-physician for the wrongful death of the plaintiff's alleged late wife. The defendant argued that the 1997 statute invalidated the marriage because of non-age of the woman. Because the marriage in issue remained voidable until the woman became eighteen in early 1998, the Houston First District Court of Appeals held that the plaintiff lacked any vested right to sue until the woman reached the age of eighteen or died before the effective date of section 2.401 on September 1, 1997.<sup>20</sup> The court relied on *Beck v. Beck*,<sup>21</sup> in which the Supreme Court of Texas held that the 1980 amendment to article XVI, section 15 of the Texas Constitution had an intended retrospective effect as indicated by the legislative history of the proposed amendment. The wife in *Beck*, therefore, held a voidable interest under a prenuptial agreement affecting her separate property interest, and thus, her husband's asserted community property rights had never "vested."<sup>22</sup> In reliance on *Beck*, the Houston court stated, "Just as the wife's voidable interest in the prenuptial agreement [in *Beck*] prevented the husband's community property rights from ever vesting, we conclude that [the] . . . voidable [informal] marriage failed to create any vested protection from a change in the law regarding informal marriages to minors."<sup>23</sup>

Despite the court's comments on vested rights, the significant conclusion of the supreme court in *Beck* was that the constitutional amendment of 1980 "demonstrates an intention on the part of the legislature and the people of Texas not only to authorize future premarital agreements but also to impliedly validate section 5.41 [now sections 4.001-4.003] of the Texas Family Code [as enacted in 1969 and 1989 and reenacted as amended earlier in the legislative session of 1997<sup>24</sup>] and all marital agree-

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15. *Id.* § 2.103.

16. *Id.* § 2.201(c).

17. 176 S.W.3d 516 (Tex. App.—Houston [1st Dist.] 2004, pet denied).

18. TEX. FAM. CODE ANN § 6.102 (Vernon 1998).

19. *Id.* § 2.401(a), (c) (effective Sept. 1, 1977).

20. *Creel*, 176 S.W.3d at 520.

21. 814 S.W.2d 745 (Tex. 1991).

22. *Creel*, 176 S.W.3d at 520-21.

23. *Id.*

24. See TEX. FAM. CODE ANN. § 2.404(b)(2), (c)(1), (2) (2004).

ments entered into before 1980 pursuant to that statute.”<sup>25</sup> Thus, by the retrospective constitutional amendment, a prior unconstitutional statute and agreement made under it were made effective despite the fact that certain *vested* rights had been acquired under the prior law. The effect of a retrospectively constitutional amendment is vastly different, however, from a statutory one that does not even purport to be retrospective in its effect,<sup>26</sup> except with respect to suits brought before and after the statute’s effective date. In *Creel* an informal but voidable marriage untested by the man and woman was incapable of being voided if a party to it died before the effective date of the statutory amendment changing the minimum age for entering into an informal marriage from sixteen to eighteen.

In *Phillips v. Dow Chemical Co.*, the husband of a deceased tort victim failed to show that the couple was informally married. The husband’s claim was barred by the fact that when the informal marriage was alleged to have existed, he was still married to someone else, and that marriage continued until after the death of the plaintiff’s alleged second wife.<sup>27</sup> Though the man may have mistakenly believed that his first marriage had been terminated before his alleged second marriage, his assertion of a putative marriage in the second instance was untenable because the man had acknowledged the validity of the prior union in the subsequent divorce suit to dissolve it.<sup>28</sup> Though the man may have been a putative spouse in his own mind during his alleged informal marriage, his status as a putative spouse could not be effectively pled because the statute referred to a “spouse,” which he was not.<sup>29</sup> The husband’s assertion of collateral estoppel was also of no assistance to him because his contestants were not parties to the probate proceeding at which he was declared the decedent’s surviving spouse.<sup>30</sup>

## II. CHARACTERIZATION OF MARITAL PROPERTY

### A. PREMARITAL AND MARITAL PARTITIONS

In *Sheshunoff v. Sheshunoff*<sup>31</sup> the Austin court pointedly rejected the

25. See *Beck*, 814 S.W.3d at 749.

26. The enactment discussed here is 75th Leg., R.S., ch. 1362, § 1, 1997 Tex. Gen. Laws 7.

27. 186 S.W.3d 121 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.).

28. *Id.* at 127-28.

29. See *Ft. Worth & Rio Grande Ry. v. Robertson*, 131 S.W. 400 (Tex. 1910), approving and adopting the opinion of the dissenting judge in the court below. 121 S.W. 202, 204 (Tex. Civ. App.—Fort Worth, 1909, no writ). See also *Tex. Employers Ins. Ass’n v. Grimes*, 269 S.W.2d 332 (Tex. 1954). The Texas putative-spouse doctrine is by no means as broad as that of Louisiana or California. See, e.g., *In re Koonce*, 380 So. 2d 140 (La. App. 1979); *Kunakoff v. Woods*, 166 Cal. App. 2d 59, 332 P.2d 773 (Cal. App. 1958); LA. CIV. CODE ANN. art. 96 (1999); *Alfonso v. Alfonso*, 739 So. 2d 946 (5th Cir. 1999); *Thomason v. Thomason*, 776 So. 2d 553 (La. Ct. App. 2000).

30. *Phillips v. Dow Chem. Co.*, 186 S.W.3d 121, 128-29 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.).

31. 172 S.W.3d 686, 701 n.21 (Tex. App.—Austin 2005, pet. denied).

wife's reliance on that court's earlier decision in *Miller v. Ludeman*.<sup>32</sup> The wife had relied on *Miller* to support the broad proposition that whenever both spouses are represented by counsel, neither owes any fiduciary duty to the other. The Austin court explained that such a standard is applicable only when spouses are engaged in divorce proceedings.<sup>33</sup>

The couple in *Sheshunoff* had entered into a premarital agreement in 1971 and entered into a further agreement concerning their property in 1990 during the marriage. With the subsisting advice of individual counsel, each began to negotiate a third agreement in 2002 and executed it the following year. Two months later, the wife filed suit for divorce. As to that third agreement, the husband testified that for tax and estate-planning purposes,<sup>34</sup> large amounts of assets were transferred to the wife, and marital liabilities were shifted to the husband. In response to his wife's petition for divorce, the husband asserted that his wife had fraudulently induced him to enter into the agreement, and he had done so without full knowledge of his wife's assets. The trial court nevertheless concluded that the agreement was enforceable and divided the property accordingly. In reviewing these conclusions, the Austin Court of Appeals noted that Texas enacted the Uniform Premarital Agreements Act with adaptations of it for marital partitions and exchanges.<sup>35</sup> Further legislative adjustments were made in 1997 when common-law defenses (such as fraud) were specifically preserved for interpreting section 4.105(a)(1) to mean that fraud "equates involuntary execution with common-law duress."<sup>36</sup> The Austin appellate court nevertheless concluded that the husband failed to raise a fact issue regarding his involuntary execution of the agreement.<sup>37</sup>

Several months after the trial court in *Sheshunoff* had granted partial summary judgment to the wife on the issue raised by the husband's argument, the trial judge struck the husband's defenses and counterclaims raised in his amended petition that asserted other common-law defenses beyond his statutory involuntary execution and unconscionability defenses.<sup>38</sup> The appellate court concluded that, because the husband had failed to raise additional defenses before the summary-judgment ruling, his additional defenses were untimely and could not provide grounds for summary judgment.<sup>39</sup> In the alternative, the Austin court ruled that section 4.105(c) barred the husband's further assertion of common-law defenses.<sup>40</sup> The court then rejected the husband's argument that he was

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32. 150 S.W.3d 592 (Tex. App.—Austin 2004, pet. denied), discussed in Joseph W. Mc Knight, *Family Law: Husband and Wife*, 58 SMU L. REV. 877, 903-04 (2005).

33. *Sheshunoff*, 172 S.W.3d at 701 n.21.

34. *See id.* at 689 n.2.

35. TEX. FAM. CODE ANN. § 4.005 (Vernon 1998) (enforcement of premarital agreements and marital partitions and exchanges made during marriage).

36. *Sheshunoff*, 172 S.W.3d at 697.

37. *Id.* at 700.

38. TEX. FAM. CODE ANN. § 4.105 (Vernon 1998).

39. *Sheshunoff*, 172 SW.3d at 702.

40. *Id.*

entitled to damages and rescission and held that the trial court had erred in severing that claim and referring the matter to arbitration.

In *In re Fischer-Stoker*,<sup>41</sup> a couple entered into a written premarital agreement listing various properties as the separate property of each. Among the properties listed by the fiancée were an employer's savings plan and shares in an individual retirement account ("IRA"). The couple agreed that all funds generated by those separate funds would be the separate property of the income-providing fund owner. During their brief marriage, the wife continued to make contributions from her salary to her savings plan. In its division of property, the divorce court awarded the husband half of the funds in the savings plan after deducting the account's value before marriage, which was designated as the wife's separate property. The court also awarded to the parties funds from the IRA computed in the same way.<sup>42</sup> On appeal, the wife prevailed and was awarded the husband's funds in the wife's accounts (the contributions she made) that were clearly her separate property. The increase in value of the IRA funds were also the wife's separate property.

The agreement had also provided that if any fund (separate or community) was used to acquire property in their joint names, such property would be jointly owned. The agreement went on to say that the spouses might designate percentages of ownership to each in such funds, and, in the absence of such an agreement, the principle of tracing would be used to determine the shares. The court found that this provision clearly had no application beyond its specific context and, therefore, would not apply the doctrine of tracing to additions of community funds to the wife's separate accounts as they had agreed.<sup>43</sup>

In *Roman v. Roman*,<sup>44</sup> a married couple entered into an in-vitro-fertilization agreement<sup>45</sup> in an effort to make it possible for the wife to have the husband's child. The agreement (evidently provided by the fertilization clinic) stated that embryos produced by the process would be the "joint property"<sup>46</sup> of the spouses . . . based on regulations [that] may change at any time" and that the embryos would be frozen for future use but would be discarded if either of them should file a petition for divorce.<sup>47</sup> The agreement also contained a provision that allowed the parties to withdraw their consent to the disposition of the embryos and to

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41. 174 S.W.3d 268 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

42. *Id.* at 272.

43. *Id.*

44. 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. granted).

45. For other approaches to gestation, see Lauren Andrew Hudgeons, Comment, *Gestational Agreements in Texas: A Brave New World*, 57 BAYLOR L. REV. 863 (2005). See also Miryam Z. Wahrman, *Fruit of the Womb: Artificial Reproductive Technologies & Jewish Law*, 9 J. GENDER RACE & JUST. 109, 110 (2005) (how Jewish law has "striven for and in many cases achieved remarkable flexibility, enabling the application of modern medical interventions for reproductive purposes").

46. *Roman*, 193 S.W.3d at 51.

47. *Id.* at 44.



discontinue their participation in the program.<sup>48</sup> Just before the scheduled implanting of an embryo, the couple decided against that procedure at the apparent urging of the husband. While the couple signed an agreement a month later to have the three then-frozen embryos implanted after obtaining approval of a counselor, the process of counseling did not proceed. About eight months later, each spouse filed a petition for divorce. After engaging in mediation, the couple agreed in writing to "division of the marital property, except for the frozen embryos."<sup>49</sup> At the trial, the husband asked the court to uphold the agreement providing for disposal of the embryos. The wife, on the other hand, desired the embryos to be implanted, but if any child should be born as a consequence, the husband "would not have parental rights or responsibilities."<sup>50</sup> Following the trial, the court ordered that the wife take possession of the embryos. The husband then sought parental rights to any child born from the embryos under section 160.706(a).<sup>51</sup> A month later, the trial court filed findings of fact, stating that the parties had signed a mediation agreement for the disposition of all their community property except the three frozen embryos, which they agreed were community property.<sup>52</sup> The court concluded that the mediation agreement constituted a just and right division of the community property and ordered that the three frozen embryos be awarded to the wife. The husband appealed.

The Houston First District Court of Appeals cautiously began its handling of the matter by saying that it responded to the issue presented "as narrowly as possible in anticipation that the issue will ultimately be resolved by the Texas Legislature."<sup>53</sup> The court noted that at least three other states (Florida, New Hampshire, and Louisiana) had enacted legislation concerning frozen embryos.<sup>54</sup> The court then reviewed the relevant case law. In a case dealing with a written agreement concerning frozen embryos, Tennessee's highest court had concluded that the husband had the right not to beget a child, and the court therefore reversed the award of the embryos to the wife. The Tennessee court pointed out that "the husband's interest in avoiding parenthood was more significant than the wife's interest in donating the embryos to another couple for implantation."<sup>55</sup> In that case, there was no agreement of the couple for disposition of the embryos, but the court stated that "an agreement regarding disposition of any untransferred pre-embryos in the event of contingencies (such as the death of one or more of the parties, divorce,

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48. *Id.* at 51.

49. *Id.* at 43.

50. *Id.* If premarital-agreement provisions in TEX. FAM. CODE ANN. § 4.003 (Vernon 1998) had been applicable, the agreement to release the husband from parental responsibility would have failed.

51. TEX. FAM. CODE ANN. § 160.706(a) (Vernon 1998).

52. *Roman*, 193 S.W.3d at 41-43.

53. *Id.* at 44.

54. *Id.* at 54.

55. *Id.* at 45 (citing *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992), *cert. denied sub nom.*, *Stowe v. Davis*, 507 U.S. 911 (1993)).

financial reversals, or abandonment of the program) should be presumed valid and should be enforced . . . .”<sup>56</sup> In reaching a similar conclusion, New York’s highest court held that a couple’s agreement should control the disposition of embryos.<sup>57</sup> A New Jersey intermediate appellate court rejected an alleged oral agreement to destroy frozen embryos in case of divorce on the ground that an agreement to procreate is itself contrary to public policy and that the wife’s right to have the embryos destroyed did not infringe on the husband’s constitutional right to procreate because he would still be able to father children.<sup>58</sup> In affirming this conclusion, the New Jersey Supreme Court nevertheless said that “persuasive reasons exist for enforcing pre-embryo disposition agreements,”<sup>59</sup> that a wife who wished to have the embryos destroyed should not be forced to be a biological parent against her will,<sup>60</sup> and that either spouse has the right to rescind an in-vitro-fertilization agreement and thus to achieve destruction of the embryos.<sup>61</sup> In another case, the Massachusetts Supreme Court held that the couple had not entered into a binding agreement in signing certain forms supplied by a medical clinic in relation to disposition of embryos.<sup>62</sup> In two other somewhat different frozen-embryo storage-agreement cases (one in Washington and another in Iowa), the Washington court concluded that the agreement governed the disputes,<sup>63</sup> whereas the Iowa court held that, in the absence of a provision in the agreement for disposition of the embryos, mutual consent of the spouses was required.<sup>64</sup>

In this case, the Houston court concluded that Texas’s Uniform Parentage Act<sup>65</sup> (in which the eventuality of divorce is mentioned but in a different context from that before the court) did not resolve this dispute. The court went on to note, however, that in the case of a gestation agreement between the donor and the prospective gestational donee, either intended parent, if the donee is married, may terminate the agreement under the provisions of section 160.759(a) of the Family Code.<sup>66</sup> The court thus held that Texas’s public policy allows a married couple to enter into an agreement providing for an embryo’s disposition before implantation under changed circumstances. The couple’s agreement had specifically provided that “[w]e have been advised that each embryo resulting from the fertilization of the wife’s oocytes by the husband’s sperm shall be the joint property of both partners based on currently accepted principles regarding legal ownership of human sperm and oocytes, . . . [i]f . . .

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56. *Id.* (quoting *Davis*, 842 S.W.2d at 597).

57. *Kass v. Kass*, 69 N.E.2d 174, 176-78 (1998).

58. *J.B. v. M.B.*, 751 A.2d 613, 618-19 (N.J. Super. Ct. App. Div. 2000).

59. *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001).

60. *Id.* at 717.

61. *Id.* at 719.

62. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056-57 (Mass. 2000).

63. *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002).

64. *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

65. TEX. FAM. CODE ANN. § 160.704(a)-(b) (Vernon 1998).

66. *Id.* § 160.759(a) (Vernon Supp. 2006).

either of us files for divorce . . . we hereby authorize and direct . . . that . . . [t]he frozen embryos(s) shall be . . . [d]iscarded.” This agreement went on to say that “we understand that we are free to withdraw our consent as to disposition of our embryo(s) . . . .”<sup>67</sup> This provision applied because each spouse refused to release the embryos to the other as the agreement allowed.

It is striking that despite the couple’s agreement referring to the embryos in the gestational agreement as “joint property” and in their mediation agreement as “community property,” which they did not agree to divide, no argument suggested that they might be subject to the provisions of article XVI, section 15 of the Texas Constitution concerning partition of community property. Though that provision deals only with a partition (or exchange) of community property rather than destruction of it, a partition to the husband could have resulted in destruction. The closest that the court came to an allusion to applicability of the property-partition concept was its quotation from the Iowa Supreme Court’s comment<sup>68</sup> that “embryos are fundamentally distinct from the chattels, real estate, and money that are the subjects of antenuptial agreements.”<sup>69</sup> But in light of what the parties had agreed in typifying the embryos as community or joint property, their agreement was controlling to partition the embryos along with the other community property. If the agreement had been interpreted as incident to divorce under section 7.006, either party could have rescinded it unilaterally.<sup>70</sup> If interpreted as a constitutional marital partition, the agreement would have required the result reached by the Houston court. It is also worth noting that the sort of marital agreement in issue here and in other cases makes it clear that the spouses and this court viewed embryos outside the womb very differently from those in the womb.

#### B. CHARACTERIZATION BY TRACING

Two cases involved proof of separate character of marital property by tracing. In *Todd v. Todd*,<sup>71</sup> the wife claimed a farm owned before marriage as her separate property and testified to its location on a particular country road. The husband complained on appeal that she had failed to offer documentary evidence of her assertion of a precise description of the property and thus failed to overcome the community presumption. The Dallas Court of Appeals, with one judge dissenting,<sup>72</sup> held that the wife had clearly and convincingly identified the property to establish her separate ownership.<sup>73</sup>

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67. *Roman*, 193 S.W.3d at 50-52.

68. *Id.* at 48.

69. *Id.* at 48 n.10.

70. TEX. FAM. CODE ANN. § 7.006 (Vernon 2002).

71. 173 S.W.3d 126 (Tex. App.—Fort Worth 2005, pet. denied).

72. *Id.* at 129.

73. *Id.* at 128.

In *Pace v. Pace*,<sup>74</sup> before the Dallas Court of Appeals, the husband complained that his wife had not offered sufficient evidence of her separate ownership of their home and of a particular investment account. Three weeks after the parties' marriage, the wife instructed the account manager of her premarital management account to remove all dividend income that might be deposited there during the marriage, as well as all interest then added to the account, and to deposit those funds in an investment account so that no community property would be held in the management account.<sup>75</sup> A witness corroborated the wife's affidavit that all dividends deposited and interest earned by the management account were paid into the investment account, thus leaving only separate funds in the management account. The court went on to say that "if the correct amount was swept [into the investment account], mixing of dollars alone does not result in commingling."<sup>76</sup> Using funds from the management account, the wife then contracted to buy a house for which she paid earnest money, the cost of an inspection, and the rest of the purchase price. Her husband asked to have his name put on the deed for the house "because he did not want to feel like a tenant in the house."<sup>77</sup> The wife complied with his request, and the couple lived in the house until they separated several years later. During that time, the wife paid all taxes, insurance, and maintenance on the house from the account from which all dividends and other income paid into the account during marriage had been withdrawn. Although taking title in the name of both spouses gave rise to a presumption of a gift of half the property interest to the husband,<sup>78</sup> the trial court concluded that the wife's evidence clearly and convincingly established her separate ownership of the house. The trial court also found that a management trust created by the wife during marriage with pre-marital assets also constituted her separate property. All community income had also been removed from the trust. On appeal, the appellate court was satisfied that the wife's account manager had swept all community property from the management account every month as her manager testified, affirming the trial court's characterization of the account as separate property.<sup>79</sup> As to the home, the court held that the husband had waived the issue of gift to him by his failure to comply with Rule 38<sup>80</sup> in not preparing an adequate brief.

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74. 160 S.W.3d 706 (Tex. App.—Dallas 2005, pet. denied).

75. With or without professional advice, the wife was following the mode of management for maintaining a separate property account in which community funds have been deposited as approved in *M<sup>c</sup>Kinley v. M<sup>c</sup>Kinley*, 496 SW.2d 540 (Tex. 1973), in using what is referred to as the "identical sum inference"—based on the deliberate removal of the precise amount of community funds in the account.

76. See *Cockerham v. Cockerham*, 527 S.W.2d 162, 167-68 (Tex. 1975).

77. For a somewhat similar situation, see *Patterson v. Metzger*, 424 S.W.2d 255, 259 (Tex. Civ. App.—Corpus Christi 1967, no writ), in which the husband's evidence was insufficient to rebut the presumption of gift.

78. *Pace*, 160 S.W.3d at 710. See *Smith v. Strahan*, 16 Tex. 314 (1856).

79. *Pace*, 160 S.W.3d at 714-15.

80. *Id.* at 715 n.4 (citing *Trawick v. Trawick*, 671 S.W.2d 105 (Tex. App.—El Paso 1984, no writ); *Farrow v. Farrow*, 238 S.W.2d 255 (Tex. Civ. App.—Austin 1951, no writ)).

In *Russell v. Russell*<sup>81</sup> the husband's sworn inventory was struck because it was not timely filed; so the Houston First District Court of Appeals only had the wife's inventory and valuation before them. At the hearing, the husband had testified that his premarital car and savings account on which he wrote checks were in his father's name. His other properties, which were listed in the wife's inventory as his separate property, consisted of an undivided retirement account and a life insurance policy. The trial court nevertheless determined that these were community properties and so divided them. The Houston appellate court concluded that the wife's inventory and statement at the hearing constituted judicial admissions sufficient to overcome the community presumption, and the husband was entitled to a new trial for division of the property.

The decision of the Waco court in *LeGrand-Brock v. Brock*<sup>82</sup> is very brief. Before the divorcing couple's marriage, the husband owned shares in a corporation. During the marriage, the corporation underwent liquidation, and the husband received liquidating dividends from what had been retained and recent earnings of the corporation. At the divorce trial, the wife offered testimony of an expert to the effect that the distributions were community property. The trial court excluded this testimony as irrelevant and found that the liquidating dividends were the husband's separate property. The wife appealed the ruling on the evidence and the characterization of the property, and the majority of the court granted her appeal and remanded the case to the trial court. In his dissent, Chief Justice Gray followed the overwhelming authority of Texas precedent in concluding that liquidating dividends<sup>83</sup> of a separately held corporate interest (like stock dividends from the same source<sup>84</sup>) are the separate property of the shareholders.

### C. REIMBURSEMENT

In *Hale v. Hale*,<sup>85</sup> while married the husband had made gifts to his church of about \$50,000 over six years. His gifts had amounted to about one-sixth of community estate at the date of divorce, and the court ordered him to pay the wife \$25,000.<sup>86</sup> This was a simple reimbursement case and somewhat reminiscent of *Carnes v. Meador*,<sup>87</sup> in which the hus-

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81. No. 01-04-00984-CV, 2006 WL 241476 (Tex. App.—Houston [1st Dist.] Feb. 2, 2006, pet. granted).

82. No. 01-04-00984-CV, 2006 Tex. App. LEXIS 869 (Tex. App.—Houston [1st Dist.] Feb. 2, 2006, no pet.) (mem. op.); *Moore v. Key*, No. 05-02-00809-CV, 2003 WL 194725 (Tex. App.—Dallas Jan. 30, 2003, pet. denied).

83. See *Hilliard v. Hilliard*, 725 S.W.2d 722 (Tex. App.—Dallas 1985, no writ); *Fuhrman v. Fuhrman*, 302 S.W.2d 205 (Tex. Civ. App.—El Paso 1957, writ dismissed).

84. See, e.g., *Wells v. Hiskett*, 288 S.W.2d 257 (Tex. Civ. App.—Texarkana 1956, writ refused n.r.e.); *Scofield v. Weiss*, 131 F.2d 631 (5th Cir. 1942).

85. No. 04-05-00314-CV, 2006 WL 166518 (Tex. App.—San Antonio Jan. 25, 2006, pet. denied).

86. *Id.* at \*4.

87. 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ refused n.r.e.).

band had lavished a disproportionate share of a modest community estate on his daughter and son-in-law.

The San Antonio Court of Appeals's opinion in *Avila v. Avila*<sup>88</sup> concerned a wife's claim for economic contribution for money she contributed to building a house on her husband's separate realty. At the divorce trial, the wife had presented evidence of five checks for specific amounts of her separate property deposited to the couple's joint checking account or simply delivered to her husband as well as some other checks allegedly meant to pay for various items used in the house's construction. The use of particular amounts of her money for construction of the home and to what extent these alleged contributions were made to enhance the "equity value" of the realty from the date of the marriage to the time of divorce were not shown. The wife had therefore failed to prove an economic contribution of a specific amount of her separate funds used to enhance the value of the husband's separate property under section 3.402(a)(1), (5), and (6).<sup>89</sup>

In *Garcia v. Garcia*,<sup>90</sup> the El Paso Court of Appeals also dealt with an economic-contribution computation, in that instance under section 3.402(a)(6). While the first five subsections of section 3.402(a) deal with discharge of liens on marital property in various circumstances, subsection (a)(6) does not deal primarily with a lien but with a capital improvement on a marital estate as an economic contribution producing an equitable lien. Speaking for the court, Justice McClure began her analysis by stating that "[g]enerally speaking, these amendments [of 2001] were not well received by family law practitioners and both bench and bar have struggled with their application."<sup>91</sup> The court then properly affirmed the ordinary reimbursement claim of the wife for \$3,000 of her separate funds expended as a payment for the purchase of certain community property. In light of the inception-of-title rule, the court made a puzzling observation that the property did not take on its community character until the time of closing. Thus, the initial earnest-money payment did not give a factual interest in the property but a mere right of reimbursement.<sup>92</sup> The court went on to classify an additional \$7,000 of separate property expended for later improvements on the realty as an economic contribution under section 3.402(a)(6). The court suggested that in drafting orders for ordinary reimbursement and economic contributions, such items should be referred to as such<sup>93</sup> (though, in the broad sense, both are types of reimbursement) in order to distinguish the statutory creation from "common law [or Spanish] reimbursement."

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88. No. 04-04-00196-CV, 2005 WL 708431 (Tex. App.—San Antonio Mar. 30, 2005, no pet. h.).

89. *Id.* at \*1-2; TEX. FAM. CODE ANN. § 3.402(a)(1), (5), (6) (Vernon Supp. 2005).

90. 170 S.W.3d 644 (Tex. App.—El Paso 2005, no pet.).

91. *Id.* at 649. For an equally forthright comment on 2005 federal bankruptcy legislation see *In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005).

92. *Garcia*, 170 S.W.3d at 650 (citing *In re Royal*, 107 S.W.3d 846, 851-52 (Tex. App.—Amarillo 2003, no pet.)).

93. *Id.* at 652.

Another instance of economic contribution is described in *Moroch v. Collins*.<sup>94</sup> There, the couple entered into a marital partition in 1987, thereby converting all their community property to separate property of each, except for their residence and a bank account, which remained community property.<sup>95</sup> In their divorce proceeding, the wife asked for economic contribution, asserting that she used a significant amount of her separate property as earnest money and mortgage payments for a renovation of their residence, and those expenditures occurred before the marital partition. The divorce court awarded the residence to the wife in satisfaction of her claim for economic contribution. In the partition agreement, the parties had waived any claim for reimbursement against the separate property of the other but not as against any community property.<sup>96</sup> Thus, any claim that the wife had for capital improvement of the community estate or contribution to the purchase price thereof was maintained.

On appeal, the husband asserted that the wife's payment of her separate property constituted a gift to him of half of that amount and that title to the property was taken in the names of both spouses in 1979. The court nevertheless found that whatever the presumptive consequence of that payment at the time of purchase, the characterization of the residence as community property in the marital partition was clearly controlling. Further, the court concluded that the wife had succeeded in tracing all of her funds claimed as payments reimbursable to her separate estate. Because the residence constituted the only community property available to discharge the wife's economic contribution, satisfaction of her claim was properly discharged by the award of the residence under section 3.403(d), within the limits of that section that "the amount of the claim . . . may not exceed the equity in the property on the date of dissolution of marriage."<sup>97</sup>

One judge on the panel dissented from the court's conclusion on the ground that the 1987 agreement precluded the wife's claim. The dissenting judge relied on the language of the partition characterizing the residence as community property "in its entirety," thus precluding the wife's economic-contribution claim.<sup>98</sup>

*Chu v. Hong*<sup>99</sup> dealt with the more familiar non-statutory type of reimbursement—an appeal by a lawyer in relation to a community donut shop, which the attorney's clients had sought to buy from a husband and wife. After negotiations between the lawyers and sellers, the seller-wife withdrew from participation in the sale despite the buyers' lawyer's threat

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94. 174 S.W.3d 849 (Tex. App.—Dallas 2005, pet. denied). Cf. *Raymond v. Raymond*, 190 S.W.3d 77 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (the claimed economic contributions were unproved).

95. *Moroch*, 174 S.W.3d at 854.

96. *Id.* at 859.

97. *Id.* at 867.

98. *Id.* at 873.

99. 185 S.W.3d 507 (Tex. App.—Fort Worth 2005, pet. filed).

of litigation against the sellers. The husband, who still hoped to sell the property, negotiated with the buyers' lawyer, who knew of the wife's unwillingness to sell. The lawyer then prepared an amended sales agreement showing the husband as the sole owner of the property and acting alone. With the buyers' belief that the husband had sole authority, the property was transferred to the buyers. The husband then promptly wired the proceeds of the sale to Korea and soon followed the money. Each spouse brought suit for divorce, and the wife brought an independent suit against the buyers and the husband to set aside the sale. The wife also sued the attorney for his fraudulent involvement in selling the shop and conspiracy with her husband to defraud her. All the suits were consolidated for trial.

The court granted the divorce and divided the community estate. The court divested the buyers of their interest in the shop, which was awarded to the wife. The trial court responded to the wife's suit against her husband for his intentional tort by an award of damages. Only the attorney appealed the judgment of the trial court. In reliance on *Connell v. Connell*,<sup>100</sup> the appellate court concluded that the husband's constructive fraud on his wife in disposing of a community asset and its proceeds, the detriment suffered by his wife, and the connivance of the buyers' attorney imposed liability on the attorney who knowingly participated in the husband's wrongful scheme. The court relied on the Texas Uniform Transfer Act, which provides relief to a creditor against a debtor who transfers property to "hinder, delay or defraud" the debtor.<sup>101</sup> The definition of a creditor in section 24.002<sup>102</sup> includes a claimant-spouse. The court concluded that the inclusion of "spouse" in the definition was meant to support and protect the concept of interspousal reimbursement because so many early decisions<sup>103</sup> on the subject arose as a result of a spouse's fraudulent transfers to injure the other spouse. In her dissenting analysis of the attorney's liability for conspiracy, Justice Gardner inferred that a wife would have had such a cause of action against her husband but that, in such a case as this, it would be precluded by the Texas Supreme Court's decision in *Schlueter v. Schlueter*.<sup>104</sup> The actual intent of the Texas draftsmen of section 24.002, however, was to emphasize the deprived spouse's claim to spousal reimbursement. Justice Gardner nevertheless took the view that the wife's claim against the attorney might still be for conspiracy to commit fraud on the community estate.<sup>105</sup> Thus, the attorney's liability might be analogous to that of the recipient of a fraudulent transfer in *Cohrs v. Scott*.<sup>106</sup>

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100. 889 S.W.2d 534, 541 (Tex. App.—San Antonio 1994, writ. dismissed).

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

102. *Id.* § 24.002.

103. See Richard F. Dole, Jr. & Vernon Teofan, *The Nonuniform Texas "Uniform" Fraudulent Transfer Act*, 42 Sw. L.J. 1029, 139 n.111 (1989).

104. 975 S.W.2d 584, 585, 590 (Tex. 1998).

105. *Chu*, 185 S.W.3d at 518-19.

106. 338 S.W.2d 127 (Tex. 1960). See also *Miller v. Miller*, 285 S.W.2d 373 (Tex. Civ. App.—Eastland 1955, no writ).



### III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

#### A. MANAGEMENT

Recently reported appellate decisions have tended to plow old ground, and many of the disputes really did not merit pursuing at the appellate level, except by those who were sued successfully for little, if any, cause. The arguments advanced by the widow-executrix of her late husband's estate and the facts on which she relied in *Lemaster v. Top Level Printing Ink, Inc.*<sup>107</sup> are very reminiscent of similar matters in *Williams v. Portland State Bank*,<sup>108</sup> though that case is nowhere alluded to in the decision of the Dallas appellate court. In *Williams*, the bank prepared notes and a deed of trust covering two tracts of community land as security for a loan to the husband. One tract was held in the names of both spouses and the other in the name of the husband alone. The wife declined to execute the instruments, and a new note and deed of trust were prepared for the husband's signature, and the loan was concluded. On the husband's default, the bank sought foreclosure of the deed of trust. In the litigation that followed, the Beaumont appellate court concluded that the foreclosure of the note on the property in the names of both spouses was controlled by what is now section 3.102(c) (Managing Community Property) and that the husband lacked authority to deal with the property alone because, as the state of the title indicated, the property was subject to the spouses' joint management. As to foreclosure on the land in the husband's name, the court held that under what is now section 3.104 (Protection of Third Persons), the bank, without knowing more, might have safely dealt with the husband alone. The court held that the bank's knowledge that the wife had refused to sign the loan instruments put the bank on inquiry with respect to the wife's interest, and by the exercise of ordinary diligence, the bank would have discovered that the husband lacked authority to act alone because that property was subject to the spouse's joint management, as it had been acquired with jointly managed community property. The appellate court, nevertheless, allowed recovery against the husband for his half-interest in each tract; it is in that respect that the court's conclusion has been regarded as erroneous.<sup>109</sup> The bank's injury was therefore self-inflicted by its initial assumption that it would achieve joinder of both spouses as borrowers without any prior inquiry as to ownership and management of the proffered collateral.

In *Lemaster*, the husband and two others orally agreed to form a partnership in 1997. In 2001, they decided that their agreement should be memorialized by an instrument in writing. Under the space provided for

107. 136 S.W.3d 745 (Tex. App.—Dallas 2004, no pet.).

108. 514 S.W.2d 124 (Tex. App.—Beaumont 1975), writ *dism'd*, 18 Tex. Sup. Ct. J. 210 (1975) (agreed motion to affirm denied, and agreed motion setting aside order granting application for writ of error and dismissing application for writ of error granted).

109. See *Dalton v. Don J. Jackson, Ins.*, 691 S.W.2d 765 (Tex. App.—Austin 1985, no writ).

signatures of the partners (referred to as stockholders), there was a place for the wives "to indicate [that] they agreed to the contract."<sup>110</sup> In rejecting the widow's argument that the agreement was subject to the wives' approval, the court said that "the agreement itself shows [that] the wives were not signing the agreement as parties"<sup>111</sup> and "[t]he agreement itself also shows that the parties intended it to be effective irrespective of the wives signatures [sic] because it states [that] it was merely a memorialization of an earlier oral agreement between the stockholders."<sup>112</sup> As one of the partners testified: "the reason they wanted the wives to sign the agreement was to avoid the litigation they were currently in."<sup>113</sup>

In their original partnership agreement, carried forward in the written instrument, it had been understood that on the death of any one of them, his share would be sold to the others at its book-value. After the death of one of the partners, it was realized that his widow had not signed. Acting as her husband's independent executrix, the widow resisted the efforts of the surviving partners to enforce the agreement on the ground that the property had been subject to her joint management. Just as the bank had provided that both the husband and his wife should join as borrowers in *Williams*, the widow in *Lemaster* asserted that the wives were *required* to join in the agreement, and her failure to sign put the partners on inquiry as to the joint management of community interest at stake.<sup>114</sup> The trial judge in *Lemaster*, however, directed a jury verdict in favor of the stockholders to enforce their agreement against the husband's estate. Unlike the court's conclusion in *Williams*, there was no proof that anyone was put on inquiry of anything by the failure of the wife to sign, and it was not proved that anyone noted her failure to sign or that she had refused to do so. Therefore, the appellate court affirmed the trial court's judgment upholding the partnership agreement.

## B. LIABILITY

In *In re Gevin*,<sup>115</sup> the husband and wife held an interest in an out-of-state partnership that they partitioned between them as separate property. A judgment had been taken against the husband for his indebtedness to a creditor. His wife was neither jointly nor severally liable on that debt nor a party to that action. In their bankruptcy that followed, the husband's indebtedness was not discharged, but the bankruptcy court enjoined the husband's creditors from recovering against money recovered by the wife for emotional distress as her separate property. The hus-

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110. *Lemaster*, 136 S.W.3d at 747.

111. *Id.* at 748.

112. *Id.* at 749.

113. *Id.* at 747.

114. See *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) and its progeny, cited in JOSEPH W. MCKNIGHT & WILLIAM A. REPPY, JR., *TEXAS MATRIMONIAL PROPERTY LAW* 269-75 (9th ed. 2006), for consequence of contract in which the wife had joinder but without full disclosure of the contract's implications.

115. 337 B.R. 854 (Bankr. W.D. Tex. 2005).

band's judgment creditors then sought to levy execution against the wife's partnership interest. The ex-wife brought suit in the bankruptcy court to enforce the injunction rendered in her interest under section 524 of the Bankruptcy Act.<sup>116</sup> Relying on *In re Torres*,<sup>117</sup> the bankruptcy court held that it had jurisdiction to enforce the court's damage award as an appropriate remedy for the ex-wife's injury under section 524.

In *Providian National Bank v. Ebarb*,<sup>118</sup> after the spouses were divorced, the ex-wife's creditor brought suit against both former spouses for recovery of a debt incurred by the ex-wife during their marriage. The ex-wife did not appeal the default judgment against her, and no liability was found against the ex-husband. The creditor-bank appealed. Though the facts of the dispute as related by the Beaumont Court of Appeals are not altogether clear, it appears that a bank had issued a credit card to the wife in the name of both spouses, but the contract between the wife and the bank included no specific provision concerning the husband's liability. When the couple divorced, the wife's debt to the bank had been only partially discharged. In its appeal, the creditor relied on the long-discredited argument that, because the wife had incurred a "community debt," the husband was therefore liable. The bank relied on the authority of *Cockerham v. Cockerham*,<sup>119</sup> in which the Texas Supreme Court (in a 5-to-4 decision) had concluded that the husband's financial support of his wife's business ventures and public acknowledgment of her debts as his own constituted joint-venture liability. The Beaumont court rejected the creditor's arguments, pointing out that, although the husband had paid some of the wife's monthly bills, there was no evidence of a contract or any agreement as to his liability to the bank and no assumption of his wife's liability as his own.<sup>120</sup> The court rejected the bank's claim against the husband under section 3.201 (Spousal Liability), enacted in 1987.<sup>121</sup> The bank had failed to establish that the husband was "personally liable for the debt, either through [the wife's] acts or through his own acts."<sup>122</sup>

In *Wolfram v. Wolfram*,<sup>123</sup> the San Antonio Court of Appeals dealt with an ex-wife's attempt to enforce a judgment debt arising out of a California divorce decree against the deceased ex-husband's subsequent widow. Just before his death, the ex-wife had recovered a California judgment against her ex-husband for unpaid ex-spousal support. The judgment was, however, barred from enforcement in Texas by the running of the Texas statute of limitations.<sup>124</sup> After concluding that domestication of the California judgment had not been achieved by a timely suit, the ex-wife sued her ex-husband's widow, who had not been a party to

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116. 11 U.S.C. § 524 (2005).

117. 309 B.R. 643, 648 (B.A.P. 1st Cir. 2004).

118. 180 S.W.3d 898 (Tex. App.—Beaumont 2005, no pet.).

119. 527 S.W.2d 162 (Tex. 1975).

120. *Providian Nat'l Bank*, 180 S.W.3d at 901-02.

121. TEX. FAM. CODE ANN. § 3.201 (Vernon 1998).

122. *Providian Nat'l Bank*, 180 S.W.3d at 902.

123. 165 S.W.3d 755 (Tex. App.—San Antonio 2005, no pet.).

124. *Id.* at 758 (citing TEX. CIV. PRAC. & REM. CODE § 16.006(b) (Vernon 1997)).

the ex-wife's California suit. Because the widow had not been a party, even if the judgment had been properly domesticated in Texas, a writ of execution on the judgment could not have run against the widow.<sup>125</sup>

It was said once again in *In re Whitus*<sup>126</sup> that section 3.102 is a Texas exemption statute that the federal Treasury can ignore in order to recover a debtor-spouse's interest in community property subject to the sole management of the other spouse<sup>127</sup> under section 6334(a) of the Internal Revenue Code.<sup>128</sup> The court reiterated that the United States "is not concerned that the Texas Family Code provision is not specifically denominated as an exemption."<sup>129</sup> It is simply a rule inherent to the nature of a solely managed community property interest as declared by statute in 1967.<sup>130</sup> In this instance, the controlling principle was the Congressional enactment and thus a rule of federal supremacy: the right of the Internal Revenue Service to seize the debtor-taxpayer's interest in the community property subject to the other spouse's sole management. It was beside the point that the type of property in issue was, if community property controlled by the husband, beyond the wife's reach and hence beyond that of her ordinary creditors. The yet unanswered question, however, is the nature of the remainder of the property after satisfaction of the Revenue Service's levy on the taxpayer's community interest. Is the amount remaining still community property, or has it been transformed into the non-debtor spouse's separate property by operation of the supremacy doctrine? The latter conclusion should be the result, despite conclusions to the contrary in Washington and New Mexico.<sup>131</sup> If the effect of application of federal law does not produce an involuntary partition to produce equal shares of separate property, federal levies may continue to be applied until the non-debtor-spouse's share is extinguished. Entry into a premarital or marital partition to avoid an existing debt to the United States is precluded by article XVI, section 15 of the Texas Constitution.<sup>132</sup>

In *Brown v. Zimmerman*<sup>133</sup> the Dallas appellate court held that division of property on divorce did not relieve the ex-wife of an obligation to discharge her note to a finance company owned by her husband because the divorce decree was silent as to the note and allocated the property

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125. *Id.*

126. 240 B.R. 705 (Bankr. W.D. Tex. 1999).

127. 26 U.S.C.A. § 6334(a) (West 2005).

128. *Whitus*, 240 B.R. at 708 (quoting *Brodoy v. United States*, 455 F.2d 1097, 1101 (5th Cir. 1972)). See also *United States v. Craft*, 535 U.S. 274 (2003); *Medaris v. United States*, 884 F.2d 832 (5th Cir. 1989).

129. *Brodoy*, 455 F.2d at 1101.

130. TEX. FAM. CODE ANN. § 3.002(b)(2) (Vernon 1998). See Joseph W. McKnight, *Family Law: Husband and Wife*, 44 Sw. L.J. 1, 38 (1990).

131. See *deElche v. Jacobsen*, 622 P.2d 835 (Wash. 1980); *McDonald v. Senn*, 204 P.2d 990 (N.M. 1949).

132. For a related but not necessarily analogous consideration of planning techniques to avoid Medicaid Estate Recovery, see MOLLY DEAR ABSAIRE, ET AL., SAVE MY HOME! SAVING YOUR HOME, FARMER RANCH FROM MEDICAID ESTATE RECOVERY IN TEXAS (Elder Law Trio Press 2005).

133. 160 S.W.3d 695 (Tex. App.—Dallas 2005, no pet.).

securing the note to the wife as separate property. *Chorman v. McCormick* is a somewhat similar debtor-creditor case but still a significantly different one.<sup>134</sup> Their land was bought during the marriage and subject to a lien for the entire purchase price. The land was left undivided by the divorce court in 1985 and thereby became a tenancy in common of the former spouses. The ex-wife, however, was awarded the right to occupy the land and was in possession. The husband was the original purchaser of the community land, and his father had discharged the purchase money lien of the unpaid seller. To discharge his obligation to his father, the son conveyed his half interest to his father, leaving one-half of the indebtedness to the father still unpaid. The father then brought suit against the son's ex-wife seeking, as he alleged, to impose his equitable purchase money lien on her share of the undivided property. He had, however, waited more than four years after paying the whole purchase price. Hence, the father asserted that he was seeking to enforce his equitable lien and not the debt owed to him. The appellate court held that the father had not acquired an equitable lien on the property because there was no implied contract with the ex-wife to support it. Therefore, his cause of action was barred by the four-year statute of limitation.<sup>135</sup> The significant difference between *Brown* and *Chorman* was that in the former, the wife was a maker of the note, whereas in *Chorman*, she was not. Even so, if the father had recovered a judgment against his son before divorce, he could then have foreclosed his lien judgment before or after the divorce within four years.

### C. EXEMPT PROPERTY

#### 1. Business Homestead

In 1999, the residential-homestead provisions of the Texas Constitution were amended to provide that a homestead "shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business"<sup>136</sup> and that the business homestead must be contiguous to the residential homestead. Disputes with respect to a business homestead are very uncommon because the configuration of a business homestead contiguous to a residential homestead is now unusual. In *In re Jay*,<sup>137</sup> the Chapter 13 debtor-husband and his non-debtor wife sought to cancel the deed that they described as their business homestead, although they did not maintain a residence there. In January of 2000 (the statute applied the 1999 constitutional definition to all Texas homesteads "whenever created,"<sup>138</sup> effective January 1, 2000), the couple conveyed the property to a lender who agreed to erect a new building on the premises,

134. 172 S.W.3d 22 (Tex. App.—Amarillo 2005, no pet. h.).

135. *Id.* at 26.

136. TEX. CONST. art. XVI, § 51.

137. 432 F.3d 323 (5th Cir. 2005). The decision at first instance is discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, 58 SMU L. REV. 877, 892-94 (2005).

138. TEX. PROP. CODE ANN. § 41.002(d) (Vernon 2000).

which would be rented to the grantors. As a term of the subsequent lease from the grantee-lender effective April 1, 2000, the grantors were given an option to repurchase the property from the grantees. Some months later, the lessor sought to eject the tenants for nonpayment of the rent, and the husband filed for bankruptcy. The bankruptcy court concluded that the sale-leaseback arrangement was a pretended sale of a business homestead because “[a]ll pretended sales of the homestead involving any condition of defeasance [are] void,”<sup>139</sup> and this conclusion was affirmed by the federal district judge. The lessor appealed.

The Fifth Circuit Court of Appeals held that the amended definition of the urban business homestead to include as applying to business premises contiguous to a residential homestead could apply to this property because the deed was executed in January 2000. As the grantors had never lived on adjacent property, however, neither property could qualify as the grantor’s business or residential homestead<sup>140</sup> and was not entitled to homestead protection. The contracts between the parties could not relate back to “the execution of the warranty deed in January 2000,” in order to fall under the old business homestead definition, or to the December 1999 lease signing because there was insufficient evidence of a contract to amount to an enforceable undertaking. The simplification of this observation is that leased premises qualify as a business homestead.

In his dissenting opinion, Judge Higginbotham would have reversed the conclusion of the bankruptcy and district courts treating this as not a real sale, but merely a pretended one based only on the grantor’s desire to borrow money with which to construct business premises and to repay the loan by repurchase of the land for the amount advanced by the grantor. Further, he stated that the bankruptcy judge went astray in that the statute altering the scope of the constitutional definition of an urban homestead did not become effective until January 1, 2000, and “any retroactive application for transactions occurring before January 1, 2000 would alter the substantive rights and obligations of the parties in violation of the Texas Constitution’s prohibitions against *ex post facto* or retroactive laws.”<sup>141</sup> This deed, he went on to reiterate, was thus “a disguised mortgage.”<sup>142</sup>

## 2. Residential Homestead

*In re Gandy*<sup>143</sup> is another of the long line of cases involving a homestead claim to property partially improved for occupancy but never actually occupied as a home. The debtor had planned to live in his travel trailer on the property, but had only constructed a driveway and made arrangements for utilities. The bankruptcy court rejected the debtor’s

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

140. *Jay*, 432 F.3d at 326-27.

141. *Id.* at 329.

142. *Id.* at 331-32.

143. 327 B.R. 807 (Bankr. S.D. Tex. 2005).

claim under the Bankruptcy Code that the property was land that the debtor "uses as a residence,"<sup>144</sup> despite the possibility of its being treated in the future as exempt from creditor's claims.<sup>145</sup>

The deceased husband in *Mangrum v. Conrad*<sup>146</sup> devised to his widow one-half of his estate on condition that she vacate their home<sup>147</sup> and waive her statutory right of an allowance in lieu of a homestead.<sup>148</sup> The widow did not, however, leave the home for two years. There is no time limit as to the widow's making an election in favor of her right as a surviving spouse, and she finally made a written election to take under the will. As a matter of law, the testator could clearly force her to make the choice within a specific time between her homestead rights and the provision made for her in the will; there can be no doubt that she could be put to such a testamentary election for the right of homestead occupancy.<sup>149</sup> The executrix nevertheless asserted that the widow had implicitly made her election in favor of her right as a surviving spouse by maintaining possession of the home. The appellate court affirmed the judgment of the probate court in favor of the widow, whose response to the provisions of the will were deemed as timely made.

The dispute in *M<sup>c</sup>Kee v. Wilson*<sup>150</sup> seems to have arisen from a fundamental misconception of some homeowners that the homestead exemption protects a homestead from foreclosure of a valid lien acquired before the property became a homestead. In this instance, a building contractor had acquired a mechanic's lien for the construction of a house that became the homestead of the property owner when the building was completed. When the couple entered into an oral contract with the builder to construct the house, which was later reduced to writing, the couple already owned and occupied a homestead. In this instance, the owners as-

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144. 11 U.S.C. § 522(d)(1) (2005).

145. *Gandy*, 327 B.R. at 808-09. For another situation involving the definition of a homestead in a debtor-creditor context, see *In re Blair*, 334 B.R. 374 (Bankr. N.D. Tex. 2005). In that case, the court held that the increase in value of a homestead (resulting in part from payments made during the 1,215 days immediately before the filing of the bankruptcy petition) did not constitute an "interest" in homestead property sufficient to come within provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act if the bankrupt had chosen state exemptions allowing protection of a homestead interest of up to \$125,000. *Id.* (citing 11 U.S.C. § 522(p) (2005)). For other problems arising under the act, see Lawrence R. Ahern, III, *Homestead and Other Exemptions under the Bankruptcy Abuse Prevention and Consumer Protection Act: Observations on "Asset Protection" after 2005*, 13 AM. BANKR. INST. L. REV. 585 (2005).

146. 185 S.W.3d 602 (Tex. App.—Dallas 2006, no pet.).

147. The will forced her to choose between the bequest provided for her and her homestead right to occupy the family home, which was the husband's separate property. *Id.* at 604.

148. TEX. PROB. CODE ANN. § 273 (Vernon 2003).

149. *Miller v. Miller*, 149 Tex. 543, 235 S.W.2d 624 (1951). See also *Garner v. Estate of Long*, 49 S.W.3d 920 (Tex. App.—Fort Worth 2001, pet. denied), discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1035, 1056-58 (2002). A widow can also be put to an equitable election between a legacy from her husband and a legacy to another he had made of her interest in the community estate. *Wright v. Wright*, 154 Tex. 138, 274 S.W.2d 670 (1955).

150. 174 S.W.3d 842 (Tex. App.—Waco 2005, no pet.).

serted that a lien could not have arisen on this property in favor of the builder because the agreement was not “in writing” (as required by section 53.254 of the Property Code<sup>151</sup>) and the lien remained unrecorded until after the couple had moved into their new home. The court held that because the owners of the new house did not occupy it until they had moved from their prior homestead, the builder had already acquired his statutory mechanic’s lien on the new home, and his compliance with section 53.354 was irrelevant.<sup>152</sup>

*Dominguez v. Castaneda*<sup>153</sup> involved somewhat similar facts. In 2002, the homeowner brought suit against her creditor seeking to enjoin foreclosure of a deed-of-trust lien fixed on the property more than four years from the time that the loan was made.<sup>154</sup> In 1996, the wife had given her husband a general power of attorney to handle her business affairs. Shortly thereafter, as his wife’s agent, the husband borrowed money from the lender, giving a deed of trust on a house allegedly owned by the wife but not actually acquired by her until 1998 (by devise as to one-half and the other half by purchase). The husband and wife lived in a house next to the one covered by the deed of trust. The lender filed the deed of trust for record about a month later. During 1998, the husband made only two payments on the note. In 2000, the wife filed for Chapter 13 bankruptcy, and her schedule showed her indebtedness to the lender. Although the wife sought to rely on the running of the four-year statute of limitation<sup>155</sup> to bar the lender’s claim, her acknowledgment of the debt in her Chapter 13 schedule had revived it.<sup>156</sup> The wife also asserted that the property subject to the deed of trust was her homestead and thus exempt from the lender’s claim. The court rejected this argument, stating that even though the house may have later become her home, the deed-of-trust lien fixed on the property when she acquired it (by operation of the after-acquired property doctrine) prevented its being claimed as not subject to the lien. The lien was thus fully enforceable.<sup>157</sup> The wife had acquired title to the land, and the lender’s lien fixed on it simultaneously.

The transfer of a homestead can rarely constitute a fraudulent conveyance, but in *In re Jones*,<sup>158</sup> the transfer contributed to that result. In that case, the unmarried owner of a homestead sold it and transferred some of the proceeds to his fiancée to buy a truck. Because this transfer occurred

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151. TEX. PROP. CODE ANN. § 53.254(a) (Vernon Supp. 2006). For an instance illustrating that a homestead may be established when a family moves from another state to Texas, even though they had not taken up residence in a new Texas home under renovation, see *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796 (Tex. App.—Austin 2004, pet. denied). The family, in the course of moving to Texas, was successful in establishing their *homestead by preparation*, despite actual occupancy.

152. *M<sup>c</sup>Kee*, 174 S.W.3d at 845.

153. 163 S.W.3d 318 (Tex. App.—El Paso 2005, pet. denied).

154. TEX. CIV. PRAC. & REM. CODE ANN. § 16.035(b) (Vernon 2002). See *Dominguez*, 163 S.W.3d at 324.

155. TEX. CIV. PRAC. & REM. CODE ANN. § 16.065 (Vernon 1997).

156. *Dominguez*, 163 S.W.3d at 324, 327.

157. *Id.* at 331.

158. 327 B.R. 297 (Bankr. S.D. Tex. 2005).



within one year of his filing for Chapter 7 bankruptcy, it was “in [the] nature of [a] fraudulent transfer” under the Bankruptcy Code.<sup>159</sup> The debtor in bankruptcy was also unable to explain the disposition of \$57,000 received for the sale of his residence. Though the debtor may hold such proceeds as exempt property for six months to allow him time to purchase another homestead,<sup>160</sup> property other than a homestead in which the proceeds are invested during the six-month period are not exempt from creditors’ claims.<sup>161</sup> The debtor, who in this instance was unable to produce records to substantiate disposition of the funds, had the burden of showing that his failure to produce the records was justified under the circumstances in order to avoid denial of a discharge.<sup>162</sup> The debtor was unable to satisfy his burden of proof, and his discharge in bankruptcy was denied.<sup>163</sup>

### 3. Home-Equity Loans

The Texas Constitutional requirements<sup>164</sup> necessary for enforcement of home-equity loans are sometimes overlooked. One of these requirements is that the lender may not “require” that the borrower apply loan proceeds to pay an existing debt to the same lender.<sup>165</sup> In *In re Box*,<sup>166</sup> the loan agreement contained a recital that the lender had not required the borrower to pay a debt owed to the lender. The bankruptcy court, however, found that both the homeowners and the lender knew that the recital was false when the agreement was made,<sup>167</sup> though the lender argued that repayment of a prior loan had not been *required* as demonstrated by the fact that the borrower had *voluntarily* entered into the loan agreement.<sup>168</sup> The court concluded that “require” in the statute means that the lender *demand*ed the term in the loan agreement as a *sine qua non* for making the loan, as was apparent in this instance.<sup>169</sup> Thus, “the mendacious recitals and affirmations” could not validate the constitutionally prohibited loan as shown by the facts.<sup>170</sup> The bankruptcy court suggested an analogy between this situation and the attitude of Texas courts toward borrowers’ assertions that the property used as collateral for a loan is not their true homestead (though demonstrably untrue) and that another property where they do not make their home is their

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159. 11 U.S.C. § 548 (2005).

160. *Jones*, 327 B.R. at 301 (citing TEX. PROP. CODE ANN. § 41.001(c) (Vernon 2005)).

161. TEX. PROP. CODE ANN. § 41.001(a) (Vernon 2005).

162. *Jones*, 327 B.R. at 304 (citing 11 U.S.C. § 727(a)(3) (2005)); *In re Juzwiak*, 89 F.3d 424, 428 (7th Cir. 1996).

163. *Jones*, 327 B.R. at 305-07.

164. TEX. CONST. art. XVI, § 50(a).

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

166. 324 B.R. 290 (Bankr. S.D. Tex. 2005), *aff'd*, *Box v. First State Bank*, 340 B.R. 782 (S.D. Tex. 2006).

167. *Id.* at 292.

168. *Id.* at 293.

169. *Id.* at 294.

170. *Id.*

homestead.<sup>171</sup>

In another dispute,<sup>172</sup> the same bankruptcy court denied fees and costs to a lender who sought, unsuccessfully, to remove the automatic stay in its attempt to foreclose a home-equity loan contrary to the Bankruptcy Act.<sup>173</sup> The fees for foreclosure on an over-secured home-equity loan were deemed “unreasonable” in the sense that the lender’s acts were not commercially prudent.<sup>174</sup>

#### 4. *Personal-Property Exemptions*

If a debtor claims exemptions in bankruptcy and no objection is made to his claim, that property vests in the debtor<sup>175</sup> and the exempt property is thereafter immune from liability for pre-petition debts.<sup>176</sup> If the Chapter 7 case is then converted into a Chapter 13 case, the deadline for objecting to exemptions does not at that point recommence; the same result occurs when a case is converted from a Chapter 13 proceeding to one under Chapter 7.<sup>177</sup> The issue before the court in *Antonov v. Walters*<sup>178</sup> was whether the wife’s claims’ for personal injury and lost wage claims’ constituted exempt personalty in her Chapter 7 bankruptcy filed soon after she was injured. No objection was filed to her exemption claim,<sup>179</sup> and the jury awarded a large verdict in her favor. At that point, the trustee in bankruptcy intervened in the proceeding, and the court entered judgment in favor of both the wife and the bankruptcy trustee. On the defendant-tortfeasor’s appeal, he asserted that the wife lacked standing to sue. The Fort Worth Court of Appeals concluded that, although all property of a bankrupt becomes the property of the bankruptcy estate when the petition is filed, the wife’s assertion of her exemptions (to which no objection was made) had vested in her free of debt. The wife therefore had standing to sue the tortfeasor.<sup>180</sup> Further, the trustee had “an enforceable interest to protect,” and his claim dated back to the wife’s filing, thus disposing of the appellant’s assertion of the running of the

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171. *Id.* at 294-95 (citing *In re Niland*, 809 F.2d 272, 276 (5th Cir. 1987); *Tex. Land & Loan Co. v. Blalock*, 76 Tex. 85, 87, 13 S.W. 12, 13 (1890)).

172. *In re Valdez*, 324 B.R. 296 (Bankr. S.D. Tex. 2005).

173. 11 U.S.C. § 506(b) (2005); *Valdez*, 324 B.R. at 300 (citing U.S.C. § 506(b)(3)).

174. *Valdez*, 324 B.R. at 301-02.

175. 11 U.S.C. § 522(l) (2005); FED. R. BANK. PROC. 4003.

176. 11 U.S.C. § 522(c) (2005).

177. See *In re Fonke*, 321 B.R. 199, 205-09 (Bankr. S.D. Tex. 2005). For a review of some of the consequences of the 2005 enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act in relation to real estate holdings of Chapters 7 and 13 homestead claimants, see Patrick E. Mears & John T. Gregg, *What Congress Hath Wrought*, 19 PROB. & PROP. 23, 26 (Nov.-Dec. 2005). In that article, the authors also discuss the timely filing of objections to exemptions when delays are occasioned by a lack of time to complete the creditors’ meeting or in finding a convenient time for its rescheduling.

178. 168 S.W.3d 901 (Tex. App.—Fort Worth 2005, pet. denied). For a case involving a pre-petition personal-injury claim recorded after the petition in Chapter 13 was filed, see *In re Launza*, 337 B.R. 286 (Bankr. N.D. Tex. 2005).

179. 11 U.S.C. § 522(d)(11)(D)-(E) (2005).

180. *Antonov*, 168 S.W.3d at 906.

statute of limitation against him.<sup>181</sup>

In *Goebel v. Brandley*,<sup>182</sup> the issue was whether a voluntary payroll deduction of wages directed by the debtor-employee to her employer to buy bonds in favor of her children constituted a fraudulent transfer. The court held that no fraudulent transfer was made in that situation. In reaching that conclusion, the Houston Fourteenth District Court of Appeals characterized the divested funds as the employee-debtor's current and unpaid wages, which are clearly constitutionally exempt property when still in the hands of the employer.<sup>183</sup> Hence, their transfer by the debtor was not a fraudulent transferor. The creditor contended that, because the debtor-employee had control over her wages, they had lost their exempt status. In repelling this argument, the debtor relied on the 1989 amendment to the turnover statute,<sup>184</sup> whereby current wages are excluded from the scope of that act except in the context of court-ordered child support.<sup>185</sup> The court was also unmoved by the creditor's further argument that the debtor's ability to cancel her direction to her employer constituted a constructive receipt of the wages. The court added that the purchase of the bonds was not commensurate to the employee's depositing her paycheck into her bank account, which she did not do, and the bonds were then issued in the names of her children.<sup>186</sup> It was also pointed out that the creditor's judgment against the debtor was incurred years after the payroll-deduction plan had been in operation.<sup>187</sup> This situation poses a very close question. It was resolved here in favor of the exemption-claimant, but not really for the claimant's actual benefit.

In *In re Watson*,<sup>188</sup> the trustee in bankruptcy sought a turnover order against the trustee of a spendthrift trust for the benefit of a Chapter 7 bankrupt. The trust had been created for the debtor's benefit by his grandfather in 1987, and the beneficiary had a right to demand withdrawals from the settlor's later additions to the trust. The bankruptcy-trustee asserted the beneficiary's right to take down those additions to the trust. The trustee of the trust asserted that because of the spendthrift quality of the trust, which protected both income and corpus of the trust from the beneficiary's creditors, the beneficiary had no beneficial interest in those amounts that would be includable in his bankruptcy estate. The trustee further asserted that the right to distribute assets was wholly discretionary.<sup>189</sup> The court disagreed with the trustee, stating that the trustee's right was not wholly discretionary because the beneficiary had a present interest to demand distribution of one-third of the additions to the trust as clearly provided in the trust agreement, and the bankruptcy-trustee

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181. *Id.* at 907.

182. 174 S.W.3d 359 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

183. TEX. CONST. art. XVI, § 28.

184. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(f) (Vernon 1997 & Supp. 2006).

185. *Goebel*, 174 S.W.3d at 365.

186. *Id.* at 365-66.

187. *Id.* at 366.

188. *In re Watson*, 325 B.R. 380 (Bankr. S.D. Tex. 2005).

189. *Id.* at 385-86 (citing TEX. PROP. CODE ANN. § 112.035 (Vernon 2006)).

could stand in the shoes of the bankrupt beneficiary to demand part of the trust corpus.<sup>190</sup>

The decision of the Corpus Christi Court of Appeals in *Ortega v. LLP Mortgage, Ltd.*<sup>191</sup> dealt with a couple's purported transfer of their homestead. A father and his son formed a partnership in 1978. In 1982, the partnership sought to negotiate a loan from the Small Business Administration but lacked the collateral needed to secure the loan. The father and mother owned a home, and they transferred it to the partnership in 1982 to be used as the collateral. The fundamental question was whether the transfer of the home to the partnership was a sham transaction made under pressure or suggestion of the lender. If a sham, the transfer was not valid, the home did not lose its homestead character, and it was thus still the homestead of the father and mother when given by the partnership as collateral for the loan in 1984. In 1997, the partnership defaulted on the loan, and the lender's assignee of the note sued to foreclose the mortgage. The father and mother counterclaimed, asserting that the notes subjecting the home to liability were invalid. Summary judgment, however, was rendered in favor of the holder of the notes.<sup>192</sup>

Claiming their homestead interest in the home, the parents were successful in their appeal. The court of appeals narrowed the appeal to a single issue: the trial court's error in submission of the question of sham-transfer to the jury.<sup>193</sup> The parents asserted that the court's charge to the jury was erroneous in that two questions were posed in the wrong order. The jury was charged to answer first whether the parents' home constituted a homestead in 1984 when the transfer was made by the partnership, and second, if so, whether the parents' 1982 transfer of the home to the partnership involved "any condition of defeasance."<sup>194</sup> The appellate court concluded that the order of this jury charge was erroneous—the jury could not answer the first question properly without first dealing with the second question. Whether the parents had a homestead interest in 1984 "depended, in part, on whether the 1982 transfer [was] valid . . . ." In other words, if the 1982 transfer was valid, the parents would not have had a homestead interest in the property in 1984.<sup>195</sup> Despite the court's analysis, the only question that the trial court really needed to ask was whether the 1982 transfer of the homestead was valid for the purpose of serving as collateral for the loan. If so, the trial court would have properly ruled in favor of the note holder. If not, the court would have ruled in favor of the parents.

In *Rousey v. Jacoway*,<sup>196</sup> the Supreme Court of the United States held

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190. *Id.* at 387.

191. 160 S.W.3d 596 (Tex. App.—Corpus Christi 2005, pet. denied).

192. *Id.* at 601.

193. As to another point that might have controlled the outcome of the case, the appellate court concluded that exclusion of certain evidence was not erroneous.

194. *Ortega*, 160 S.W.3d at 601.

195. *Id.* at 601-02.

196. 544 U.S. 320 (2005).

that, under the provisions of the Internal Revenue Code<sup>197</sup> and the Bankruptcy Code,<sup>198</sup> a couple's individual retirement accounts were exempt from their creditors' claims, though readily accessible to them but with some adverse federal-tax consequences:<sup>199</sup> (1) the right to receive payments must be from "a stock bonus, pension, profit-sharing, annuity, or similar plan or contract;" (2) the right to receive payments must be "on account of illness, disability, death, age, or length of service;" and (3) even then, the right to receive payment may be exempted only to the extent that it is "reasonably necessary to support the account holder or his dependents."<sup>200</sup>

#### IV. DIVISION OF MARITAL PROPERTY ON DIVORCE

##### A. DIVORCE PROCESS

###### 1. *Jurisdiction and Venue*

In *Shackelford v. Barton*,<sup>201</sup> the court explained that the failure of the respondent (a prisoner) to make a timely objection to a jurisdictional recital in a final divorce decree protected such a judgment from collateral attack even if other parts of the record showed a lack of jurisdiction. The court then explained the limits of a trial court's jurisdiction over a divorce: a trial court retains jurisdiction over a case for thirty days after signing a final judgment. Its plenary power may be extended for up to an additional seventy-five days by filing an appropriate post-judgment motion within that initial thirty-day period. If a party files an appropriate post-judgment order, however, the trial court loses jurisdiction over the case at the end of the initial thirty days and has no power to set aside a judgment thereafter except by bill of review for sufficient cause. After the court's plenary jurisdiction ends, the trial court retains its inherent power to clarify or enforce its divorce decree. Thereafter, any order to amend, modify, or alter the final decree is beyond the court's power.<sup>202</sup>

###### 2. *Temporary Protective Orders*

There are several exceptions to the general rule that appellate jurisdiction does not extend to cases in which a final judgment has not been rendered.<sup>203</sup> In some instances, interlocutory orders are appealable,<sup>204</sup> but in disputes between husbands and wives, these situations do not ordinarily arise. A temporary protective order in response to family-violence is often included with other protective orders and may sometimes be is-

197. 26 U.S.C. § 408(a) (2005).

198. 11 U.S.C. § 322(d)(10)(E) (2005).

199. *Rousey*, 544 U.S. at 326-28.

200. *Id.* at 325-26.

201. 156 S.W.3d 604 (Tex. App.—Tyler 2004, pet. denied).

202. *Id.* at 606-07.

203. See *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992).

204. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN §§ 15.003(b), 51.014, 171.098 (Vernon Supp. 2005).

sued under a cause number other than that of the pending divorce.<sup>205</sup> Unless there is a final order, however, such blanket orders are not appealable, and appealing a temporary order with respect to family violence may only lead to a pyrrhic victory.

In its exercise of temporary emergency jurisdiction, the trial court in *In re M.G.M.*<sup>206</sup> entered an ex parte interlocutory protective order in favor of the wife against her husband to ensure the safety of their children. In its protective order, the court also prohibited the husband from “transferring, encumbering, or otherwise disposing of property mutually owned or leased by the parties.” The Beaumont appellate court held that making that additional order with respect to property was beyond the scope of the court’s temporary emergency jurisdiction in the absence of any evidence that this further order “related to emergency protection [of a] child, parent or sibling.”<sup>207</sup>

When a divorce was proceeding between the spouses in *Crane v. Crane*,<sup>208</sup> the court granted a protective order in response to allegations of continuous family violence perpetrated by the husband, despite a great deal of conflicting testimony as to the behavior of the husband and wife. At the final hearing on this matter in February 2006, the court held that the court’s conclusions were supported by sufficient evidence.

### 3. Notice

In *Mathis v. Lockwood*,<sup>209</sup> the Supreme Court of Texas addressed the issue of sufficiency of notice in a dispute turning on the validity of an informal marriage but not peculiarly applicable to that subject matter. In this case, an alleged husband filed a suit for declaratory judgment that there was no informal marriage between him and the respondent. The woman allegedly filed an answer, but it was not in the record. The case was set for trial, and in the woman’s absence, judgment was rendered for the man. Nearly a month later, the woman filed a motion for a rehearing, stating that she did not receive notice of the trial. The court set a hearing and evidently held it, but the motion was apparently not ruled on until a second hearing was held a month later when the judge ruled against the woman. The Dallas appeals court sustained the trial judge’s ruling.<sup>210</sup>

In its per curiam response, the Texas Supreme Court considered only one question as necessary for determination: whether the woman had established that her nonappearance was not intentional or the result of conscious indifference.<sup>211</sup> The court concluded that there was no

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205. See *Hamel v. Hamel*, 161 S.W.3d 736, 738 (Tex. App.—Beaumont 2005, no pet.).

206. *In re M.G.M.*, 163 S.W.3d 191 (Tex. App.—Beaumont 2005, no pet.).

207. *Id.* at 198.

208. 188 S.W.3d 276 (Tex. App.—Fort Worth 2006, pet. filed).

209. 166 S.W.3d 743 (Tex. 2005).

210. *Id.* at 745.

211. *Id.* at 744. The court stated that it did not need to consider whether a new trial would be necessary because the woman’s sworn motion asserted that a new trial would not injure the man, and there was nothing in the record to prove the contrary. *Id.*

presumption that she had been given notice.<sup>212</sup>

Here, the record contain[ed] no certificate of service, no return receipt from certified or registered mail, and no affidavit certifying service. . . . As none of the prerequisites for prima facie proof of service were met, the court of appeals was incorrect in indulging a presumption that [the woman] received the notice [that the man's] counsel [had] sent.<sup>213</sup>

The only oral evidence of service in the record was that of the man's attorney. That was not enough evidence to raise a presumption that the petitioner had received notice.<sup>214</sup> Even if the trial judge disbelieved the woman's testimony, there was still no affirmative evidence that notice had been given.<sup>215</sup> Though notice was sent to the woman's former attorney, he had then already withdrawn from representation. The woman's last known address to which notice was sent was the man's: the man could not give notice to the woman "by serving himself."<sup>216</sup> His counsel's representation that his office called the woman about the hearing did not show personal knowledge that the notice was received, "certainly not 45 days before trial."<sup>217</sup> Even assuming that there is a duty on the part of a party to keep the court informed of her address (a point about which there is some disagreement among the courts of appeals), "due process requires some lesser sanction than trial without notice or an opportunity to be heard."<sup>218</sup> Thus, without hearing oral argument, the Texas Supreme Court granted the woman's petition for review, and the case was remanded to the trial court.<sup>219</sup>

In response to his wife's suit for divorce in *In re Runberg*,<sup>220</sup> the husband appeared at the hearing for temporary orders. At that hearing, he had announced that he was ready, but he had not made a written assent. After the hearing, he hired counsel, and his lawyer wrote a letter to the wife's lawyer. The wife gave the husband no further notice, and after the court entered a judgment, the husband moved for a new trial, which was denied without a hearing. The husband appealed to the Amarillo Court of Appeals. In reviewing the denial of the motion for new trial for abuse of discretion, the Amarillo court held that the husband's participation at the temporary hearing was in the nature of an appearance in the suit as a matter of law, and thus his due-process right of notice of the final hearing attached. The court concluded, however, that the husband was not required to fulfill the mandate of *Craddock v. Sunshine Bus Lines, Inc.*<sup>221</sup> The court noted that all three elements of *Craddock* "are based in eq-

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212. *Id.* at 745.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 746.

217. *Id.* (citing TEX. R. CIV. P. 245).

218. *Id.*

219. *Id.*

220. 159 S.W.3d 194 (Tex. App.—Amarillo, 2005, no pet.).

221. 134 Tex. 388, 133 S.W.2d 124 (1939).

uity,” and they are not always applicable. Justice Reavis dissented on the ground that the wife’s pleading had given the husband adequate notice that a dispute in judgment might be rendered against him if he did not file another answer within the time limits, as explained in the wife’s pleadings.<sup>222</sup>

#### 4. Appointment of Arbitrator

The Houston Fourteenth District Court of Appeals held in *Goetz v. Goetz*<sup>223</sup> that if the parties to a divorce agree to enter into a mediated settlement agreement but are unable to decide on an arbitrator to achieve a mediated settlement agreement, the court can appoint an arbitrator for that purpose if the parties’ agreement does not specify the method of appointment.<sup>224</sup>

#### 5. Mandamus

In *In re Rowe*,<sup>225</sup> the Eastland Court of Appeals dealt with a husband’s petition for a writ of mandamus to order a trial court to abate the wife’s divorce proceeding brought in a county in which she had not been a resident for ninety days as required by section 6.301.<sup>226</sup> Two days later, the husband filed his petition in the county where the spouses had lived together. The husband’s argument in support of prompt relief was that passage of time would defeat his venue argument and make any appeal moot as to venue. Though the Waco appellate court had held in *Cook v. Mayfield*<sup>227</sup> that a writ of mandamus will not lie in such cases, in this instance, the Eastland court declined to follow that decision in light of the statutory provision that durational residence for the purpose of venue is fixed *at the date of filing for divorce*. In denying the writ of mandamus, the Eastland court said that the husband’s appellate remedy is adequate when the benefits of mandamus-review are outweighed by its detriments,<sup>228</sup> which include disruption of the trial process by taking up “valuable time with issues that may ultimately be unimportant to the disposition of the case” and thereby add “to the expense and delay [in] the litigation.”<sup>229</sup> The court added that, in the absence of legislative intervention, this issue should now be resolved by the supreme court.<sup>230</sup>

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222. *Runberg*, 159 S.W.3d at 199-200.

223. 130 S.W.3d 359 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

224. *Id.* at 361-62.

225. 182 S.W.3d 424 (Tex. App.—Eastland 2005, no pet.).

226. TEX. FAM. CODE ANN. § 6.301 (Vernon 1998).

227. 886 S.W.2d 840, 842-43 (Tex. App.—Waco 1994, no writ), *cf.* *Beavers v. Beavers*, 543 S.W.3d 549, 722-23 (Tex. Civ. App.—Waco, 1976, no writ).

228. *Rowe*, 182 S.W.3d at 426.

229. *Id.*

230. The court commented briefly on the failure of prior legislative response to this sort of problem. *Id.* at 426-27.



## 6. *Disqualification of Counsel*

A pair of disputes dealt with problems of disqualification of counsel in not particularly unusual situations, and both decisions are very brief. In *In re Gerry*,<sup>231</sup> the shorter one, a husband appealed the trial court's decision to deny his motion to substitute counsel. The husband had moved to substitute counsel early in the divorce proceeding. The wife objected, asserting that the proposed substitute counsel's firm had a conflict of interest because she had spoken to another attorney in the same firm as that of the proposed counsel to represent her. All that the attorney could recall was that the wife had said something about her husband's having been in jail and that the wife would call back if the wife wished to hire her. The attorney testified that it was "entirely possible" that in the conference of 42 minutes, the wife might have orally provided her with confidential information, but she did not remember receiving any documents from her. She also said that she could not "categorically refute" the wife's assertion that the wife might have given documents to someone else at her firm, though she had no personal knowledge in that regard.<sup>232</sup> During the hearing, the wife's attorney offered to provide any specific information *in camera*, but the husband's attorney declined the offer.<sup>233</sup> The trial court nevertheless denied the husband's motion to substitute counsel, and the appellate court denied his motion for mandamus.<sup>234</sup>

In *In re Bivins*,<sup>235</sup> the wife sought to vacate an order granting her husband's motion to disqualify her attorney. The attorney had prepared the husband's will and had advised him regarding the adoption of his wife's children from a prior marriage. The husband's motion rested principally on the fact that the wife's attorney had prepared a deed of conveyance by the husband's father to the husband, and the character of that property was in dispute in the case. The husband testified that he had paid the lawyer's fee, though the attorney represented both the husband and his father in the transaction.<sup>236</sup> In conditionally granting the writ of mandamus, the Waco appellate court pointed out that a denial of relief sought by the husband in such a case might rest on some other solution if, for example, the court could protect the husband from any harm by barring the attorney from testifying.<sup>237</sup> The court put great weight on the fact that the husband had not shown that some lesser alternative was not available and that he did not show actual prejudice on the part of the lawyer.

The court's decision in *In re Fischer-Stoker*<sup>238</sup> responded to a petition for a writ of mandamus to dismiss a contempt proceeding brought in the

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231. 173 S.W.3d 901 (Tex. App.—Tyler 2005, no pet.).

232. *Id.* at 904.

233. *Id.* at 903 n.1.

234. *Id.* at 904.

235. 162 S.W.3d 415 (Tex. App.—Waco 2005, pet. granted).

236. *Id.* at 417, 419.

237. *Id.* at 417-18 (citing *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002)).

238. 174 S.W.3d 272 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

trial court after the court had granted a divorce and division of property. The court originally ordered each party to make checks to the other from bank accounts and to supply the other with accountings as to the funds on deposit. Shortly thereafter, the wife filed her appeal to the judgment in the principal suit. The husband then filed a motion for contempt until the wife complied with the past judgment orders of the trial court. The trial court refused to dismiss the contempt proceedings, and the wife filed a petition for a writ of mandamus. The Houston First District Court of Appeals conditionally granted the mandamus. That court observed that section 9.007(a) provides that the trial court is limited in its powers to enforce a decree for property division to making an order “to assist in the implementation of or to clarify” the division of property in the decree,<sup>239</sup> and that this power is specifically abated during the pendency of an appeal.<sup>240</sup> Further, the Houston Fourteenth District Court of Appeals had previously held in *English v. English*<sup>241</sup> that the trial court is precluded from implementing or clarifying the property division. The court construed the husband’s proceedings and the response of the trial court<sup>242</sup> as coming within the acts precluded.

### 7. *Appeal and Error*

The M<sup>c</sup>Goodwins have climbed up and down the judicial ladder several times.<sup>243</sup> As part of a settlement of their 1989 divorce proceeding, the husband and his closely held corporation executed a promissory note to the wife for \$150,000, with interest payments of \$1,500 each month until October 1997, when payments on the principal and interest were to begin. The couple also entered into a security agreement by which the wife was to hold corporate stock as collateral for performance of the note. The following day, the husband and wife entered into an agreement incident to divorce by which they divided the community shares in the corporation. Their divorce decree incorporated the agreement, and its terms were performed for over two years until the corporation ceased most of its business activities. In 2001, the ex-wife brought a successful suit to enforce the note. The Dallas Court of Appeals reversed the ex-wife’s judgment on the note and limited her recovery to the six years before the 2001 suit.<sup>244</sup> On remand to the trial court, the ex-wife was granted a monetary award with post-judgment interest. The ex-husband and the corporation, however, failed to perform the terms of the judgment, and the ex-wife brought another suit. The ex-wife prevailed in the trial court, and the ex-husband appealed. The ex-husband argued that his liabilities under the note and under the first agreement were merged into the sec-

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239. TEX. FAM. CODE ANN. § 9.007(a)-(b) (Vernon 1998).

240. *Id.* § 9.007(c) (Vernon 1998).

241. 44 S.W.3d 102, 106 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

242. *Fischer-Stoker*, 174 S.W.3d at 275.

243. M<sup>c</sup>Goodwin v. M<sup>c</sup>Goodwin, 181 S.W.3d 870 (Tex. App.—Dallas 2006, pet. denied).

244. M<sup>c</sup>Goodwin v. M<sup>c</sup>Goodwin, 2003 Tex. App. LEXIS 7371 (Tex. App.—Dallas 2003, pet. denied).

ond agreement (the agreement incident to divorce) and were thus discharged. The Dallas appellate court rejected this argument because the parties to the two agreements were different, and the subject matter was different. The court also attached significance to the fact that the security agreement was entered into before the agreement incident to divorce. Thus, the parties evidently intended that each transaction was independent of the other in concluding the divorce settlement.<sup>245</sup> The court rejected the ex-husband's argument that the ex-wife's efforts to enforce the note was a collateral attack on the divorce decree.<sup>246</sup> The terms of the divorce settlement were therefore resolved in favor of the ex-wife.

## B. MAKING THE DIVISION

### 1. *Property Settlement Agreements*

In the divorcing couple's mediated property settlement agreement at issue in *Goetz v. Goetz*,<sup>247</sup> certain community property was awarded to the wife, and a lien on that property was awarded to the husband. In her appeal, the wife asserted that the award deprived her of her separate property contrary to the rule of law that a spouse's separate property cannot be divided on divorce.<sup>248</sup> The wife argued that the settlement (despite its use of the word *division* and not *partition*), which stated that the husband "is hereby divested of all rights, title, interest, and claim," had the effect of creating a separate property interest as a consequence of the settlement. The court held that the mediated settlement stood not as a partition agreement, but as an agreement incident to divorce and was thus subject to the court's review to determine proper characterization and division or repudiation by either party before the court's finding that the agreement is "just and right" and granting the divorce.<sup>249</sup> A written "agreement incident to divorce" entered into under section 6.604 is different from such partition agreements.<sup>250</sup>

An agreement to divorce is binding on the parties if it is provided that the terms are irrevocable and that agreement is put "in boldfaced type or in capital letters or underlined" and signed by the spouses and their attorneys. A mediated property settlement under section 6.602 is subject to those same rules.<sup>251</sup> In *Lee v. Lee*,<sup>252</sup> the divorcing couple sought to reach an agreement ostensibly under section 6.602 (as specifically noted therein in capital letters) as to the division of property, but the agreement was reached without the assistance of counsel or a mediator. Before the rendition of the divorce, the husband announced his repudiation of the agreement. The court, however, refused to accept the repudiation and

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245. *McGoodwin*, 181 S.W.3d at 874.

246. *Id.*

247. 130 S.W.3d 359 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

248. *See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977).

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

250. *Id.* § 6.604.

251. *Id.* § 6.602.

252. 158 S.W.3d 612 (Tex. App.—Fort Worth 2005, no pet.).

rendered judgment on the agreement. In his appeal, the husband sought to take the agreement outside the purview of section 6.602. The Fort Worth appellate court noted that “mediation” might be achieved without a neutral mediator’s assistance and that “for many years,” section 7.006 had allowed “divorcing parties to enter into written agreements without requiring mediation concerning the division of the community [estate].”<sup>253</sup> Thus, the court refused “to carve out a common-law exception” to section 6.602 “based on mere form.”<sup>254</sup> The court went on to say, however, that the agreement of the parties was not *mediated* in the sense of that term in section 6.602 and therefore fell under section 7.006.<sup>255</sup> Without even considering the fact that compliance with section 6.002(b) had been recited in the agreement itself in capital letters, the court concluded that the trial court’s ruling was erroneous and that the husband might repudiate his settlement under section 7.006.<sup>256</sup> The enactment of section 6.604 in 2005 provides that an informal settlement conference may produce a binding written agreement with the usual capitalized notice or with underscored words or boldface type and warning of binding effect; this settlement is also subject to rejection by the court if found not to be just and right.<sup>257</sup>

During the course of the divorce trial in *Haynes v. Haynes*,<sup>258</sup> the couple entered into an irrevocable written mediated property settlement allocating the husband’s non-transferable stock options by net value in unequal shares favoring the wife. Despite the husband’s objection, in the divorce decree prepared by the wife’s attorney and approved by the court, additional terms were supplied to make the husband “constructive trustee” of the wife’s interest in the options and to provide other details including the handling of tax liabilities. The husband objected to the decree’s additional “terms [to which] he did not agree”<sup>259</sup> and the “imposed additional duties, liabilities, and burdens on him.”<sup>260</sup> The Dallas appellate court held that the trial court had followed the “material term” of division as provided in the mediated agreement, had merely provided implementation of the agreement, and had not changed it.

Another variant of such an agreement was before the Amarillo appellate court in *Woods v. Woods*.<sup>261</sup> In this case, the couple entered into what the appellate court referred to simply as an “Agreement Incident to

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253. *Id.* at 613.

254. *Id.* at 613-14.

255. *Id.* at 614.

256. What was purported to be a mediated settlement in *Argovitz v. Argovitz*, No. 14-04-00885-CV, 2005 WL 2739152 (Tex. App.—Houston [14th Dist.] Oct. 25, 2005, no pet.), was sought to be rescinded by the ex-wife for fraud. The court held that the ex-wife’s complaint was estopped by her acceptance-of-benefits of the agreement. For a contrary result in application of the acceptance of benefits doctrine, *cf.* *Raymond v. Raymond*, 190 S.W.3d 77, 79-80 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

257. TEX. FAM. CODE ANN. § 6.604 (Vernon Supp. 2005).

258. 180 S.W.3d 927 (Tex. App.—Dallas 2006, no pet.).

259. *Id.* at 930.

260. *Id.* at 929.

261. 167 S.W.3d 932 (Tex. App.—Amarillo 2005, no pet.).

Divorce,” which is subject to revocation by either party under section 7.006.<sup>262</sup> The parties’s agreement was presented to the court only about twenty days after filing the petition. Then, the trial judge told the parties that a temporary order based on their agreement was approved and would be entered as a final judgment when they submitted their final decree after the sixty-day waiting period<sup>263</sup> had run. It appears that the wife moved to withdraw her consent sometime before entry of the final decree. The court nevertheless entered its judgment in accordance with the agreement. The appellate court held that the trial court had clearly acted improperly by incorporating the agreement in the final decree.

The issue before the court in *Guerrero v. Guerra*<sup>264</sup> was decidedly more complex in that (1) it required a more difficult interpretation of the parties’ agreed judgment, and (2) it arose not by way of an appeal from the judgment but in response to the ex-husband’s motion almost twenty years later to clarify the judgment with respect to their agreement concerning his former wife’s retirement benefits as amplified since divorce through post-divorce earnings. The trial court found that the term of the agreed judgment, which was *res judicata* and had the finality of the decree, was nevertheless ambiguous.

The judgment in *Guerrero* provided that the husband was entitled to a share of the wife’s retirement benefits “accrued or unaccrued, matured or unmatured, vested or otherwise . . . with all increases thereon . . . if, as, and when paid.”<sup>265</sup> The agreed decree further provided that the amount of the retirement pay received was to be adjusted “in accordance with the approved ‘after-acquired’ property theory concerning division of pension and retirement benefits.”<sup>266</sup> Though the San Antonio appellate court concluded that the opening language suggested that the retirement benefits would be valued at the date of the ex-wife’s retirement, the court noted that the latter term of the agreed judgment suggested that the benefits were to be valued at the date of divorce by reference to the rule that post-divorce compensation of a former spouse is that person’s separate property. The appellate court applied the doctrine of interpreting the ambiguous decree as a contract when entered into.<sup>267</sup> Since the trial court had heard all the evidence with respect to the making of the contract and the testimony of the parties concerning its making, the appellate court affirmed the trial court’s conclusion that the ambiguous terms would be interpreted as having the former meaning,<sup>268</sup> especially in light of the fact that both parties testified that they did not know the meaning of the phrase “after-acquired property theory.”<sup>269</sup>

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262. *Id.*

263. TEX. FAM. CODE ANN. § 6.702 (Vernon 1998).

264. 165 S.W.3d 778 (Tex. App.—San Antonio 2005, no pet.).

265. *Id.* at 781.

266. *Id.*

267. *Id.* at 782-84.

268. *Id.* at 784.

269. *Id.* In using that phrase, it may be surmised that the parties’ council who drafted the judgment were pupils of a fact generation of law-professors who responded to a stu-

In *State Farm Insurance Co. v. Martinez*,<sup>270</sup> the Waco Court of Appeals dealt with the consequences of an insured husband's attempt to change the beneficiary of his life insurance policy during his second marriage. In reaching a settlement of their interests, the husband and his first wife had agreed that she would be the beneficiary of his life insurance contract in order to assure receipt of the monetary settlement to which they had agreed. Shortly before his death, however, the husband directed the insurer to substitute his second wife as the beneficiary of the policy. Aware of the terms of the settlement with the first wife, the insurer refused to make the requested change. Following his death, the second wife brought suit to determine the proper beneficiary of the policy and claimed the statutory penalty for the insurer's delay in payment. The first wife also sued as the proper beneficiary.<sup>271</sup> The insurer in turn filed an interpleader suit against the claimants, and the two suits were consolidated for trial. The district court granted summary judgment in favor of the second wife, subject to a constructive trust in favor of the first wife for the unpaid portion of the divorce settlement, and awarded the second wife her statutory claim against the insurer and her attorney's fees.

The insurance company appealed. Its claim was rejected by the Waco appellate court on the ground that the insurer's position was not in accordance with the policy's terms. In terms of the community property management, the court commented that

even if the insured's first wife had a community interest in the policy proceeds when payable, the insurer had neither the contractual right nor legal standing to prevent the insured from changing the beneficiary to his second wife.<sup>272</sup>

Chief Justice Gray dissented with respect to the insurer's liability for a statutory penalty, attorney's fees, and pre-judgment interest on the ground that the insurer did not delay unreasonably in paying the widow in light of its doubts as to the proper distribution under the policy.<sup>273</sup>

## 2. *Making the Division*

Judicial division of property on divorce must be supported by evidence. In *In re Padilla*,<sup>274</sup> neither the wife nor her attorney appeared at the hear-

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dent's reply to a question "on what theory?" "Theory" in that context might have meant "for what reason?" or "for what person, or precedent, or some other rule of bar?"

270. 174 S.W.3d 772 (Tex. App.—Waco 2005, pet. granted).

271. The daughter of the first marriage, who was named as successor beneficiary of the policy, also sued for a share of the proceeds. The trial court dismissed the daughter's claim as not supported by the terms of the policy. In his change of beneficiary designation, the insured had not named her as successor beneficiary.

272. *State Farm Ins. Co.*, 174 S.W.3d at 779. The decedent's daughter of this first marriage also appealed. The appellate court concluded that the insurer acted within the terms of the policy in recognizing the daughter as a successor beneficiary, relying *inter alia* on *Salvato v. Volunteer State Life Ins. Co.*, 424 S.W.2d 1, 5 (Tex. Civ. App.—Houston 1968, no writ).

273. *State Farm Ins. Co.*, 174 S.W.3d at 791.

274. No. 10-05-00184-CV, 2005 WL 2465794 (Tex. App.—Waco Oct. 5, 2005, no pet.).

ing; the trial court considered the husband's petition, granted the divorce, and divided the property without hearing any evidence with respect to the value of the personal or real property, debts (except for a \$20,000 loan for which the husband agreed to be responsible), or retirement benefits except by way of the husband's testimony. On the wife's appeal, the Waco court reversed the judgment and remanded the case for trial. The court adopted the wife's argument that the trial court simply had no means of dividing the property in a manner that was just and right<sup>275</sup> without having substantially more evidence.

In *In re Powell*<sup>276</sup> the court ordered the ex-husband to pay \$1,000 to his ex-wife's attorney by a certain date. Two days before the deadline, the ex-husband paid agents to deliver the \$1,000 in twenty bank bags of 100,000 unrolled pennies to the attorney's office. After he had made enquiries of several banks to redeem the coins, the attorney found a bank that consented and charged the attorney \$100 for its service, leaving the attorney with a net fee of \$900. The attorney promptly filed a second motion to enforce the court's order. At the hearing, the ex-husband expressed his contempt for the attorney and the inconvenience and defended himself by asserting that he had done what the court had ordered him to do. The court found the ex-husband's conduct "frivolous and ridiculous" and ordered him to pay the attorney \$100 for the bank's fee, \$350 in attorney's fees, and court costs of \$83 but did not hold him in contempt. The court described the mode of payment very precisely. On the ex-husband's appeal, he asserted that the court had no reason for making its order. In affirming the trial court order, the Eastland appellate court held that the trial court had acted well within its inherent power to aid in the exercise of its jurisdiction and that it had "vast discretion to maintain control of the proceedings before it."<sup>277</sup>

### 3. Clarification and Enforcement

In *In re A.E.R.*,<sup>278</sup> the ex-wife sought clarification of a 1992 agreed divorce decree and a qualified domestic relations order ("QDRO") that went beyond the terms of the decree with respect to the ex-wife's enjoyment of the ex-husband's military retirement benefits and in some instances, beyond the benefits to which she would be entitled under federal law. The decree did not indicate any agreement of the ex-wife's entitlement to the benefits that she claimed. The court directed that the trial court correct its QDRO to conform to that of the divorce decree and original QDRO.<sup>279</sup>

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275. TEX. FAM. CODE ANN. § 7.001 (Vernon 2002).

276. 170 S.W.3d 156 (Tex. App.—Eastland 2005, no pet.).

277. *Id.* at 158.

278. No. 2-05-057-CV, 2006 Tex. App. LEXIS 1342 (Tex. App.—Fort Worth Feb. 16, 2006, no pet.). For a recent general summary of the subject see Susan L.B. Darnell, *Dividing Military Retirement Benefits*, 26 FAM. ADVOC. 31 (No. 2, Fall 2005).

279. *In re A.E.R.*, 2006 Tex. App. LEXIS, at \*10-11.

Correcting the error in *In re Jones*<sup>280</sup> was a much more protracted matter. Twenty-four years after their divorce, the former spouses disputed the division of the ex-husband's benefits from the Teachers Retirement System as requested by the ex-wife. The court entered a QDRO, which became final thirty days later. Seven weeks later, the court issued another QDRO; three-and-a-half months later, the court issued a third QDRO in very different terms. A fourth QDRO was entered another ten months later, after the ex-husband had retired; this QDRO produced the ex-wife's appeal. The Texarkana court concluded that the fourth QDRO clarified the first. Though the typewritten decree used 12 ½ as the numerator of the prescribed formula, that number had been changed to 7 by hand; however, there was no evidence to show that the change was made by anyone other than the trial judge. The fourth QDRO merely supplied the proper denominator for the formula and thus clarified the first QDRO.<sup>281</sup>

#### 4. Post Divorce Disputes

The decision in *de la Garza v. de la Garza*<sup>282</sup> involved a post-divorce dispute with respect to contractual alimony payments made six months late. Neither the pre-judgment-interest statutes in effect at the time of the judgment<sup>283</sup> nor other rules of law supported the complaint of the ex-wife's claim. The ex-wife also was not allowed to recover pre-judgment interest on loans of money allegedly required for the purpose of meeting her expenses resulting from the ex-husband's failure to make prompt payment.<sup>284</sup> The ex-wife was equally unsuccessful in recovering attorney's fees<sup>285</sup> because she did not recover damages in a suit for which attorney's fees are specifically recoverable<sup>286</sup> or may be recovered if the petitioner prevails in the suit.<sup>287</sup>

The divorce decree at issue in *Morales v. Morales*<sup>288</sup> provided that the ex-wife pay her husband \$10,000 when their son reached 18, she remarried or had a male non-family-member residing with her, or she decided to sell their former residence. In 1996, the son informed the ex-husband that his ex-wife was cohabitating with another man, but the ex-husband did not sue for recovery of the \$10,000 until spring of 2005. Thus, the ex-husband had failed to file his motion to enforce the decree within two

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280. 154 S.W.3d 225 (Tex. App.—Texarkana 2005, no pet.).

281. In 2005, section 3.007 was added to the Family Code to provide significant definitions of a considerable variety of employee benefits including defined benefit plans, defined contribution plans, and stock-option plans of various sorts.

282. 185 S.W.3d 924 (Tex. App.—Dallas 2006, no pet.).

283. *Id.* at 928 (citing TEX. FIN. CODE ANN. §§ 301.002, 302.002, 304.101, & 304.103 (Vernon Supp. 2005)).

284. *Id.* at 929.

285. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997).

286. *Id.*

287. TEX. FAM. CODE ANN. § 9.014 (Vernon 1998).

288. No. 04-05-00513-CV, 2006 Tex. App. LEXIS 791 (Tex. App.—San Antonio Feb. 1, 2006, pet. filed).



years from the date when his right to payment matured.<sup>289</sup> His motion was therefore barred.

### 5. *Ex-Spousal Maintenance*

In two divorce proceedings, the ex-husband appealed an award of ex-spousal maintenance. In *In re M<sup>c</sup>Farland*<sup>290</sup> the appellate court considered both the property division and the order for spousal maintenance. The divorce court had ordered the husband to pay his wife \$1,200 a month for two years and \$800 a month for the third year. Her license as a manicurist had lapsed some time past, and her earning capacity was limited to work paying less than \$10 an hour while the husband's annual earning capacity neared \$80,000. In the division of the marital estate, the court awarded the home with \$35,000 equity to the wife, but after selling it and paying commissions and taxes, she would get only about half that amount. The award to her of half the husband's retirement account of \$245,000 would also have left her with less than \$100,000 after paying taxes for premature withdrawal.<sup>291</sup> She would also need to acquire lodging for herself and the three minor children. With continued assistance from her extended family, projected wages, and agreed child-support payments from her husband, it was estimated that she would still be short by over \$1,500 in meeting her monthly bills. These facts justified the order of spousal maintenance as fixed by the divorce court and the property division of the divorce court, which the appellate court affirmed.<sup>292</sup>

*Cooper v. Cooper*<sup>293</sup> involved a couple who had been married for twenty-one years and had one child under eighteen, for whom the court had awarded the mother child support of \$1,200 a month. The requirements of section 8.051(2) were clearly met: (1) the recipient had sought suitable employment<sup>294</sup> and (2) she was developing skills necessary toward becoming self-sufficient. On appeal, the husband argued that her "minimum reasonable needs" were actually met by her income described in her financial statement without having to resort to other assets. In addition to her monthly expenses listed in her statement, she was only making a payment of \$208 a month toward discharging a second lien on

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289. TEX. FAM. CODE ANN. § 9.003(b) (Vernon 2002).

290. 176 S.W.3d 650 (Tex. App.—Texarkana 2005, no pet.).

291. TEX. FAM. CODE ANN. § 7.008 (Vernon Supp. 2005), enacted in 2005, provided specifically that a divorce court may consider the tax consequences of the property division of various types of assets.

292. *In re M<sup>c</sup>Farland*, 176 S.W.3d at 660. In reaching its conclusions with respect to the maintenance order, the court discussed a number of prior cases: O'Carolan v. Hopper, 71 S.W.3d 529 (Tex. App.—Austin 2002, no pet.); Deltuva v. Deltuva, 113 S.W.3d 882 (Tex. App.—Dallas 2003, no pet.); Lopez v. Lopez, 55 S.W.3d 194 (Tex. App.—Corpus Christi 2001, no pet.); Amos v. Amos, 79 S.W.3d 747 (Tex. App.—Corpus Christi 2002, no pet.); Truehart v. Truehart, No. 14-02-01256-CV, 2003 WL 22176626 (Tex. App.—Houston [14th Dist.] Sept. 23, 2003, no pet.); and Alagheband v. Abolbaghaei, No. 03-02-00445-CV, 2003 WL 1986777 (Tex. App.—Austin May 1, 2003, no pet.). *In re M<sup>c</sup>Farland*, 176 S.W.3d at 658-60.

293. 176 S.W.3d 62 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

294. *Id.* at 64 (citing TEX. FAM. CODE ANN. § 8.051(2) (Vernon Supp. 2004)).

her house and \$20 toward payment of her attorney's fees of over \$5,000. The court observed, however, that even without considering whether child-support payments should be included with the wife's monthly income, the evidence showed that her income fell short of her monthly needs, and it was uncontested that her earning ability was insufficient to provide her needs. The trial court had therefore not erred in awarding spousal maintenance.<sup>295</sup>

In *Crane v. Crane*,<sup>296</sup> the divorce court in 1999 ordered ex-spousal maintenance for the wife to extend through 2002, and in 2003 she filed a motion for periodic review and continuance<sup>297</sup> of spousal maintenance because of her unrelieved physical disability and inability to work. Such orders under section 8.054<sup>298</sup> are ordinarily effective for three years or longer in cases of disability.<sup>299</sup> "The court may order maintenance for an indefinite period as long as the disability continues . . . [and] may order periodic review of its order."<sup>300</sup> The trial court in *Crane* found that the ex-wife's disability was continuing but unchanged; therefore, her motion for periodic review was denied. On the ex-wife's appeal, the Fort Worth court held that, under the 2001 and 2005 statutory amendments, periodic reviews may be granted to determine continued disability.<sup>301</sup> Unlike the motion to modify, the appellate court observed, proof of a material and substantial change is not required for modification of the original order concerning disability, and proof by preponderance of the evidence suffices to support the movant's request.<sup>302</sup> Because the divorce court had ordered maintenance for three and a half years, the appellate court interpreted the order as impliedly based on a finding of physical or mental disability under section 8.054(b) rather than section 8.054(a), which limits spousal maintenance to three years.<sup>303</sup> The court therefore allowed the ex-wife's appeal.

In *Dunn v. Dunn*,<sup>304</sup> a continuation of spousal maintenance was sought. The couple had been married to each other, divorced, and then married again for twelve years. Their three children were adults. The community property acquired during their second marriage had been divided by agreement. There was some conflict in the evidence as to the wife's physical disability, but the court nonetheless awarded \$890 a month for ex-spousal maintenance. Over a period of eight months, the trial court reconsidered maintenance needs on three occasions. Finally, the

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295. *Id.* at 65-66.

296. 188 S.W.3d 276 (Tex. App.—Fort Worth 2006, pet. filed).

297. TEX. FAM. CODE ANN. § 8.054 (Vernon Supp. 2005) is not to be confused with a motion under § 8.057 to modify maintenance ordered by the original decree. *Crane*, 188 S.W.3d at 280-81.

298. TEX. FAM. CODE ANN. § 8.054 (Vernon Supp. 2005).

299. *Crane*, 188 S.W.3d at 280.

300. *Id.* at 279 (citing TEX. FAM. CODE ANN. § 8.054(a) (Vernon Supp. 2005)).

301. *Id.* at 280-81.

302. *Id.* at 281.

303. *Id.*

304. 177 S.W.3d 393 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

court determined that after three months, only one more payment as originally ordered would be made, as the former wife reported no change in circumstances since the divorce as to her physical and financial condition. The court explained that in making its order, the court was aware of the fact that the ex-wife had not been forthcoming with any financial statement or inventory for the court. The ex-wife also had the burden of proof to show continuing need, and that burden had not been discharged.<sup>305</sup> The ex-wife also did not object to the court's findings and conclusions as reviews had been conducted. The ex-wife had therefore waived any error and presented nothing for review.

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305. *Id.* at 397.